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Probate Decrees—Extrinsic Fraud—Personal Notice of Proceedings

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Seemingly at variance with the Washington rule stated above, is a long line of cases on legal description in the field of tax foreclosures where the court has consistently quoted verbatim, authority which as it is usually understood, represents with clarity the majority rule relating to certainty of legal description. This passage, taken from 1 JONES, LAW OF REAL PROPERTY IN CONVEYANCING § 323 (1898) states: "The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels. See *Ontario Land Co. v. Yordy,* 44 Wash. 238, 87 Pac. 257 (1906); *Opsjon v. Engebo,* 73 Wash. 325, 131 Pac. 1146 (1913); *Merges v. Adams,* 137 Wash. 208, 242 Pac. 43 (1926); *Wingard v. Pierce County,* 23 Wn. 2d 296, 160 P. 2d 1009 (1945); *Turpen v. Johnson,* 26 Wn. 2d 716, 175 P. 2d 495 (1946).

The variance between the Washington rule and the Jones quotation may be rationalized on either of two narrow grounds. First, extrinsic evidence is admissible, but only when the extrinsic evidence offered is incorporated by reference into the writing. See *Bingham v. Sherfey,* 38 Wn. 2d 886, 234 P. 2d 489 (1951). Or second, extrinsic evidence is admissible, but only when the writing already includes lot, block, addition, city, county and state.

The Martin rule presents very stringent requirements for a real estate contract involving platted land. It tends to work hardship in that it enables one party to defeat an otherwise valid contract. But subsequent cases, construing the Martin rule, indicate that in actual effect, part performance, judicial notice, and incorporation by reference tend to modify the harshness of the rule. See *Stephens v. Nelson,* 37 Wn. 2d 28, 121 P. 2d 520 (1950) (State and county omitted); *Bingham v. Sherfey,* 38 Wn. 2d 886, 234 P. 2d 489 (1951) (Description vague and erroneous); *Lofberg v. Viles,* 139 Wash. Dec. 459 (1951) (State and county omitted).

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Probate Decrees—Extrinsic Fraud—Personal Notice of Proceedings. *D* was appointed administratrix of the estate of her husband who died intestate in 1943. Notice of the probate proceedings was given by publication as provided in RCW 11.76.040 [RRS § 1532; PPC § 192-17]. *P,* a daughter of deceased by a former marriage, was not given personal notice of the probate proceedings, or of the final decree. However, she learned of the death within a few hours, and of the decree of distribution a few months after it was entered. The final decree was entered in 1944, awarding the entire estate to *D* as sole heir at law. This action was brought in 1948 as a collateral attack upon the probate decree, *P* alleging that *D* was guilty of extrinsic fraud. There was conflicting testimony as to whether *D* knew that *P* was a daughter of deceased. The trial court found that *D* did not know that *P* was a daughter of deceased and ruled for *D. Held:* Reversed. The Supreme Court found extrinsic fraud in obtaining the probate degree because *D* knew of *P*'s claim, and by failing to give personal notice of the proceedings she prevented *P* from presenting such claim in court. *D* was declared constructive trustee for *P* of one-half of the estate. *Francon v. Cox,* 38 Wn. 2d 530, 231 P. 2d 265 (1951).

The general rule is that a probate decree is res judicata, and cannot be attacked collaterally except for extrinsic fraud. Mere error, no matter how clearly demonstrated after entry of the final decree, will not invalidate the court's decision. Neither can the decree be set aside nor the distributees treated as trustees even though it be shown that the decree was obtained through intrinsic fraud. *Krohn v. Hirsch,* 81 Wash. 222, 142 Pac. 647 (1914); *Meeker v. Waddle,* 83 Wash. 628, 145 Pac. 967 (1915); *Davis v. Seavey,* 95 Wash. 57, 163 Pac. 35 (1917); In re *Nilson's Estate,* 109 Wash. 127, 186 Pac. 268 (1919); *Farley v. Davis,* 10 Wn. 2d 62, 116 P. 2d 263 (1941); In re *Baker's Estate,* 27 Wn. 2d 933, 181 P. 2d 826 (1947).

The foregoing is the frequently stated general rule. To a large extent our court has merely stated the rule in general terms and has then proceeded to the conclusion that the facts do or do not establish the required extrinsic fraud. The decisions, to a large extent, are vague as to the dividing line between extrinsic fraud justifying collateral attack on the decree and intrinsic fraud which permits no attack.

Prior to the decision in the instant case, the leading case in defining this dividing line was *Krohn v. Hirsch, supra.* That case is distinguishable from the instant case in only one respect. In the *Krohn* case the defendant wrote the plaintiff informing her that her rights in the estate would not be recognized. The court there said, ". . . the statutory manner of giving notice . . . that is, by publication and posting, amounts to due process of law." It was further said, "Respondent . . . did absolutely nothing tending to prevent appellant from appearing at the hearing, and presenting evidence touching her claimed rights. Neither did respondent do or say anything inducing appellant . . . to believe that her rights . . . would be protected. . . . Indeed, respondent's acts and communications to appellant . . . were consistent with and would even suggest the very course she pursued. . . ." Thus, the case held that where an interested party was not prevented from asserting her claim, nor induced not to assert it, notice by publication amounts to due process of law and extrinsic fraud did not exist. In referring to the correspondence with the plaintiff, the court speaks of it as an additional equity in defendant's favor, rather than as a controlling factor. If, as was suggested in the instant case, the correspondence positively denying the plaintiff's right to share in the estate was a controlling factor in the *Krohn* case, it would follow that direct communication with the interested party is necessary. If this be so, the language of the *Krohn* case with respect to notice by publication is meaningless.

The reasoning of the *Krohn* case was followed by the Washington court in a number of later decisions which held that notice by publication is sufficient to meet the requirements of due process. Failure to give personal notice to the interested party has been held to be an intrinsic matter. In re *Christianson's Estate,* 16 Wn. 2d 48, 132 P. 2d 368 (1942). A similar result was reached in the case of In re *Baker's Estate, supra,* where there was no allegation that defendant did anything to lull appellants into a sense of security except fail to give personal notice of the probate proceedings. The rather clear inference to be drawn from these decisions is that the decree can be attacked only when there was some affirmative action which prevented or discouraged participation by the injured party in the probate proceedings. The instant case disposed of the *Baker* case by saying that it involved only intrinsic fraud and therefore had no bearing on the present case. But in the instant case *D* did nothing to lull *P* into a sense of security, or to prevent her from asserting her claim in court except fail to give personal notice. Hence, the *Baker* case is precisely in point. The court has now gone well beyond the *Krohn, Christianson,* and *Baker* cases by holding, in effect, that the personal representative must actually advise a potential beneficiary that his claim will not be recognized.

Rule of Pleading, Practice and Procedure 41, 34A Wn. 2d 106 requires that personal notice be given to known interested parties of known address prior to the entering of

the final decree of distribution. This rule was adopted prior to the decision in the instant case, but subsequent to the decree that was attacked. Compliance with the new rule would not necessarily meet the standard laid down in the instant case. There is no statutory requirement that notice of hearing of the final report disclose the personal representative's views as to the relative rights of those claiming to be interested in the estate.

Had the instant case held that personal notice is a requirement of procedural due process, it might be consistent with both our present court rule and with the federal view. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The significance of the instant case lies in the holding that the failure to give personal notice indicating that *P*'s claim will be challenged amounts to extrinsic fraud. It would appear that our court has until very recently considered extrinsic fraud in the light of acts or words which prevent an interested party from asserting his rights or which convey to him a false impression that his rights will be protected. Language such as "inducing," "misleading," "lulling into a sense of security," is used in all the earlier cases. This narrow view of extrinsic fraud seems to have come from *Davis v. Seavey, supra,* which held that the suppression of a codicil was not extrinsic fraud. The court in that case apparently interpreted the *Krohn* case to mean that the only act which can be extrinsic fraud is one which prevents the interested party from asserting his claim. However, in 1950 the court, in deciding the case of *Ellis v. Schwank,* 37 Wn. 2d 286, 233 P. 2d 448 (1950), seemed to expand the concept of extrinsic fraud. In that case it was alleged that the defendant had fraudulently destroyed two wills and statements in writing which purportedly established plaintiff's status as the deceased's daughter. The court quoted with approval 113 A.L.R. 1235, to the effect that "concealing" or "failing to disclose to the court the existence of a person interested in the estate" is extrinsic fraud if the party is thereby prevented from learning of the proceedings or asserting his claim therein. No reference was made to other Washington cases, and especially not to the *Davis* case. In holding, for the first time, that a deceased's personal representative was guilty of extrinsic fraud in obtaining a probate decree, the court added a new phase to the extrinsic-intrinsic fraud distinction. The reference to the A.L.R. article indicates that extrinsic fraud will include any misconduct which prevents an interested party from learning of his rights, as well as from asserting them.

It should be noted, however, that the facts of the *Ellis* case show affirmative misconduct, while the instant case involves only an act of omission, *viz.*, the failure to give personal notice to *P* that her claim would be challenged. In holding this to be extrinsic fraud, the court has adopted a rule that an act of omission, as well as an affirmative act, may prevent an interested party from learning of or asserting his rights in the estate. Yet, can it be said that this omission prevents *P* from learning of her claim?

The *Ellis* case, in holding that an act which prevents the interested party from learning of his interest, seems to have extended some of the earlier cases, including *Davis v. Seavey, supra.* However, it is not authority for a holding that failure to give personal notice amounts to extrinsic fraud. The *Francon* case is therefore without previous authority in Washington, and lays down a rule broader than that heretofore accepted in this state and in most jurisdictions. This rule leaves the concept of extrinsic fraud still in some doubt, as it ultimately depends upon a finding that this omission prevents the interested party from learning of his rights. In the light of prevailing policy, it would seem that cases involving the sufficiency of notice would be better decided on the basis of procedural due process.

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