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RECENT CASES

Divorce—Custody of Children—Modification Pending Appeal. A divorce decree awarded custody of two minor children to *H* for eleven months of each year, *W* to have custody in July annually. Pending appeal by *W*, *H* filed an original application in the Supreme Court for a suspension of that portion of the decree awarding custody to *W* in July, 1950, on the ground that enforcement would be inimical to the children's best interests. *Held:* the Supreme Court has sole original jurisdiction pending appeal from a custody award to change the award, and will do so where enforcement will jeopardize the children's welfare. Since the affidavits submitted indicate that it will not be to the best interests of the children to place them in the custody of *W*, but contain insufficient facts upon which to base an alteration of the decree, the case is remanded to the trial court for hearing, modification if required, and return to the Supreme Court for certification as to what is to be done. *Walkow v. Walkow,* 136 Wash. Dec. 471, 219 P. (2d) 108 (1950).

It was early held that the Supreme Court has sole jurisdiction to make any orders changing a decree as to custody of children pending appeal therefrom. *Irving v. Irving,* 26 Wash. 122, 66 Pac. 123 (1901) ;*see State* ex rel. *Davenport v. Poindexter,* 45 Wash. 37, 40, 87 Pac. 1069 (1906) ; *State* ex rel. *Clark v. Superior Court,* 90 Wash. 80, 83, 155 Pac. 398, 399 (1916) ; *State* ex rel. *Wilkerson v. Superior Court,* 108 Wash. 15, 16, 183 Pac. 63 (1919) ; *Pike v. Pike,* 24 Wn. (2d) 735, 740, 167 P. § (2d) 401, 403 (1946), 163 A. L. R. 1314. And in *State* ex rel. *Wilkerson v. Supreme Court, supra.,* the Supreme Court also claimed exclusive jurisdiction to make orders to enforce a custody award pending appeal, and, guided by consideration for the children's best interests during the pendency of the appeal, refused to enforce the award appealed from.

However, in *Sewell v. Sewell,* 28 Wn. (2d) 394, 184 P. (2d) 76 (1947), 23 WASH. L. REV. 145, the Supreme Court, in a proceeding brought pending appeal from a decree as to custody, dismissed a wife's petition for an order directing the husband to deliver a child to the wife in accordance with the decree. The court held that the trial court, and not the Supreme Court, was the appropriate forum for enforcing the decree, and said that the Supreme Court would "not take jurisdiction to pass upon the merits as to the custody of children during the pendency of the appeal and issue and enforce [its] own orders pertinent thereto." It was further ruled that the trial court could not change its award pending the appeal, nor could the decree be superseded, following the rule of *State* ex rel. *Davenport v. Poindexter, supra.*

By omitting any discussion of the welfare of the child and by its statement that the Supreme Court would not take jurisdiction to pass upon the merits as to custody, the *Sewell* case raised doubt, as pointed out in a dissenting opinion, whether the Supreme Court would take jurisdiction to change a decree as to custody pending appeal in any event. In view of the rule of that case that the trial court must enforce its custody award but cannot change it, there would be no relief in a situation where the welfare of children was jeopardized by such enforcement unless recourse could be had to the Supreme Court.

The instant case erases that doubt, following the rule of the earlier cases that the Supreme Court has sole jurisdiction pending appeal to change a divorce decree insofar as it relates to custody of children. In so holding the court denies that the Divorce Act of 1949 vests jurisdiction to modify the custody award under these circumstances in the trial court. The disputed provision of that act reads: ". . . the trial court shall

at all times, including the pendency of any appeal, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice." REM. REV. STAT. § 997-11 (1949 Supp.). The quoted language is identical with that of the provision repealed by the 1949 act, except for the addition of the words, "including the pendency of any appeal." REM. REV. STAT. § 988 [P.P.C. § 23-15]. Since the repealed section was in effect at the time of the *Sewell* case, the court appears correct in holding that the present provision does no more than declare the law of that case, *i.e.*, that the trial court can take any appropriate action to enforce its custody award, but has no jurisdiction to alter such award during the pendency of an appeal.

Thus, while claiming jurisdiction to modify the decree as to custody, the court in the instant case is consistent with the holding of the *Sewell* case that the trial court is the appropriate forum for enforcement of a custody award pending appeal. Further, the court restates the rule that a custody award cannot be superseded. The instant case has the virtue of clarity and is consistent with the guiding principle in this line of cases—the welfare of the child of the broken home.

J. F. H.

Special Verdict—Majority Verdicts. *P* brought an action under the Workman's Compensation Act to force the Department of Labor and Industries to re-open *P*'s original claim and change his disability classification from permanent partial disability to permanent total disability. The trial judge instructed the jury that a civil action required only ten jurors to agree upon a verdict and that their verdict would be in the form of answers to interrogatories. The first interrogatory asked the jury to decide whether *P*'s present condition was the result of an aggravation of his earlier injury which had occurred in the course of his employment. If *P*'s present condition was the result of such an aggravation, the jury was to decide whether *P* was totally disabled. If *P* was not totally disabled, then the jury was to determine the percentage of his partial disability. The jury returned a verdict finding that *P*'s condition was the result of an aggravation of his earlier injury, and that *P* was totally disabled. When the jury was polled, three jurors said the verdict was the jury's verdict but not their own. It appeared that during the voting in the jury room, Juror No. 1 had dissented on the first question, but since she regarded the vote of the other eleven jurors as establishing *P*'s right to recover for an aggravation, she felt entitled to vote on the separate and distinct question involving the extent of recovery. On the latter question, she agreed with the majority, while two other jurors dissented. The final vote was eleven to one (Juror No. 1 dissenting) on the finding that *P*'s condition was the result of an aggravation of his earlier injury, and ten (including Juror No. 1) to two on the finding that *P* was totally disabled. The trial judge ruled that the verdict was valid since a majority of ten or more agreed on each finding. Appeal. *Held*: Reversed. A valid verdict requires a majority of ten jurors. Only nine of them agreed that *P* should recover in this case. Juror No. 1 would deny recovery on the ground that there had been no aggravation of the earlier injury. Two other jurors would deny recovery on the ground that *P* was not totally disabled. *Devoni v. Department of Labor & Industries.* 136 Wash. Dec. 202, 217 P. (2d) 332 (1950).

The jury apparently rendered a special verdict. They returned a verdict consisting solely of answers to interrogatories. These answers established the essential facts upon which the trial court entered a judgment in favor of *P*. "The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special

verdict is that by which the jury finds the facts only, leaving the judgment to the court." REM. REV. STAT. § 362 [P.P.C. § 100-1].

In Washington, if ten jurors agree on a verdict in a civil action, the verdict has the force and effect of a verdict agreed to by twelve jurors. REM. REV. STAT. § 558 [P.P.C. § 99-73]. A question of interpretation may arise under this statute when a jury returns a special verdict consisting of answers to more than one interrogatory. This question is whether *any* ten jurors may agree on each interrogatory or whether the *same* ten jurors must agree on all of the interrogatories. In light of the instant case, the present Washington rule requires the same ten jurors (at least) to agree on all of the interrogatories submitted.

In the only other Washington case dealing specifically with this problem, the court some years ago reached a contrary result. *Bullock v. Yakima Valley Transp. Co.* 108 Wash. 413, 184 P. 641, 187 P. 410 (1919). In that case the trial judge instructed the jurors that it was not necessary that the same ten agree in answering each interrogatory. The Supreme Court upheld the instruction, reasoning that since the answer to an interrogatory is a special *verdict* and only ten need agree to reach a valid *verdict,* the same ten need not agree on all the answers, but rather, any majority of ten can render a valid answer.

The reasoning used by the court in that case is based on the proposition that each answer constituted a special verdict. This analysis makes it easy for the court to apply the majority verdict provision which by its terms applies generally to verdicts. Such an analysis appears doubtful, however, since by definition, a special verdict contemplates more than one finding or answer. REM. REV. STAT. § 362 [P.P.C. § 100-1]. Technically, the term indicates merely that the jury will find only the facts, and does not refer to specific findings. CLEMENTSON, MANUAL RELATING TO SPECIAL VERDICTS & SPECIAL FINDINGS BY JURIES, p. 45 (1905). At any rate, the decision has apparently been overruled and without mention.

The present Washington position is consistent with a long line of decisions in Wisconsin under similar statutes. *Scipior v. Shea* 252 Wis. 185, 31 NW.(2d) 199 (1948). This position has been supported as the more logical on the ground that the questions under a special verdict express the steps that would be necessary to find a general verdict, and disagreement in answering any one question should have the same effect as such a disagreement would have in finding on that fact if the jury had returned a general verdict. 7 WIS. L. REV. 111 (1932). Ontario, by statute, reaches a contrary position, consistent with the earlier Washington position. R.S.O. 1950, c. 190, s. 60-(3). At least one writer approves of this on the ground that the jury's function is to establish probabilities of fact and the agreement of a stipulated majority on any question of fact should adequately establish the probabilities. 37 COL. L. REV. 1235 (1937).

R. E. M.

Municipal Corporations—Tort Liability—Defects in Street. Decedent, riding a motor scooter at a speed of fifteen m.p.h., struck holes in the street, lost control, and swerved into a telephone pole, sustaining injuries causing his death. The street was surfaced with blacktop paving. There was testimony that the holes were 6 inches wide and 2 inches deep, and that the surface of the street was generally "washboardy." Action for wrongful death, alleging negligence of *D* city in failing to maintain the street in a reasonably safe condition for ordinary travel. Verdict for *P*. Trial court granted judgment n.o.v. Appeal. *Held:* Reversed and remanded for entry of judgment on the verdict. The evidence raised fact questions on which reasonable minds might differ, and there-

fore the issues of negligence and contributory negligence were for the jury to determine. *Bulette v. Bremerton,* 134 Wash. Dec. 770, 210 P.(2d) 408 (1949).

The duty of a municipality to exercise ordinary care to keep its streets in a reasonably safe condition for ordinary travel is well settled. *Throckmorton v. Port Angeles,* 193 Wash. 130, 74 P.(2d) 890 (1938). The same duty is imposed on counties under REM. REV. STAT. § 6450-1 [P.P.C. § 2697-421] and REM. REV. STAT. § 951 [P.P.C. § 8394]; *Berglund v. Spokane County,* 4 Wn.(2d) 309, 103 P.(2d) 355 (1940). Whether a city has exercised reasonable care in the performance of its duty is essentially a jury question, *James v. Seattle,* 68 Wash. 359, 123 Pac. 472 (1912), and a judgment n.o.v. cannot be granted unless there is no evidence or reasonable inference therefrom to sustain the verdict. *Smith v. Leber,* 134 Wash. Dec. 561, 209 P.(2d) 297 (1949).

Technically, under the above rules of law, which are generally applicable to all negligence cases, the decision is sound. However, the case raises the question as to what circumstances will move the court to rule as a matter of law that the city has exercised reasonable care. This question is of practical importance to city authorities, who argue that the result of the instant case places an excessive burden of maintenance and repair on municipalities which, because of financial and technical considerations, they are unable to bear.

The defect complained of must be substantial, *Lewis v. Spokane,* 124 Wash. 684, 215 Pac. 36 (1923) and constitute an unusual hazard. *Leber v. King County,* 69 Wash. 134, 124 Pac. 397 (1912); *Gabrielson v. Seattle,* 150 Wash. 157, 272 Pac. 723 (1928). Thus a break in a sidewalk may be so small that the court will hold as a matter of law that the walk was reasonably safe, on the ground that reasonable minds could not conclude that failure to repair the defect constituted lack of reasonable care. *Grass v. Seattle,* 100 Wash. 542, 171 Pac. 533 (1918). The test is whether or not the defect is such that reasonably prudent men, having a duty to observe and repair, would anticipate that it might cause injury. *Lewis v. Spokane, supra.* In the instant case there was evidence which would justify the court in concluding that the defects were substantial.

In order to establish negligence, *P* must prove that the defect could have been repaired, and the court has held that a city was not proven negligent, as a matter of law, where there was no showing that holes in a gravel street could have been satisfactorily repaired. *Throckmorton v. Port Angeles, supra.* In the instant case, the court distinguished the *Throckmorton* case, emphasizing that here there was ample evidence that blacktop paving could be permanently repaired by patching.

What of the argument that because of extensive use of blacktop surfacing, and its known tendency to break up under heavy travel and bad weather conditions, it is not economically feasible to keep it free of holes and therefore, as a matter of policy, the city should be relieved of liability? This argument was dismissed by the court with the statement that the wisdom or policy of the law was a legislative problem. While the court has used this policy argument in holding that a county had no duty to maintain unimproved portions of the roadway. *Leber v. King County, supra; Barton v. King County,* 18 Wn.(2d) 573, 139 P.(2d) 1019 (1943), their position in the instant case is consistent with the rule that financial burdens and technical considerations are factors to be considered in determining whether or not the city exercised reasonable care. *Berglund v. Spokane County, supra.* It follows that the policy argument should be made at the trial level to the jury, who are the judges of whether or not reasonable care was exercised.

Those who predict financial ruin for the cities as a result of the *Bulette* holding overlook the factor of contributory negligence which should normally bar recovery in the majority of cases. A person traveling on a public highway must exercise such care

as an ordinarily prudent person would use to avoid injury from defects or obstructions. *Christensen v. Grays Harbor County,* 134 Wash. Dec. 809, 210 P.(2d) 693 (1949). The fact that *P* had knowledge of the defect, or had passed over the defective road previously, is evidence from which the jury may find contributory negligence, *McQuillan v. Seattle,* 10 Wash. 464, 38 Pac. 1119 (1895); *Tait v. King County,* 85 Wash. 491, 148 Pac. 586 (1915), and may even be contributory negligence as a matter of law. *Chase v. Seattle,* 80 Wash. 61, 141 Pac. 180 (1914); *Hurley v. Spokane,* 126 Wash. 213, 217 Pac. 1004 (1923). The most unusual feature of the *Bulette* case is the fact that the plaintiff was able to convince the jury that the decedent was not contributorily negligent.

In order to be held liable, the city must have had actual or constructive notice of the defect. Whether or not the city by the exercise of ordinary diligence could have discovered the defect is a factor to be considered by the jury in determining whether the city was negligent, but the circumstances may be such that constructive notice cannot be imputed as a matter of law. *Chase v. Seattle, supra.* Thus this rule can be a substantial factor in limiting the city's liability.

The most important point for city officials to recognize is that the amount of care required to meet the general standard of reasonable care depends on the factual circumstances of each case, *Slattery v. Seattle,* 169 Wash. 144, 13 P.(2d) 464 (1932), and is therefore decided by the jury at the trial level. With a proper emphasis on the factors of economic feasibility of repair, contributory negligence, and constructive notice, a jury may well be expected to find in favor of the city under facts similar to the *Bulette* case. A collateral factor in favor of the city at the trial level is the knowledge of the jurors that, as taxpayers, a judgment for the plaintiff will be paid out of their own pockets.

R. D. S.

Host-Guest Statute—Hitchhiker as Guest. *P* solicited a ride on a public highway from *D.* Both *P* and *D* were acting unlawfully under the "anti-hitchhiking" statute. REM. REV. STAT. § 6360-100 [P.P.C. § 295-51]. *D* negligently caused an accident injuring *P,* and at the trial *D*'s demurrer was sustained on the basis of the "host-guest" statute. REM. REV. STAT. § 6360-121 [P.P.C. § 295-95]. *Held:* Affirmed. Recovery is barred by the host-guest relationship. *Bateman v. Ursich,* 136 Wash. Dec. 676, 220 P.(2d) 314 (1950).

The court was faced with the problem of distinguishing *Upchurch v. Hubbard,* 29 Wn.(2d) 559, 188 P.(2d) 82 (1948). In that case *P*'s eight-year-old child, riding on *D*'s running board, leaped off and was fatally injured. *D*'s transporting him in this manner was unlawful by statute. REM. REV. STAT. § 6360-115 [P.P.C. § 295-81]. The child was absolved by the jury of contributory negligence and the court allowed recovery on the sole ground that *D* could not create the host-guest status by an unlawful act. The relationship is consensual. *Taylor v. Taug,* 17 Wn.(2d) 533, 537, 136 P(2d) 176, 179 (1943); but *cf. Akins v. Hemphill,* 33 Wn.(2d) 735, 207 P.(2d) 195 (1949), 25 WASH. L. REV. 246. The *Upchurch* case added the requirement of a *lawful* giving of consent by the host. To invoke the statute, the relationship "must be 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." *Upchurch v. Hubbard, supra,* at 566.

The cases are distinguished by the court on the ground that the child in the *Upchurch* case committed no crime, since nothing in the statute makes it unlawful to *ride* on the outside of a vehicle; but in the instant case "the application of the host-guest

statute cannot be avoided upon the ground that respondent was engaged in an unlawful act in giving transportation to [*P*] in response to their solicitation because it was only as a result of their own illegal conduct in soliciting such a ride that respondent acted." *Bateman v. Ursich, supra,* at 681. *P*'s initial illegal conduct was totally responsible for the illegality of *D*'s act, for an unsolicited offer by *D* would have been lawful. *P* cannot take advantage of his own unlawful act to deprive *D* of his normal protection under the "host-guest" statute.

That the court reached the proper result is uncontroverted; that it used the proper reasoning seems questionable. If the *Upchurch* case did in fact set out a requirement of lawful consent, it is difficult to see how the instant case legitimately avoids that rule, for the host's consent was made no less unlawful by the guest's prior illegal act. The holding apparently stems from a feeling that an adult lawbreaker simply should not benefit by the *Upchurch* rule. The same result could have been reached, probably on firmer ground, by holding the parties *in pari delicto.* See 24 WASH. L. REV. 105.

Meantime, the present rule would seem to be this: an automobile driver cannot create a valid host-guest relationship by his own unlawful act, unless such act was solicited by a prior unlawful act on the part of his passenger.

W. L. D.

Negligence Per Se—Proximate Cause—Burden of Proof. *D*'s bus pulled out from a side road onto an arterial highway and collided with *P,* who was exceeding the speed limit on that highway. *D* conceded negligence in failure to yield the right of way. Judgment for *P. Held:* Reversed. *P*'s violation of the statutory speed limit was contributory negligence as a matter of law and would defeat recovery "in the absence of pleading and proof of peculiar facts as would justify the violation or negative it as a proximate cause of the injury." *Barrow v. School District No. 317,* 32 Wn.(2d) 323, 201 P.(2d) 217 (1949). Restated, the holding here is that violation of a statute is negligence *per se* and will defeat recovery without any showing that such negligence was a proximate cause of the injury—this being true whether the violation is offered as a ground of defense or as a ground of recovery.

It is well established that ordinary negligence must cause harm within the risk to be a basis for recovery. Negligence *per se* does not differ from ordinary negligence except in the method of determining the standard of care; in ordinary negligence the reasonable man is used as the standard; in negligence *per se* the standard is set by the legislature. PROSSER, TORTS, § 39 (1941); RESTATEMENT, TORTS, § 285 (1934). Establishing negligence *per se* merely puts the proponent of negligence over the first hurdle—that of proving negligence, but the burden of proof is still upon the proponent to show that such negligence was the proximate cause of the harm or that the injury which resulted was a harm within the risk. RESTATEMENT, TORTS, § 286 (1934).

That the violation of statutes or ordinances regulating traffic is negligence *per se* is well settled in this state. *Twedt v. Seattle Taxicab Co.,* 121 Wash. 562, 210 Pac. 210 (1922); *Gardner v. Seymour,* 27 Wn.(2d) 802, 180 P.(2d) 167 (1947). The Washington Court has followed the orthodox rule and recognized that the violation of the statute must be the proximate cause of the injury suffered in order to bar the injured party's right of recovery, *White v. Kline,* 119 Wash. 45, 204 Pac. 796 (1922); *Portland-Seattle Auto Freight Co. v. Jones,* 15 Wn.(2d) 603, 131 P.(2d) 736 (1942), and that such proximate cause must be proved by the one alleging the negligence. *Bredemeyer v. Johnson,* 179 Wash. 225, 36 P.(2d) 1062 (1934); *Atkins v. Churchill,* 30 Wn.(2d) 859, 194 P.(2d) 364 (1948). Only in the instant case and in a few others, *Twedt v. Seattle Taxicab Co., supra; Zurfluh v. Lewis County,* 199 Wash. 91, 91

P.(2d) 1002 (1939); *American Products Co. v. Villvock,* 7 Wn.(2d) 246, 109 P.(2d) 570 (1941), has the orthodox rule been disregarded, but these cases are so obviously incorrect that the current expression of the rule, it is hoped, will prove merely a temporary aberration.

J. M. D.

Community Property—Insurance—Right of Wife to Proceeds. All premiums on a National Service Life Insurance Policy were paid out of army pay received by *H* while married to *W*. *H* changed the name of the beneficiary from *W* to his mother shortly after entering the service. The California Court of Appeals held that under California community property law *W* has a vested right to one-half the proceeds. Appeal to the Supreme Court of the United States. *Held:* Reversed. The beneficiary is entitled to the entire proceeds of the policy. *Wissner v. Wissner,* 338 U.S. 655 (1950).

The National Service Life Insurance Act expressly provides that the insured has the right to designate the beneficiary of the policy, and that no person should have a vested right in the proceeds of the policy. 38 U.S.C. § 802 (g, i) (1946). Mr. Justice Clark, for the majority, said it follows from this and from the fact that federal law is controlling, U. S. CONST., Art VI, § 2, that the named beneficiary should take all the proceeds notwithstanding California community property law, under which the wife has a vested interest in one-half the proceeds of an ordinary life insurance policy. CALIFORNIA CIVIL CODE § 161(a) (Deering, 1949); *Grimm v. Grimm,* 26 Cal.(2d) 173, 157 P.(2d) 841 (1945); *Mundt v. Conn. General Life Insurance Co.,* 35 Cal. App.(2d) 416, 95 P.(2d) 966 (1939).

Mr. Justice Minton, dissenting, with Justices Frankfurter and Jackson, reasoned that the exemption provision, section 802(i), *supra,* applies only to independent creditors and presupposes that the beneficiary is the undisputed owner of the proceeds. Therefore, it does not apply to a case such as this where the wife is claiming as *owner* of one-half the proceeds of the policy. Furthermore, since the wife is claiming as owner the choice of beneficiary provision, section 802(g), *supra,* does not apply. Therefore, it is not necessary to upset settled family law and its incidents in order to give effect to Congressional intent and the serviceman's right to select his beneficiary.

The instant case is of interest here since Washington, like California, holds that the community has an interest in ordinary life insurance policies in proportion to the premiums paid with community funds, and that each spouse has a vested interest in one-half the proportion so paid. *In re Coffey's Estate,* 195 Wash. 379, 81 P.(2d) 283 (1938); *Occidental Life Insurance Co. v. Powers,* 192 Wash. 475, 74 P.(2d) 27 (1937). *See also* 114 A.L.R. 531. Thus a change of beneficiary from the wife to another is a gift of community property, and ineffective without her consent. *In re Towey's Estate,* 22 Wn.(2d) 212, 155 P.(2d) 273 (1945), 20 WASH. L. REV. 167. However, the California court holds the wife to have an inchoate interest in one-half the community property becoming vested on the death of the husband; whereas under the doctrine of *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111 (1916), the Washington court holds the wife to have a present vested interest in one-half the community property. *Occidental Life Insurance Co. v. Powers, supra.* Therefore, as pointed out by Mr. Luccock in his article, "Life Insurance as Community Property," 16 WASH. L. REV. 187 (1940), in Washington an unauthorized designation of beneficiaries is void *in toto* as to the surviving spouse, while in California such designation is effective as to the insured's interest in the policy. *New York Life Insurance Co. v. Bank of Italy,* 60 Cal. App. 602, 214 Pac. 61 (1923); *Mazman v. Brown,* 12 Cal. App. (2d) 272, 55 P.(2d) 539 (1936).

Thus the Washington court, in a case similar to the instant case, would probably have held the attempted change of beneficiary entirely ineffective.

Although a number of cases in community property states have assumed that a soldier's pay is community property, there is apparently no case directly so holding. See *French v. French,* 17 Cal. (2d) 775 at 776, 112 P.(2d) 235 at 236 (1941). Assuming, as does the instant case, that it is, it would appear that the reasoning of the majority is erroneous since they do not recognize the fact that the wife is claiming as *owner* rather than as beneficiary or independent creditor. An article in 36 VA. L. REV. 255 (1950) points out an analogy to this type of case in those cases where embezzled funds have been used to pay premiums, the courts there finding a trust in favor of the person from whom the funds were embezzled for the proportionate part of the proceeds so purchased. See *Truelsch v. Northwestern Mutual Life Insurance Co.,* 186 Wis. 239, 202 N.W. 352 (1925); 38 A.L.R. 914. Bearing this in mind the case against the majority is very cogently put by Mr. Justice Minton when he poses the question: "Can it be said that Congress intended to say to the serviceman, 'You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money.'?" *Wissner v. Wissner,* 338 U.S. 655 at 660. The view of the dissentients is espoused by at least one of the primary authorities on community property law, Professor de Funiak, in 1 ANNUAL SURVEY OF CALIFORNIA LAW 109 (1950).

A possible justification of the majority opinion is that the proceeds of the policy are not the return of an investment of community funds, even assuming army pay is community property; rather they are a *gift* from the federal government to the beneficiary. So treated, under REM. REV. STAT. § 6890 [P.P.C. § 434-25] the proceeds would not be community property and the wife would have no vested interest therein. See *Hatch v. Ferguson,* 68 Fed. 43 (C.C.A. 9th 1895); *Ames v. Hubby,* 49 Tex. 705 (1878). This line of reasoning has more validity than would first appear. Under the National Service Life Insurance Act the administration expenses and most of the claims have been paid out of Congressional appropriations. 38 U.S.C. §§ 804, 806, 807 (1946). Only about eight per cent of the total claims presented have been paid out of funds created by the receipt of premium payments. 4 JOURNAL OF THE AMERICAN SOCIETY OF CHARTERED LIFE UNDERWRITERS 7 (1949). Also, there has been an average rebate to the serviceman of seventy per cent of the total amount which he paid in. *Id.,* at 8.

It is submitted that the view of the dissent is preferable as preserving state community property law, and in no way infringing on the serviceman's rights under the National Service Life Insurance Act. However, if the result the majority reaches is to be accepted, it could be justified by the argument suggested above, thus achieving consistency with settled community property law as expressed by the state courts.

R. F. V.

Evidence—Privileged Communications Between Spouses. On trial for grand larceny, *D* sought to exclude testimony of *W,* his former wife, claiming that it consisted of privileged communications between spouses within the protection of REM. REV. STAT. § 1214 [P.P.C. § 38-9]. The testimony of *W* was that *D* waited for her in an automobile while she applied for license plates and certificate to a stolen car. *D*'s objection to the evidence was overruled. Appeal. *Held:* Conviction reversed on other grounds. As to this question the court held that *W*'s testimony as to her own acts was not within the privilege of section 1214 as it did not involve a communication between *H* and *W*; however, it was error to admit the testimony of *W* relating to *D*'s act of waiting in

the car. "It is obvious that he would not have waited in the automobile had he not relied upon the confidence between them by reason of the marital relation." *State v. Robbins,* 135 Wash. Dec. 363, 213 P.(2d) 310 (1950).

Among the states whose statutes limit the coverage of the privilege to "communications" there is a split of authority as to whether this includes "acts." This split results from the conflict between two fundamental policies, namely, the abhorrence of any hindrance of justice by the exclusion of helpful and relevant truths and the countervailing social policy of the preservation of the marital relation subserved by the husband-wife confidential communications privilege. *See, e.g., McMann v. Securities & Exchange Comm.* 87 F.(2d) 377, 378 (C.C.A. 2d 1937).

A number of courts adhere to the strict view that "acts" are not covered by the privilege. *See, e.g., State v. Dixon,* 80 Mont. 181, 260 Pac. 138 (1927); *Poulson v. Stanley,* 122 Cal. 655, 55 Pac. 605 (1898); *Shanklin v. McGraken,* 140 Mo. 348, 41 S.W. 898 (1897).

The section from *Corpus Juris* cited by the Washington court in the instant case expresses the more liberal view:

> The term "communication," within the meaning of the privileged communication rule, as to husband and wife should be given a liberal construction and is not confined to mere audible communications or conversations between the spouses, but embraces all facts which have come to his or her knowledge or under his or her observation in consequence or by reason of the confidence of the marital relation, and which but for the confidence growing out of it would not have been known. It includes knowledge communicated by an act, which would not have been done by one spouse in the presence of, or within the sight of, the other, but for the confidence between them by reason of the marital relation. . . . 70 C. J. 388, § 520 (in part)

This citation refers to "knowledge communicated by an act," indicating that it is not just the doing of the act that is protected but rather the knowledge communicated to the other spouse by the doing of the act, and in order to prevent disclosure of the latter, the former must be excluded.

However, in a large number of decisions, including eight of the nine cited by *Corpus Juris* as authority for the above statement, the courts have seemed more concerned with the element of confidentiality than with the question of whether "communications" includes "acts." The testimony was excluded in *Allock v. Allock,* 174 Ky. 665, 192 S.W. 853 (1917); *Willey v. Howell,* 168 Ky. 466, 182 S.W. 619 (1916); *Wall's Ex'r et al v. Dimmett,* 132 Ky. 747, 117 S.W. 299 (1909) and *Leuch v. Leuch,* 129 Ky. 700, 112 S.W. 845 (1908), with emphasis on the fact that it concerned evidence of treatment of the wife, or acts and conditions in the privacy of the home when no one else was present; and was admitted in *Smith v. State,* 198 Ind. 156, 152 N.E. 803 (1926) where the court felt it was not "clothed with that secrecy and intimate relation peculiar to the married state." Also admitted was testimony which included information obtained in the "same manner that any bystander could have obtained it." *Victor v. Comm.,* 237 Ky. 317, 35 S.W. (2d) 546 (1930), or which involved acts done in public which "may have been known and seen by any person who had opportunity to know or see." *Hughes v. Bates Adm'r,* 278 Ky. 592, 129 S.W. (2d) 138 (1939). It is obvious from these cases that adherence to the *Corpus Juris* would not necessarily preclude the admission of testimony like that in the instant case.

Wigmore would extend the privilege "only to communications, i.e., utterances, *not acts.*" 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940). However, he says that under certain circumstances *"any particular act or conduct may in fact become the subject of a special confidence* in the wife alone, *i.e.,* may become a communication to her." He gives as an example a husband calling to his wife's attention the placing of a package in a

drawer, thereby communicating to her not only the words, but the act of placing the package.

A compromise between the strict and liberal views would be a rule somewhat analagous to Wigmore's suggestion. The line should be drawn somewhere between assertive acts, *i.e.,* acts connected with a conversation, or acts done expressly for the purpose of disclosure which are made the subject of a special confidence, and non-assertive acts, done just for the sake of doing.

No prior Washington case has extended the confidential communication privilege to acts. Two Washington cases have admitted testimony of a spouse as to acts of the other: *Sackman v. Thomas,* 24 Wash. 660, 64 Pac. 819 (1901) (*W* permitted to testify that *H* gave her money to use toward purchase of property), and *State v. Snyder,* 84 Wash. 485, 147 Pac. 38 (1915) (testimony concerning intercourse between witness' daughter and *H*). In neither case did the court discuss the extension of the privilege to include acts. It was not necessary to do so as the evidence was admissible in the latter case because the acts were not confidential communications induced by the marital relation and in the former because, so far as the court was concerned, the transactions related to business and hence were not confidential.

Although REM. REV. STAT. § 1214 specifically limits the coverage of the privilege to "communications," there was no attempt in the instant case to distinguish between those acts which are communications and those which are not. According to Wigmore ". . . the mere doing of an act by the husband in the wife's presence is not a communication of it by him. . . . There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge." WIGMORE, *op. cit. supra.* Also the act here neither imparts knowledge nor conveys facts as is required under the rule of *Corpus Juris* for the privilege to apply. C. J., *op. cit. supra.* It is true that many acts communicate more than words and may be more confidential. The extension of the marital privilege by the Washington court to cover such acts may be commendable. However, the holding in the *Robbins* case seems to indicate that the intention of the court was to extend the privilege to all acts of one spouse done in the presence of the other so long as they may be found to be confidential. If it is deemed desirable to include all types of domestic conduct in the privilege perhaps the wording of the statute could be changed to "transactions," but it is submitted that the application of the present statute to the *Robbins* case was inappropriate.

P. A. T.

Wills—Pretermitted Heirs—Construction of Statute. *T,* having one child of his first marriage, two of his second, and none of his third, made a will leaving property to, and creating trusts for, his third wife and the children of his second marriage. In case of lapse as to the above beneficiaries a contingent bequest of the trust property was made to "my then living legal heirs." The trial court held that *P,* the child of the first marriage, was entitled to her intestate share under the pretermitted heir statute. Appeal. *Held:* Affirmed. In re *Ridgway's Estate,* 33 Wn. (2d) 249, 205 P. (2d) 360 (1949).

The pretermitted heir statute, REM. REV. STAT. § 1402 [P. P. C. § 219-17], provides that a testator "shall be deemed to die intestate" as to children "not named *or* provided for" in his will. The object of such statutes is to provide against the inadvertent disinheritance of children. *Bower v. Bower,* 5 Wash. 225, 31 Pac. 598 (1892).

In holding that *P* had not been "named" by the contingent bequest to "my then living heirs" the court relied on *Gehlen v. Gehlen,* 77 Wash. 17, 137 Pac. 312 (1913), and In re *Bauer's Estate,* 5 Wn. (2d) 165, 105 P. (2d) 11 (1940). These cases estab-

lished the rule that a child need not be named individually, but at least must be described by the class designation "children." The court in the instant case admitted it had misapplied the above rule in the only case out of harmony, In re *Harper's Estate,* 168 Wash. 98, 10 P. (2d) 991 (1932).

The court next considered whether the contingent bequest satisfied the statute by providing for *P* even though it did not name her. The statutory phrase "provided for" was said to call for some "beneficial provision which vests directly and absolutely in the child and becomes legally available." Since the contingency of lapse had not occurred *P* had not been provided for. As authority for this interpretation the court relied on three early cases: *Bower v. Bower, supra;* In re *Barker's Estate,* 5 Wash. 390, 31 Pac. 976 (1892); and *Purdy v. Davis,* 13 Wash. 164, 42 Pac. 520 (1895).

The problem raised by this second holding is in the inference that had *T*'s bequest to "my then living legal heirs'" been an *absolute* gift instead of a *contingent* gift, the child, *P,* even though not named, would have been provided for and the statute satisfied. Logically this would mean that the *Bauer* case, *supra,* ("One dollar to each heir" held not to name or provide for a child) was wrong, though relied upon as authority in the first holding in the instant case. Conversely, the *Harper* case, *supra,* (Five dollars to any person alleging "any right as an heir to me" held a sufficient naming of a child) was correctly decided, though the wrong reason was given. Certainly both of these nominal gifts would vest absolutely and a child though not "named" by the word "heir" would nevertheless be "provided for."

Two solutions to this apparent conflict seem within reason. The first solution is suggested by the *Gehlen* rule as restated in the instant case: "a testator, in order to prevent the invocation of the statute against his estate, must at least use words which describe his children as a class and must couple them with other language which conveys the intention either of providing for them or of disinheriting them." Literally applied, this rule would make adequate description or naming a prerequisite to either disinheriting or providing for a child. The practical result would be to read "provided for" out of the statute insofar as it is a disjunctve alternative to "named." Thus a provision which is held not to name a child could not possibly provide for him. Such a literal application of the *Gehlen* rule in the instant case would have rendered the second holding unnecessary.

A second solution is suggested by a statement in the early *Barker* case, *supra,* not referred to in the instant case, to the effect that "provided for" calls for "some *substantial provision* for the children." By adding this to the stated requirements of absolute and direct vesting, the "provided for" rule no longer conflicts with the *Bauer* and *Harper* cases. The *nominal* gifts in those cases would not satisfy the *substantial provision* requirement and the children would not be provided for. As a nominal gift would not seem to be a true provision for a child but the practical equivalent of disinheritance, it seems only just that the same naming requirement be applied to both situations.

R. A. O'G.