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Probate—Notice—Due Process; Attorney and Client—Substitution of Attorneys—Fees; Community Property—Property Acquired After Separation

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RECENT CASES

Limited Partnership—Participation in Management by Limited Partner. In a suit against a partnership, *P* alleged *D*, a limited partner, became liable as a general partner because he took part in the control of the business as provided in REM. REV. STAT. (1945 Supp.) § 9975-7 [P.P.C. 45 § 768m-13] which is Section 7 of the Uniform Limited Partnership Act. It provides: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." The acts of *D* which *P* claims were an exercise of control in the business were these: (1) The by-laws named *D* as a member of the managing board of directors, although he did not function as such; (2) *D*, with knowledge, took title to firm property along with the general partners; (3) *D* executed certain documents for the firm, one by himself, and the others along with the general partners; (4) *D* assisted managing partner in negotiating a loan for construction of a building, and negotiated with a contractor for the construction of the building. *Held:* There is not sufficient participation in the business under Section 7. *Rathke v. Griffith,* 136 Wash. Dec. 361, 218 P. (2d) 757 (1950).

This is the first case in Washington in which our court has been called upon to interpret Section 7. Despite the adoption of the Uniform Limited Partnership Act in thirty-two jurisdictions, since its framing in 1915, there is only one case, aside from the present case, where this clause has been interpreted. That case is *Holzman v. De Escamilla,* 86 Cal. App. 858, 195 P. (2d) 833 (1948), where the limited partners were held liable as general partners because the limited partners were almost always consulted before any transaction took place, and no money belonging to the firm could be withdrawn without the consent of at least one of the limited partners. The court did not discuss to what extent a limited partner could participate in the business without being held liable as a general partner since it appeared to be a clear case of excessive control. The court said that "the manner of withdrawing money from the bank accounts is particularly illuminating," thus indicating that it would have considered mere consultation with limited partners proper if the limited partners had not had the power to control the withdrawal of money. The case is not very helpful otherwise. It is necessary to examine the rest of the act and cases decided under similar provisions of limited partnership acts other than the Uniform Act in order to get a clearer picture of a limited partner's powers. Section 10 of the act enumerates the "rights" of the limited partner, namely, the right of access to the partnership books, full information concerning partnership affairs, the right to dissolution and winding up by decree of court, and the right to share in the profits. These rights are clear; the question we are concerned with is how much farther a limited partner can go.

Most statutes, both prior to the act and also those still in force in jurisdictions which have not adopted the act, contain language similar to Section 7 restricting the limited partner's participation in management. In cases construing such statutes it has been held that a limited partner may deal with the firm in the same manner as a stranger might. For example, he may advise as to firm management, *Lewis v. Graham,* 4 Abb. Pr. 106 (N.Y. 1857); advise third persons of firm's solvency, *Ulman v. Briggs, Payne & Co.,* 32 La. Ann. 655 (1880); do an occasional errand for the firm, *McKnight v. Ratcliff,* 44 Pa. 156 (1863); act as surety for the firm, *Rayne v. Terrell,* 33 La. Ann. 812 (1881); or loan money to the firm. In re *Terry,* 23 Fed. Cas. 852, No. 13,836 (N.D. Ill. 1870). The limited partner is not responsible for acts purported to have

been done in his name but in fact done without his knowledge. *Madison County Bank v. Gould,* 5 Hill 309 (N.Y. 1843). He may do acts of control when the general partners are incapacitated, *Cropper v. Illinois Sewing Mach. Co.,* 100 Miss. 127, 54 So. 849 (1911), and he may also participate in winding up after dissolution, *Lawson v. Wilmer,* 3 Phila. 122, 15 Leg. Int. 133 (Pa. 1858); *Outcalt & Co. v. Burnet & Bro.,* 1 Handy 404 (Ohio 1855); *Continental Nat. Bank of Boston v. Strauss,* 137 N.Y. 148, 32 N.E. 1066 (1893).

Of the nineteen jurisdictions which have not adopted the act, seven have express provisions refusing to allow a limited partner to be employed as agent for the firm. A number of the prior statutes in states which subsequently adopted the act had similar provisions. Construing such a statute, the New York court in *Skolny v. Richter,* 139 App. Div. 534, 124 N.Y.S. 152, 156 (1910), said of a limited partner: "He may not sign for the partnership nor bind it, nor transact any business on its account, or be employed for that purpose as agent, attorney, or otherwise. In short he may not in his right as a partner, or even by direct authority of his copartners, become the agent of the firm for any purpose. He may negotiate sales, purchases, and other business, but cannot carry such negotiations to the point of binding the firm. . . ." Whether the draftsmen of the act intended that Section 7 should go this far cannot be ascertained. It would appear that our court does not think so since *D* in the present case did act as an agent. Apparently Section 7 would prevent him from participating in decisions which determine business policy to any substantial extent. This view is supported by cases denying limited liability where title to firm property is solely in the limited partner's name, *First Nat. Bank of Canandaigua v. Whitney,* 4 Lans. 34 (1871), *aff'd.* 53 N.Y. 627 (1873); where he exercises managerial discretion as agent for the firm, Re *Sucesores De José Hernaiz,* 3 Porto Rico Fed. 202 (1907); *Hutchison v. Bowes, McDonell & Cotton,* 15 U.C.Q.B. 156 (Can. 1858), where his own agents are in control, *Strang v. Thomas,* 114 Wis. 599, 91 N.W. 237 (1902); *Richardson v. Hogg,* 38 Pa. 153 (1861), where he acts as chairman of the managing committee, *Bowes & Hall v. Holland,* 14 U.C.Q.B. 316 (Can. 1857); or where he executes contracts for the firm on his own authority, *Farnsworth v. Boardman,* 131 Mass. 115 (1881).

Uncertainty as to the scope of Section 7 and also the inactivity required of a limited partner in partnership affairs has acted as a deterrent to the use of a limited partnership to obtain limited liability. The limited partner's position in the partnership gives him less voice in the business than is enjoyed by a corporate stockholder who at least has a vote in the choice of management. The liberality shown *D* by the Washington court in the present case in permitting a limited partner to take title to firm property and execute contracts is a step toward alleviating the unattractiveness of limited partnerships. However, until the meaning of Section 7 is more clearly defined by additional decisions the general language of the statute will doubtless continue to operate as a deterrent to the use of limited partnerships, except in those situations clearly within the rule of the principal case or where the limited partner is willing to refrain from anything resembling active participation in management.

J.T.M.

Community Property—Insurance. *H* died leaving a $10,000 insurance policy on his own life, which named *S* as one-fourth beneficiary, and *W* as three-fourths beneficiary. The premiums had been paid one-fifth from separate funds and four-fifths from community funds. The trial court found *S* entitled to $2.000. *W* appeals. *Held:* Affirmed. *Wilson v. Wilson,* 35 Wn.(2d) 364, 212 P.(2d) 1022 (1949).

The problem of how to distribute the proceeds of a life insurance policy for which community funds have been expended has been a recurring one. *Occidental Life Insurance Co. v. Powers,* 192 Wash. 475, 74 P.(2d) 27 (1937), is the leading case on this subject, and while it settled several aspects of the problem, at the same time it raised new questions. See Hokanson, *Life Insurance Proceeds as Community Property,* 13 WASH. L. REV. 321 (1938); Luccock, *Legal Institute Papers,* 16 WASH. L. REV. 187 (1941). In the *Powers* case, the husband had the right under the terms of the policy to change the beneficiary, but his attempt to exercise that right and substitute a third person in place of his wife was held ineffective. The wife was permitted to have the change of beneficiary set aside and thus recover the proceeds of the policy in her own right on the ground that the change in beneficiary without her consent was an unauthorized gift of community property within the rule of *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111 (1916). The court stated that in this state the wife had a present vested interest in the insurance contract paid for with community funds, and not a mere expectancy. The capacity in which the wife took the proceeds as a result of the suit was not discussed beyond the language: "the wife in her own right is entitled to all the proceeds of the policy." But this seems to indicate that she took the money without reference to her husband's estate. In *King v. Prudential Insurance Co.,* 13 Wn.(2d) 414, 125 P.(2d) 282 (1942), the *Powers* case was reaffirmed and the wife was again permitted to set aside the change in beneficiary.

In the case of In re *Towey's Estate,* 22 Wn.(2d) 212, 155 P.(2d) 273 (1945) the court reaffirmed both the *Powers* and *King* cases which hold that the husband cannot change the beneficiary of a life insurance policy, paid for with community funds, from his wife to a third person. The court distinguished those cases from the situation in which the husband changes the beneficiary from his wife to his "estate" and then leaves the wife one dollar in his will. In practical result the husband, in this case, effectively disposed of one-half of the proceeds of the policy by changing the beneficiary although it cannot be said that such a change was an unauthorized gift of community property.

In *Small v. Bartyzel,* 27 Wn.(2d) 176, 177 P.(2d) 391 (1947), it was held that the wife could recover from her stepdaughter the *pro rata* share of a policy which had been paid for partially with separate funds, but also with community funds. The stepdaughter was the sole beneficiary of the policy which was issued prior to the marriage. It should be noted that in this case the wife recovered for the benefit of the community estate, and, therefore, took the proceeds subject to the claims of community creditors.

In *California-Western States Life Insurance Co. v. Jarman,* 29 Wn.(2d) 98, 185 P.(2d) 494 (1947), it appeared that some three months after the wife had obtained an interlocutory decree of divorce the husband took out a life insurance policy and named his mother as beneficiary. The husband died before the final decree was entered. It was held that the divorced wife was entitled to recover as representative of the community as against the named beneficiary. This case demonstrates a very liberal attitude in favor of the wife in that a persuasive argument can be made for the proposition that separate funds were expended for the policy. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 57 (1943). This argument is even stronger in light of more recent cases. *Togliatti v. Robertson,* 29 Wn.(2d) 844, 190 P.(2d) 575 (1948); In re *Armstrong's Estate,* 33 Wn.(2d) 118, 204 P.(2d) 500 (1949).

In the recent case of In re *Knight's Estate,* 31 Wn.(2d) 813, 199 P.(2d) 89 (1948), the State Inheritance Tax Supervisor sought to include in the community estate of the deceased wife the cash surrender value of certain policies of life insurance taken out on the life of the husband who was still living. The insurance contract was clearly "property," *May v. Ruddel,* 149 Wash. 393, 270 Pac. 1041 (1928), and the *Powers Case* em-

phatically says that the wife's interest in the policy is a vested one. It is difficult to see under this state of facts why the wife's vested interest in the property would not vest in her personal representative in the same way as her rights in other property vest. The court, however, held that the interest of the wife was not one that passed by "will or the statute of inheritance" within the meaning of the inheritance tax statue, REM. REV. STAT. (1945 Supp.) § 11201 [P.P.C. 45 § 974-1].

It is against this background that the principal case must be evaluated. It holds that when the premiums of a life insurance policy have been paid in part with separate funds, and in part with community funds, the wife will take in the capacity by which she receives the most benefit, *i.e.,* if she takes more as named beneficiary than she would take as personal representative, then she will take in the former capacity and have the benefit of the statute exempting insurance proceeds from the claims of creditors; but if she takes more as representative of the community than she would as beneficiary, she will take her designated share as beneficiary, and presumably have the benefit of the exemption statute to that extent also, and in addition be permitted to recover as representative of the community estate the difference between what she takes as beneficiary and the portion of the proceeds attributable to premiums paid for with community funds. The result is that the widow will not be put to an election in such a situation but will have one ready made by rule of law. This is thoroughly consistent with the liberal attitude of the court toward the surviving wife, previously well illustrated by the *Jarman* case, *supra.*

In none of the cited cases, however, has there been in issue one important aspect of the community insurance problem. The *capacity* in which the wife takes the proceeds of a policy paid for with community funds may be of vital importance to creditors, as well as to the taxing authorities. Logically, the results should be uniform in the three situations where (a) the wife was never named as beneficiary; (b) the beneficiary is changed from the wife to the "estate"; (c) the wife was named beneficiary originally, but later replaced by a third person. But this is not true under the cases for in situation (c) she has recovered all the proceeds, while in the other two she ultimately gets only one-half. These divergent results have been of no practical importance in the cases thus far decided, and, consequently, the effect of the decisions on such collateral problems remains uncertain.

R.K.G.

Physicians and Surgeons—Ownership and Operation of Dental Office by Unlicensed Persons. Action to enjoin *B, S,* and *H* from illegal practice of dentistry. *H,* a licensed dentist, entered a conditional sales contract to purchase a dental business from *B* and *S* who, although never licensed to practice dentistry, owned and operated the business. As a part of the contract *B* was retained by *H* to manage the office, buy supplies, keep accounts, etc. In addition to his salary *B* had received several very large bonuses "in appreciation of the increase in business." The trial court found that *B* and *S* with the knowledge and consent of *H* did "own, manage and operate" the dental office within REM. REV. STAT. § 10031-6 [P.P.C. § 501-11] which forbids unlicensed persons to own, maintain or operate a dental office. The trial court denied the injunction, holding this statute unconstitutional as a violation of WASH. CONST., Art. I, § 12 which forbids the granting of any privileges and immunities to any citizen which do not equally belong to all citizens. In so ruling the trial court followed *State v. Brown,* 37 Wash. 97, 79 Pac. 635 (1905) which had held a nearly identical statute unconstitutional. *Held:* Reversed, overruling *State v. Brown.* The court agreed with the statement in the *Brown*

case that "to own and manage property is a natural right," but said there was a clear distinction between the power of the state to interfere with the owning and managing of property, as such, and its right, under the police power, to protect the health of its people. Care of the teeth requires not only skill, but the personal relationship between dentist and patient; hence it is a proper subject for regulation under the police power. *State v. Boren,* 136 Wash. Dec. 481, 219 P.(2d) 566 (1950).

The decision in the *Brown* case has never found much support in other jurisdictions. Indeed, in a number of cases it has been expressly repudiated. *People v. Carroll,* 274 Mich. 451, 264 N.W. 861 (1936); *State v. Williams,* 211 Ind. 186, 5 N.E. (2d) 961 (1937); *People v. United Medical Service,* 362 Ill. 442, 200 N.E. 157 (1936); *Rust v. Dental Examiners,* 216 Wis. 127, 256 N.W. 919 (1934). The courts have quite uniformly held that statutes forbidding corporations to practice the learned professions through licensed employees are a valid exercise of the police power. For collection of cases see 103 A.L.R. 1240.

The same policy considerations would seem to apply in the case of natural persons. 41 AM. JUR. 149. At least the courts have not attempted to distinguish between the two situations. *Deaton v. Lawson,* 40 Wash. 486, 82 Pac. 879 (1905); *State* ex rel. *Standard Optical Co. v. Superior Court,* 17 Wn. (2d) 323, 135 P.(2d) 839 (1943); *State Electro-Medical Institute v. Platner,* 74 Neb. 23, 103 N.W. 1079 (1905); *Painless Parker v. Dental Examiners, supra; State v. Williams, supra.* However, only two courts, other than Washington, have had the opportunity to consider the same question with regard to the operation of such offices by unlicensed natural persons. *State v. Williams, supra; People v. Carroll, supra.* In both cases the courts held nearly identical statutes constitutional as to such individuals.

All of these cases indicate that the corporations, firms, or persons charged with illegal practice not only owned the offices and equipment, but also had nearly complete discretion as to policy and personnel. What is more important, in every case the persons engaged in the actual performance of professional services were employees, hired on a salary or commission basis. Indeed, this factor has quite uniformly been held to be the justification for the statutory regulation. *Deaton v. Lawson, supra; State Electro-Medical Institute v. Platner, supra; State v. Williams, supra.* The reasoning of the Wisconsin court in *Rust v. Dental Examiners, supra* at 921, fairly represents the majority view. In that case the court said, "The law contemplates regulation . . . to such an extent as to protect the public . . . against those who, by management or some other intimate relation, are in charge of those who are practicing dentistry. . . . [Otherwise] the proprietor of the business may . . . violate all standards which a licensed dentist would be required to respect and stand immune from any regulatory supervision whatsoever. His employee, the licensed dentist, would also be immune from discipline upon the ground that he was not responsible for his employer's misconduct. . . ."

Taking the majority view to be the better approach, the Washington court in the *Boren* case probably determined that, stripped of all subterfuges, the whole transaction in issue was neither more nor less than a contract by *H* to render professional services for *B* and *S* and was, therefore, a subtle attempt to circumvent the statute. Whether the court did so determine is not clear from the opinion, but even under the more liberal modern approach to the problem of police power regulation as indicated in *Shea v. Olson,* 185 Wash. 143, 147, 53 P.(2d) 615, 618 (1936), neither the ownership, alone, of a dental office by an unlicensed person, *e.g.,* a landlord, nor the employment of an unlicensed person in a dental office, *e.g.,* a bookkeeper, would seem to offend any established policy.

D.C.S.

Contracts—Construction—Unilateral or Bilateral. *D* by letter made the following offer to *P*, "*dow* [do] *thee* work what you think to *bee* needed and I will pay you later on when you send me *thee* bill (sic). . . ." *P* replied *promising* performance. The trial court held there was no contract as the minds of the parties did not meet. Appeal. *Held:* Reversed. A binding bilateral contract was formed by *P*'s reply. *Cook v. Johnson,* 137 Wash. Dec. 18, 221 P.(2d) 525 (1950).

In reaching this decision the court, looking to the conduct of the offeree, found that although the offeree could have performed and thus formed a binding unilateral contract, "he went further than that and promised to do the work. . . . The promises of the two men thereby became reciprocal and binding, each upon the other." 137 Wash. Dec. 18, 22, 221 P.(2d) 525, 528 (1950). Thus the court seems to hold that where the offeror submits an offer for a unilateral contract, the offeree has an option of performing, thus forming a unilateral contract, or promising performance, thereby forming a bilateral contract. This statement is not accepted by the authorities. *Martinson v. Carter,* 190 Wash. 502, 505, 68 P.(2d) 1027, 1028 (1937); *Higgins v. Egbert,* 28 Wn. (2d) 313, 182 P.(2d) 58 (1947); RESTATEMENT, CONTRACTS §§ 12; 59, illus. 2 (1932). An offer for a unilateral contract requires an act by the offeree to make a binding contract. This act is the consideration for the promise of the offeror, and no contract is formed until performance of the act with intent to accept. RESTATEMENT, CONTRACTS § 55 (1932). An offer for a bilateral contract requires a promise by the offeree to form a binding contract. *Higgins v. Egbert, supra;* 17 C.J.S. 326; 1 CORBIN, CONTRACTS § 21 (1950); RESTATEMENT, CONTRACTS § 12 (1932). Where an unambiguous offer is made, the offeree does not have an option to treat the offer as a request for either a unilateral or a bilateral contract. RESTATEMENT, CONTRACTS § 59, illus. 2 (1932). Any promise of performance by an offeree to an unambiguous offer for a unilateral contract could be no more than a counter-offer. 1 WILLISTON, CONTRACTS § 73-73A (Rev. ed. 1938); RESTATEMENT, CONTRACTS §§ 36, 38 (1932). Any variance from the requested acceptance means not only that no contract is formed but that the offer is rejected. *Bond v. Wiegardt,* 136 Wash. Dec. 36, 216 P.(2d) 196 (1950); *Schulze v. General Electric Co.,* 108 Wash. 401, 184 Pac. 342 (1919); *Bridge v. Calhoun, Denny and Ewing,* 57 Wash. 272, 106 Pac. 762 (1910); 1 WILLISTON, CONTRACTS § 77 (Rev. ed. 1938).

Although it is true that an offer should be interpreted, if possible, as an offer for a bilateral contract, the primary question in the formation of informal contracts is what the *offer* requests as the acceptance and consideration. 1 WILLISTON, CONTRACTS §§ 31A, 60 (Rev. ed. 1938); RESTATEMENT, CONTRACTS § 31 (1932). The court in the instant case apparently looked to the action of the offeree for construction of the offer rather than to the offer itself to determine what acceptance was requested.

While the statement of the court quoted above is disturbing at best, it is not clear that this statement is necessary for the holding in the case. The conclusion that there was a bilateral contract in the instant case could have been reached by orthodox reasoning. Indeed, it is possible that the court was reasoning from accepted rules pertaining to objective manifestations of the offeror. 1 CORBIN, CONTRACTS § 106 (1950). If the court had found the offer in the instant case to be ambiguous as to whether an act or promise was requested, then the rules of undisclosed understanding would apply. RESTATEMENT, CONTRACTS § 71 (1932). Thus if the offer could be interpreted by a reasonable offeree to request a promise as consideration, a bilateral contract would have been formed.

J.J.G.

Taxation—Construction of Combination Life Insurance and Annuity Contracts in Relation to Inheritance Tax. At the age of seventy-eight, *T* purchased from each of two insurance companies a "single premium life insurance" policy and a "nonrefund life annuity." *T* was not required to take a physical examination by either of these companies. The executor of *T*'s estate contended that the proceeds of the two life insurance policies were exempt under REM. REV. STAT. § 11211b [P.P.C. § 974-15] which allows an exemption from inheritance taxation of the first $40,000 of the proceeds of all insurance policies which are payable to beneficiaries other than the estate of the deceased. The trial court held that the proceeds of the policies were not within the meaning of the statutory exemption because no risk was involved. Appeal. *Held:* Affirmed. The question of the existence of an insurance risk is a question of fact. While the two documents did not refer to each other, they must be considered together; and so considered, the necessary element of insurance risk is nonexistent. The longer *T* lived, the more interest would accrue to the insurance company on the policy premium and the more money would be paid back on the annuity plan; and, conversely, the sooner *T* died, the less interest would accrue and the less would be paid back on the annuity. Therefore, the two documents created a balance which nullified the possibility of any loss caused by an early death. The transactions are actually only gifts made or intended to take effect in possession or enjoyment after death and are taxable within REM. REV. STAT. § 11201 [P.P.C. § 974-1]. *Pacific National Bank v. Supervisor of the Inheritance Tax Division,* 35 Wn. (2d) 863, 216 P.(2d) 212 (1950).

This is a case of first impression under the Washington inheritance tax statute, although analogous cases have arisen under the federal estate tax and other state succession taxes. Apparently this case puts Washington in line with the majority view that prepaid insurance contracts and correlative life annuities will not successfully avoid the inheritance tax if, in fact, an insurance risk is lacking, regardless of the form of the contracts. *Helvering v. Le Gierse,* 312 U.S. 531 (1941).

The decision that the two documents must be considered together seems sound in the light of the general rule that: "Even where a writing does not refer to another writing, if such other writing was made as part of the same transaction, the two should be interpreted together." 3 WILLISTON, CONTRACTS, § 628 (Rev. ed. 1936). On this point the Washington court went further than the other courts cited as having decided the question on similar facts. *Helvering v. Le Gierse, supra; Old Colony Trust Co. v. Commissioner,* 102 F.(2d) 380 (1st Cir. 1939); *Day v. Walsh,* 132 Conn. 5, 42 A.(2d) 366 (1945). In those cases it was shown that the policy would not have been issued without the annuity, and such was not shown in the instant case. No other case has been found where an insurance policy and an annuity have been considered together, unless it was shown that the policy would not have been issued without the annuity. Thus it would appear that the Washington court has extended the doctrine of the *Le Gierse* case to the extent that it is unnecessary to prove that the policy would not have been issued without the annuity. However, the basic policy as stated by the U.S. Supreme Court—frustration of a rather bizarre scheme to escape a succession tax—is not disturbed since the surrounding circumstances in the instant case indicate a novel but obvious attempt to avoid the tax. These contracts were effected in September, 1935—about six months after Washington first applied its inheritance tax to insurance proceeds, exempting $40,000 only. The face value of the two policies equalled an even $40,000, and the practical effect of the contracts was to provide a fair income to *T* for the rest of her life with a guarantee that $40,000 would be paid at her death to beneficiaries designated by her.

Prior Washington definitions of insurance are of little help in this area. The statute which allows the exemption gives no help as it fails to define "insurance." REM. REV.

STAT. § 11211b [P.P.C. § 974-15]. The accepted local definition of "insurance" seems to be the one expounded in the cases of *State* ex rel. *Fishback v. Universal Service Agency,* 87 Wash. 413, 151 Pac. 768 (1915), and In re *Knight's Estate,* 31 Wn. (2d) 813, 199 P.(2d) 89 (1948). These cases stress only a contract to pay if the insured or his beneficiary sustains a loss as a result of certain hazards or perils. The instant case does not conflict with either of these rules, but only adds a warning that, in an inheritance tax case, a contract must show the qualities of risk-shifting and risk-distributing in order to qualify as insurance within the meaning of the statute. The court follows the normal principle of looking to the substance rather than the form in matters of taxation. *Mossberg v. McLaughlin,* 125 Conn. 680, 7 A.(2d) 910 (1939); In re *Jones Estate,* 350 Pa. 120, 38 A.(2d) 30 (1944); *Ballou v. Fisher,* 154 Ore. 548, 61 P.(2d) 423 (1936).

The difficulty of predicting the limits of this doctrine is suggested by PAUL, FEDERAL ESTATE AND GIFT TAXATION, 1946 Supp., § 10.09, p. 320. He poses the question whether there would be an insurance risk if the insurance company accepted the payment in two or three installments over the period of a year. It seems that the best method of testing the taxability of proposed insurance plans would be a case by case factual analysis to determine whether the plan fits the general definition of insurance as a distribution of risk.

C.C.C.

Evidence—Criminal Law—Admissibility of Habit of Care. *D* was charged with manslaughter for failing to use ordinary care while hunting, as a result of which he shot and killed another. At the trial, a witness of long hunting experience with *D* was asked, "What is the fact . . . as to whether or not [*D*] is careful as a hunter and in the use of a gun?" An objection of immateriality and irrelevancy having been sustained, *D* made the following offer of proof: "that the reputation of [*D*] in . . . hunting was that of a careful and prudent individual, and this witness . . . would testify that he had hunted many, many times with [*D*], and that [*D*] was careful in the handling and use of firearms." *Held:* Conviction affirmed. The testimony offered had no bearing on the issue of whether *D* was negligent when he shot, since the fact that *D* was careful in handling of firearms on other occasions did not tend to prove that he was careful this time. *State v. Lewis,* 137 Wash. Dec. 507, 225 Pac. 428 (1950).

It would seem that the result is correct but is founded upon the wrong basis. This and prior Washington cases possibly miss a distinction between evidence of character and of habit. Evidence of a careful character for heed is usually inadmissible, but evidence of habit, *i.e.,* a fixed or invariable method of acting, is admissible to show a probability that the person acted in the same way on a particular occasion. *Greenwood v. Boston & M.R.R.,* 77 N.H. 101, 88 Atl. 217 (1913). The court cites *Rossier v. Payne,* 125 Wash. 155, 215 Pac. 366 (1923), as supporting its conclusion. That case was a wrongful death action where the general custom and habit of one to stop and look was held inadmissible because "it is not competent . . . to rebut evidence of negligence . . . to show the party to be generally careful. . . ." The evidence offered was of habit but was treated as though of character. The question in the *Lewis* case, though borderline, called for an answer as to character for care, not as to *D*'s habit, and the court uses the reversed reasoning of the *Rossier* case as authority. It is submitted that these two cases incorrectly blend two concepts that should be kept distinct.

Character for care is viewed in slightly different lights in the civil and criminal cases. The civil rule is that it is not proper in denial of a charge of particular acts of negligence to show that the party is generally careful, since logical probabilities do not

support a conclusion from this that defendant was careful in this instance. *Carter v. Seattle,* 19 Wash. 597, 53 Pac. 1102 (1898); *Chilberg v. Parsons,* 109 Wash. 90, 186 Pac. 272 (1919); Falknor, *Competency of Proof of "Customary" Negligence in Support of Charge of Specific Act of Negligence,* 12 WASH. L. REV. 35 (1937); MODEL CODE OF EVIDENCE, Rule 306(3) (1942). In criminal cases, however, the defendant may introduce evidence of his general reputation as to the trait of character in issue. *State v. Hosey,* 54 Wash. 309, 103 Pac. 12 (1909); *Lowrey v. State,* 87 Okla. Crim. 313, 197 P.(2d) 637 (1948); *People v. Dyer,* 30 Cal. App. 590, 86 P.(2d) 852 (1939). Washington cases are extremely strict in requiring that the reputation evidence be limited to the specific trait in issue and have been criticized in 1 WIGMORE, EVIDENCE § 59 (3d ed. 1940). See *State v. Surry,* 23 Wash. 655, 63 Pac. 557 (1900); *State v. Schuman,* 89 Wash. 9, 153 Pac. 1084 (1915). The concept of character for care, as such, is little noticed by the cases and would seem to be subject to the court's valid criticism of immateriality, since defendant's reputation for care does not bear squarely on the issue of whether or not defendant was careful this time. The policy of allowing the accused in a *criminal* trial to offer evidence of his good character is basic, however. It would seem that since, in the defendant's behalf, evidence of general repute for peacefulness is admissible in homicide cases, good moral character in sex offenses, truth in perjury cases and honesty in fraud cases, *State v. Hosey,* 54 Wash. 309, 103 Pac. 12 (1909); *Beaird v. State,* 215 Ala. 27, 109 So. 161 (1926); Cripe, *Character Evidence in Criminal Causes,* 3 IND. L. J. 706 (1927-28), then evidence of a character for due care should be deemed probative and admissible when the issue is criminal negligence. This should be especially so in the light of the Washington homicide statute, since it encompasses manslaughter as a segment of homicide.

The court based its reasoning on the habit concept, however, rather than on character. If this had been a true case of habit, the evidence should have been admitted, being clearly relevant. The manner of doing the act, in the instant case, was material, since under REM. REV. STAT. § 2395 [P.P.C. § 117-11] manslaughter is homicide not excusable or justifiable in cases other than those specified in REM. REV. STAT. §§ 2392, 2393, 2394 [P.P.C. §§ 117-5, -7, -9]. Lack of ordinary caution without unlawful intent makes the homicide inexcusable and, therefore, manslaughter. REM. REV. STAT. § 2404 [P.P.C. § 117-29]; *State v. Stevick,* 23 Wn. (2d) 420, 161 P.(2d) 181 (1945); 17 WASH. L. REV. 175 (1942).

"Whenever . . . the manner of doing . . . an act is material to be proved, the person's habit is relevant providing it involves a fair regularity in frequency of conduct as to the act . . . in question." WIGMORE, CODE OF EVIDENCE § 270, Rule 40 (3d ed. 1942); MODEL CODE OF EVIDENCE, Rule 307 (1942). Contrary to the Washington view as found in *Rossier v. Payne, supra,* is the ruling in *Craven v. Central Pacific Ry.,* 72 Cal. 345, 13 Pac. 878 (1887), that when the point to be determined is whether a person did a certain thing in a particular way, the evidence of his prior habit is admissible. The correct rule would seem to be as expressed in *State v. M.&L.R.R.,* 52 N.H. 528 (1873), where, in a criminal case, the act of a railroad engineer at a particular time was in question. Evidence of his past habit was allowed, the court saying, "It would seem axiomatic that a man is likely to do or not to do a thing . . . as is his habit. . . ." Had counsel in the *Lewis* case sought to develop defendant's invariable habit of acting in a specific situation, instead of endeavoring to show his reputation for carefulness generally, the better reasoning would seem to make it admissible. The difference is substantial.

K.M.C.

Real Property—Adverse Possession by the State. By mutual mistake, a ten-acre tract of land was omitted from the description in a deed. In an action to try title between the grantee, state of Washington, and the successor in interest of the grantor, the trial court found the state had acquired title to the disputed premises by adverse possession. Appeal. *Held:* Affirmed. *State v. Stockdale,* 34 Wn. (2d) 857, 210 P.(2d) 686 (1949).

The decision in the instant case raises the seldom discussed question of, "Who can acquire an adverse interest in land?" as distinguished from the usual question of, "What amounts to adverse possession?" Insofar as the holding of the court indicates that the state of Washington can acquire title to real property by adverse possession, it is of first impression in this state. Although there is a surprising lack of cases on this precise point, what few cases there are establish the rule that a state may so acquire title. *State v. Vanderkopel,* 45 Wyo. 432, 19 P.(2d) 955 (1933); *Brunette v. City of Rochester,* 124 Misc. 209, 207 N.Y. Supp. 232 (1925); *Stephenson v. Van Blockland,* 60 Ore. 247, 118 Pac. 1026 (1911); *Eldridge v. City of Binghamton,* 120 N.Y. 309, 24 N.E. 462 (1890); *Attorney General v. Ellis,* 198 Mass. 91, 84 N.E. 430 (1908); *Birdsall v. Cary,* 66 How. Prac. (N.Y.) 358 (1883); *Parker v. Southwick,* 6 Watts (Pa.) 377 (1837). A municipal corporation falls into the same category as any other corporation which has the capacity to hold land in its own right, and can acquire a title by the usual rules of adverse possession. *New York v. Carlton,* 113 N.Y. 284, 21 N.E. 55 (1889); *Murphy v. Commonwealth,* 187 Mass. 361, 73 N.E. 524 (1905).

It has also been held that a period of adverse possession by the federal government could be used as a defense to trespass. *City of El Paso v. Fort Dearborn National Bank,* 96 Tex. 496, 74 S.W. 21 (1903). But in such a situation certain language in the case of *Stanley v. Schwalby* as originally decided in 85 Tex. 348, 19 S.W. 264 (1892) suggests the qualification that unless the government is subject to suit, or the rightful owner can by legal proceedings against the agents of the government assert his right to possession, the statute of limitations will not run in favor of the government. However, in *Stanley v. Schwalby,* 147 U.S. 508 (1893), to the contrary, the court indicated that it is not necessary that the government be amenable to suit as a prerequisite to taking title by adverse possession. The court said, "protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of right to possession . . . when the action cannot be brought, as the action itself when it can." With this possible qualification, the rule as stated by Thompson, "title by adverse possession may be acquired by every class and description of persons, natural and artificial," 5 THOMPSON, REAL PROPERTY § 2661 (Perm. ed. 1940), seems perfectly sound and proper, and insofar as the principal case holds that the state may acquire an adverse title to realty, it is absolutely correct.

R.K.G.