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Appeal and Error—Amending a Statement of Points Submitted with the Short Statement of Facts; Torts—Guest and Host Statute—No Protection When an Unlawful Act; Property—Waste—Treble Damages; Death—Damages—Excessive Damages—New Trial—Future Earnings—Rate of Discount; Workmen's Compensation—Employers Within the Act; Quitclaim Grantee's Right to Payments on Executory Contract of Sale; Husband and Wife—Community Property—Conduct After Separation as Affecting Status of Property Subsequently Acquired

H. R. V.

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RECENT CASES

Appeal and Error—Amending a Statement of Points Submitted with the Short Statement of Facts. In order that he might effect an appeal from a denial of his pre-trial motion to dismiss, *D* filed a short statement of facts containing only those matters and proceedings relating to the motion for dismissal. Pursuant to Rule 9(2) RULES OF THE SUPREME COURT, *D* also submitted a brief statement of the points on which he would rely on the appeal. The statement of points was so phrased as to indicate that *D* was appealing not only upon the ruling on his motion to dismiss, but from every ruling made by the trial court. After the ninety-day period allowed for filing the statement of points had passed, *D* amended the statement of points to indicate an appeal only from the denial of the motion to dismiss. *Held*. the statement of points cannot be amended and the amendment made in this case is stricken. Because the original statement of points covered all the rulings of the trial court and the statement of facts failed to contain all of the matters necessary for a review of all of the rulings below, the statement of facts must be stricken and the judgment affirmed. *Falk v. Stembeck,* 130 Wash. Dec. 56, 190 P.(2d) 747 (1948).

An appellant must file, with a short statement of facts, a statement of the points upon which he wishes to rely. Rule 9(2), *supra.* The short statement of facts must be certified by the trial court, but only after the parties have had an opportunity to be heard on the question of the materiality and the adequacy of the proposed statement of facts. REM. REV. STAT. § 398 *et seq.* [P.P.C. § 78-1 *et seq.*], *Livermore v. Northwest Air Lines, Inc.,* 6 Wn.(2d) 1, 106 P.(2d) 578 (1940). The principal case rules that only the statement of facts may be altered or amended during the precertification proceedings. When the statement of facts contains all the matters and proceedings relevant to the particular points the appellant wishes to review, but his statement of points does not clearly identify those particular points, the ambiguity cannot be remedied by rephrasing the statement of points.

To support the decision in the principal case the Supreme Court said that the appellant would have an unfair advantage if he could cite many errors when he intended to argue only a few. However, an appellant gains no advantage by submitting a statement of points which indicates that he wishes to appeal all of the rulings of the trial court if his statement of facts contains matter relevant to only one ruling of the trial court; the discrepancy is patent. The respondent and the trial judge are entitled to know, when a short statement of facts is submitted by the appellant, exactly what issues the appellant will raise on appeal. It does not follow, however, that an appellant should be bound by the statement of points as originally filed. When the statement is filed with the trial court, the respondent is given an opportunity to object to any discrepancy. REM. REV. STAT. § 389 *et seq.* [P.P.C. § 47-17]. The court is not bound to certify a proposed statement of facts if it does not contain all of the matters and proceedings both parties consider necessary for this particular appeal. REM. REV. STAT. § 391 [P.P.C. § 47-17]. If the statement of points is ambiguous, the judge, respondent, and appellant can reasonably be expected to discover that ambiguity. And they should be free to resolve it in whatever manner seems reasonable to them.

The present rule 9(2), *supra,* does not specifically provide that the statement of points can be modified pending certification. This writer suggests that the rule should be revised, for the present rule unduly restricts the trial judge and the appellant during the precertification proceedings in the trial court. The parties, at that stage of the appeal, are in a position to expedite and facilitate the appeal if they are free to identify and define satisfactorily to themselves the particular issues to be presented to the Supreme Court for review. H.R.V

Tort—Guest and Host Statute—No Protection When An Unlawful Act. *P* brought suit to recover damages for death of a minor son. The deceased, eight years, three months old, sustained injuries causing his death when he jumped from the running board of a mail delivery truck where he had been riding with the knowledge of *D*, the driver. *D* admitted knowledge of a statute (REM. REV. STAT. §6360-115 [P.P.C. § 295-81]) making it unlawful to transport persons on the outside of a vehicle. The jury found that the boy had not been contributorily negligent and gave judgment for *P* *D* appeals, contending liability is avoided by the "host and guest" statute. (REM. REV. STAT. § 6360-121 [P.P.C. § 295-95]). *Held*. affirmed. *D* cannot claim protection of the guest statute when his own unlawful act has created the alleged relationship. *Upchurch v. Hubbard,* 129 Wash. Dec. 519, 188 P.(2d) 82 (1948).

The principal purpose of the guest statute is to prevent collusive suits for damages. *Shea v. Olson,* 185 Wash. 143, 53 P.(2d) 615 (1936). In determining who are guests within the meaning of the statute, the enactment should not be extended beyond the correction of the evils which induced it. *Thuente v. Hart Motors,* 234 Iowa 1294, 15 N.W.(2d) 622 (1944). Recognizing these principles our court may have felt that *D*, in the *Upchurch* case, should not be exempted from liability.

In reaching the conclusion that the guest statute was inapplicable because of the unlawfulness of *D*'s act, the court selected an unfortunate basis of decision. A better ground might have been the boy's lack of capacity to enter a guest-host relationship. In *Taylor v. Tauge,* 17 Wn.(2d) 533, 136 P.(2d) 176 (1943) the court recognized that the guest-host concept requires an offer by the host, or request by the guest, followed by an acceptance. Presumably some capacity is necessary to make such acceptance. This problem has never been considered by our court. Comments, 12 WASH. L. REV. 138 (1937), 15 WASH. L. REV. 87 (1940). Having found the boy too immature to be contributorily negligent, the jury might also have found him to immature to accept a ride and "assume the risk of all injuries, except those intentionally caused by the driver" as apparently required by *Parker v. Taylor,* 196 Wash. 22, 81 P.(2d) 806 (1938). The fact that the guest statute does not make an exception in favor of minors, as pointed out in *Shiels v. Audette,* 119 Conn. 75, 174 Atl. 323, 94 A.L.R. 1206 (1934) and *Tilghman v. Rightor,* 199 S.W.(2d) 943 (Ark., 1947) cited in the *Upchurch* opinion, does not mean that a child may not lack capacity to assume the status of a guest.

By relying on the unlawful act of *D*, instead of the deceased's lack of capacity, as the reason for not applying the guest statute the court has left fertile ground for litigation. Certainly the court is not prepared to hold that a hitchhiker may recover for injuries received in an accident caused by the operator, for this would defeat a fundamental purpose of the statute. But REM. REV. STAT. § 6360-100 [P.P.C. § 295-51] provides that it shall be *unlawful* for any person to solicit a ride on the highway, and *unlawful* for any driver to give such person a ride upon solicitation. At page 526 of the *Upchurch* opinion the court indicates that the operator is exempted from liability only when the relationship of guest-host is a lawful one, "or at least not an unlawful one, nor one dependent for its creation upon some unlawful act of the owner or operator himself." Unless the court can use the fact that the driver and hitchhiker would be in pari delicto, which was not true in the *Upchurch* case as the statute there made only the act of the driver unlawful, the cases would seem indistinguishable.

L.V.R.

Property—Waste—Treble Damages. At the termination of *D*'s lease, *D* removed certain fixtures and in doing so injured part of the building. *P* sued to recover treble damages for waste relying on REM. REV. STAT. § 938 [P.P.C. § 103-3] as amended by

Wash. Laws 1943, c. 22, § 1. The trial court awarded only compensatory damages. *Held:* reversed. The statute as amended in 1943 is mandatory in that treble damages must be given where waste is *voluntary. Graffell v. Honeysuckle,* 130 Wash. Dec. 361, 191 P.(2d) 858 (1948).

Prior to the 1943 change it had been held that in spite of the language of the waste statute, "there may be judgment for treble damages," punitive damages were unsound in principle and not recoverable unless expressly provided for in the statute. *De Lano v. Tennent,* 138 Wash. 39, 244 Pac. 273 (1926). For this reason the amendment seemingly compelling the award of treble damages in certain instances came as somewhat of a surprise. Cross, *The Amendment of the Waste Statute—Retrogression?,* 21 WASH. L. REV. 31 (1946). In the cited comment, from which both *P* and *D* quote in their appellate briefs, the author argues that the variance in the language of the two parts of the statute would justify a construction that only *voluntary* waste should be penalized by treble damages. The court gives some support to this contention by emphasizing the word *committing* in the part awarding treble damages and the word *permitting* in the part providing for another form of relief.

It would seem, then, that the court was on safe ground in the instant case. However, where only *permissive* waste is involved it would appear desirable, in view of the *De Lano* case, to adopt the construction suggested in the above-mentioned comment and award only compensatory damages.

R.A.C.

Death — Damages — Excessive Damages — New Trial — Future Earnings — Rate of Discount. In *Kelleher v. Porter,* 129 Wash. Dec. 601, 189 P.(2d) 223 (1948) the Court held. (1) That a verdict for $70,000 in a wrongful death action was so excessive as unmistakably to indicate that the verdict must have been the result of passion or prejudice and to require a new trial under REM. REV. STAT. § 399(5) [P.P.C. § 78-3(5)], and (2) that the discount rate to be applied in a wrongful death action in computing the present value of future earnings is a question of fact for the jury.

Evidence had been introduced that, at the time of his death, the deceased had a life expectancy of from thirty-five to thirty-nine years, that he was earning slightly more than $4,000 per year, and that the present value of $4,000 per year payable in equal monthly installments until deceased would have reached the age of sixty-five, discounted at 2½ per cent, was approximately $78,000. Since this was the only actuarial evidence in the case, it would appear that the verdict was based on this evidence rather than being the result of passion or prejudice. But the evidence also showed that prior to the war deceased had earned only $125 monthly, and that his present earnings were the result of the abnormal war labor conditions and his working sixteen hours a day and seven days a week as a sheetmetal worker and truck driver. Therefore, since those conditions could not reasonably be expected to continued for the next thirty years, a new trial could have been granted under REM. REV. STAT. § 399(7) [P.P.C. § 78-3(7)], on the ground that the evidence would not support the size of the verdict. The opinion of the court actually demonstrates this proposition, and all the cases cited as authority were decided on this basis, *e.g., Thompson v. Fiorito,* 167 Wash. 495, 9 P.(2d) 789 (1932), *Vowell v. Issaquah Coal Co.,* 31 Wash. 103, 71 Pac. 725 (1903).

The court specifically refused to allow a remittitur. Its refusal stems from a reluctance to allow the verdict to stand as to the basic liability of *D* when that verdict was determined to have been the result of passion or prejudice, *Puget Sound Lumber Co. v. Mechanics' and Traders' Insurance Co.,* 168 Wash. 46, 10 P.(2d) 568 (1932). But this is by no means a universal rule, Sutherland, *Damages* § 459, 460, and has been criticized, McCormick, *Damages* § 19. Furthermore, the allowance of a remittitur is

specifically provided for by REM. REV. STAT. § 399-1 [P.P.C. § 78-5], and the only situation mentioned in the statute is that in which the verdict is determined to have been the result of passion or prejudice.

The holding as to the interest rate to be used in capitalizing future earnings appears to be the first on the precise point in this state. In the main, two rules have been adopted in other jurisdictions. The numerical weight of authority is that the legal rate of interest must be applied. (Cases collected in 104 A.L.R. 234.) The other is that the rate of interest available on safe investments should be applied. The latter seems more realistic and just, McCormick, *Damages* § 86 note 25, and is the rule adopted for the Federal Employers' Liability Act, *Chesapeake & O. R. Co. v. Kelly,* 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117, L.R.A. 1917F, 367, 13 N.C.C.A. 673 (1916). Of the cases applying it there appear to have been none holding that the interest rate is a matter of law for the judge. (Cases collected in 104 A.L.R. 234.) The proper interest rate is a question for the jury either under the evidence, *Gulf, C. & S. F R. Co. v. Moser,* 275 U.S. 133, 48 S.Ct. 49, 72 L.Ed. 200 (1927), or in the absence of evidence then from their own knowledge of rates available on safe investments, *Western & A. R. Co. v. Lochridge,* 170 Ga. 208, 152 S.E. 474 (1930).

In *Borland v. Pacific Meat and Packing Co.,* 153 Wash. 14, 279 Pac. 94 (1929) the court held admissible evidence as to the cost of purchasing an annuity of the given amount from standard insurance companies. Since this cost is presumably based on an investment rate rather than the legal interest rate, the present holding seems to be but a proper extension of the same rule and will allow evidence of actuarial tables computed with different rates of interest, leaving it to the jury to apply the one they find proper.

J. F R.

Workmen's Compensation—Employers Within the Act. Claimant, an employee of the Cooperative Association Naval Supply Depot, was injured while engaged in extrahazardous work. His claim for compensation under the Workmen's Compensation Act was denied by the joint board. The holding was affirmed by the superior court on the ground that the act does not extend its coverage to nonprofit organizations. *Held:* reversed. All that is necessary to be shown to bring an employer within the act is that such employer be engaged as a regular business or trade, in the type of extrahazardous work involved. *Pitts v. Department of Labor and Industries,* 130 Wash. Dec. 118, 191 P.(2d) 295 (1948).

Early cases on this point arose under REM. REV. STAT. § 7675 [P.P.C. § 3470] which defined "employer" "Except when otherwise expressly stated, employer means any person while engaged in this state in any extrahazardous work or who contracts with another to engage in extrahazardous work." It would seem that the words "or who contracts with another" indicated the intention to include in the statute those persons not engaged in business. However, the cases consistently refused to follow this interpretation. "The whole theory of the act is to the effect that it applies to a trade or business which is operated for profit or pecuniary gain." *Thurston County Chapter, American Nat. Red Cross v. Dept. of Labor and Industries,* 166 Wash. 488, 492, 7 P.(2d) 577, 579 (1932). See also *Carsten v. Dept. of Labor and Industries,* 172 Wash. 51, 19 P.(2d) 133 (1933), *Dalmasso v. Dept. of Labor and Industries,* 181 Wash. 294, 43 P.(2d) 32 (1935).

In 1939 the statute was amended to read. "Except when otherwise expressly stated, employer means any person while engaged in this state in any extrahazardous work, by way of trade or business, or who contracts with one or more workmen, the

essence of which is the personal labor of such workman or workmen, in extrahazardous work." REM. REV. STAT. (Sup.) § 7675 [P.P.C. § 709-1].

Crane v. Dept. of Labor and Industries, 19 Wn.(2d) 75, 141 P.(2d) 129 (1943), being the first case to interpret the new statute, continued to follow the rule laid down in the previous cases. It was held that a workman injured while working for a man building his own home was not within the act because the man was not engaged in construction work as a business. But it is arguable that had the legislature been satisfied with the rule of the prior cases that it would have left the statute untouched.

The court in the instant case confines the *Thurston* rule to out-and-out charities. It has continued, however, to ignore the latter part of the new statute, which would appear to include, even more clearly than the old statute, not only one who is engaged in extrahazardous work as a trade or business but also one who merely contracts personally with a workman to do extrahazardous work. It would extend even to a householder who has some casual work done upon his premises. Perhaps the court realizes the administrative difficulties that will occur as to the collection of premiums and assessments from such persons and, for this reason, is hesitant to give the more obvious interpretation to the statute. However, this is a legislative problem, not a judicial one.

W. A. R.

Quitclaim Grantee's Right to Payments on Executory Contract of Sale. Grantor, *H,* contracted to sell realty to *X* and thereafter quitclaimed his interest in the land to the grantee, *W,* prior to their marriage. Subsequently the realty was awarded to the grantor in a divorce action. The grantee sued the grantor's estate for payments made by *X* to the grantor on the contract in the interval between delivery of the quitclaim deed and the property award of the divorce court. In the alternative, the grantee wanted the land if *X* had defaulted on the contract. *Held:* A quitclaim deed of itself does not carry with it the right to collect payments on an outstanding executory contract of sale of the property. Since there was no evidence that the grantor intended to assign the contract, judgment in favor of the grantor was proper. *Biehn v. Lyon,* 129 Wash. Dec. 692, 189 P.(2d) 482 (1948).

The court recognized that the vendor's rights in the contract and legal title may be separated. A vendor may keep the contract right to receive payments and transfer legal title, or he may convey legal title to one and assign the contract to another. *Shelton v. Jones,* 4 Wash. 692, 30 Pac. 1061 (1892), *Culmback v. Stevens,* 158 Wash. 675, 291 Pac. 705 (1930). However, though the decision may be supported on other grounds, the language indicating that a quitclaim deed alone does not carry with it the right to receive payments on an executory contract of sale seems contrary to the normal rule.

A quitclaim deed conveys whatever present title, right, or interest the grantor has in the land. *Pinkerton v. Fenelon,* 131 Wis. 440, 111 N.W 220 (1905), *See* Annotation 44 A.L.R. 1266. Thus a conveyance of his interest by the vendor to a third party will, as a general rule, pass the right to receive the purchase money remaining unpaid. *Lamm v. Armstrong,* 95 Minn. 434, 104 N.W 304 (1907), 1 Tiffany, *Real Property* (3rd Ed. 1939) § 307

The situation is closely analogous to a conveyance by a mortgagee in a "title theory" state. It is generally held there that the right to payment passes with the conveyance of the land in the absence of clear evidence to the contrary. *Griffin v. Wilmer,* 136 Md. 623, 111 Atl. 114 (1920), *Stark v. Boynton,* 167 Mass. 443, 45 N.E. 764 (1897). A quitclaim deed is sufficient to assign the mortgage if there is no negotiable note or other independent evidence of the mortgage debt outstanding. *Hawkins v. Elston,* 58 Colo. 400, 146 Pac. 254 (1915). Since the conveyance of a bare security interest would be contrary to the normal expectations of the parties, the formal con-

veyance is deemed to raise an inference that an assignment of the debt was intended by the grantor. Walsh, *Mortgages* (1934) § 58.

It would seem that the reasoning of these cases is applicable to the instant case, and in the absence of clear evidence of a contrary intention a quitclaim grantee should receive the right to collect payments due on an executory contract of sale along with the right to foreclose the security interest for his own benefit upon default by the purchaser.

J. D. B.

Husband and Wife—Community Property—Conduct after Separation as Affecting Status of Property Subsequently Acquired. Sixteen years after his separation from *D*, the intestate purchased from his earnings United States savings bonds naming *P* as alternate payee. In an action to determine title to these bonds, the court, *en banc, held*. Despite the continuance of the marriage relation, *D* and the deceased had so conducted themselves after their separation as to indicate their intention that property thereafter acquired by either of them should be the separate property of the one acquiring it. The bonds were, therefore, the separate property of the deceased husband. *Togliatti v. Robertson,* 129 Wash. Dec. 808, 190 P.(2d) 575 (1948). Rehearing denied, 130 Wash. Dec. 355 (1948).

Shortly after the separation, an interlocutory decree of divorce had been entered but, no final decree having been granted, it abated and became a nullity upon the death of the husband. That point is well settled in this jurisdiction. *Dougherty v. Dougherty,* 24 Wn.(2d) 811, 167 P.(2d) 467 (1946). By failing to put stress on the entry of an interlocutory decree, the court has left intact the holding of *California-Western States Life Ins. Co. v. Jarman,* 129 Wash. Dec. 95, 185 P.(2d) 494 (1947), to the effect that earnings subsequent to the entry of such a decree are usually community property. However, the three judges who concurred in the result in the principal case did so on the ground that the *Jarman* case should be overruled, asserting that entry of an interlocutory decree should mark that point in time after which individual acquisitions are to be considered as the separate property of the acquiring spouse. Two judges dissented, stating that neither an entry of an interlocutory decree nor a protracted separation should prevail over the clear language of REM. REV. STAT. § 6892, [P.P.C. § 1433], defining community property as all property (with certain exceptions not pertinent here) acquired after marriage.

The precise reasoning upon which the majority bases its result is not apparent but, consistent with the tenor of the opinion, two theories might be advanced in its support: (1) The Washington court, as pointed out in the opinion, has given effect to alleged informal "understandings" or agreements as to the separate status of individual acquisitions during marriage when supported by evidence of conduct consistent with the existence of such an agreement. *Lanigan v. Miles,* 102 Wash. 82, 172 Pac. 894 (1918), *Dobbins v. Dexter Horton & Co.,* 62 Wash. 423, 113 Pac. 1088 (1911), *Union Securities Co. v. Smith,* 93 Wash. 115, 160 Pac. 304 (1916), McKay, *Community Property* (2nd Ed. 1925) § 892. The further step of *implying* such an agreement from a long continued course of conduct involves no insuperable conceptual difficulties. Perplexing problems arise, however, in determining at what point in time such agreements become effective and their possible retroactive effect. (2) A woman who, in good faith, though erroneously, believes she *is* married is held in this state to have an equitable interest acquired during the period of cohabitation. *Buckley v. Buckley,* 50 Wash. 213, 96 Pac. 1079 (1908), *Knoll v. Knoll,* 104 Wash. 110, 176 Pac. 22 (1918). By a parity of reasoning, a woman who, in good faith, though erroneously, believes she is *not* married may be said to suffer a corresponding disability to assert a community interest in the acquisi-

tions of the husband from whom she lives separate and apart. In the instant case, *D, in good faith,* believing her marriage to have been terminated by the interlocutory decree, contracted a void marriage with another shortly thereafter.

Whatever solace one may derive from legal analysis of the instant case is dissolved by the elastic reservation contained in the last paragraph of the majority opinion. "Each case must be disposed of on its own peculiar facts." This, taken in conjunction with the wide divergence of opinion currently entertained by the members of the court, largely undermines the importance of the case as a reliable precedent by which bench and bar may be guided.

C. L. S.