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Criminal Law

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tember 22, 1951, the judgment being still unsatisfied; the administratrix, the defendant, was appointed on November 8, 1951, and published the notice to creditors of the estate on March 28, 1952; the plaintiff filed his claim on September 26, 1952—six years and eight months after judgment. The court has heretofore interpreted the statute of limitations concerning judgments in litigation involving a living judgment debtor. This statute, RCW 4.56.210 & 220, has been construed not only to bar the remedy but to extinguish the substantive right, *Hutton v. State,* 25 Wn.2d 402, 171 P.2d 248 (1946). Further, by judicial interpretation the operation of the statute is not tolled by the absence of the judgment debtor from the jurisdiction. *Hemen v. Reinhard,* 45 Wash. 1, 87 Pac. 953 (1906). In affirming a judgment for the plaintiff the court, in the principal case, said, "We hold that, in the event of the death of a judgment debtor, this section [RCW 11.40.130] applies to the exclusion of all other statutes, so that a claim, valid at the date of his death, must be allowed as a valid claim against his estate provided it is filed in accordance with RCW 11.40.010. . . ." This decision clarifies the law in this particular and puts judgments on the same footing with all other claims against the estate, so far as the time of presentation is concerned, and thus helps to prevent injustice.

CRIMINAL LAW

Perjury—What is Necessary to Constitute a Valid Oath in Washington. Due to the numerous situations in which statements must be made under oath the question of what constitutes a valid oath is one of practical importance. In a recent decision[1] the Washington Supreme Court said:

> It is a matter of common knowledge that in many instances, notaries acknowledge signatures to claims, affidavits, depositions, and verifications without the signer actually being present, and also that quite often, when the signer is present, nothing is said about an oath and no thought is given to it whatever, thus raising a serious doubt as to whether a solemn oath had actually been administered by the notary and taken by the signer.[2]

Whether a valid oath has or has not been given is a question that frequently arises in a criminal action for perjury. Is proof of the defendant's signature and of the signature of the acknowledging officer sufficient to show the allegedly false statements were made under oath? There seems to be no clean-cut answer to this question by the Washington court.

In *State v. Dodd,*[3] the defendant, a public official,[4] was charged with perjury for falsifying several monthly claims for expenses.[5] The

[1] State v. Heyes, 44 Wn.2d 579, 269 P.2d 577 (1954).
[2] *Id.* at 587, 269 P.2d at 582.
[3] 193 Wash. 26, 74 P.2d 497 (1937).
[4] Defendant was the King County Engineer during 1936.
[5] Eleven expense account claims, one for each month except February, formed the basis of the charge.

defendant twice certified that the claims were accurate, once as the claimant and again as the head of the department. On direct examination the notary identified each of the instruments forming the basis of the perjury counts and testified that the defendant signed the certificates and that he, the notary, executed the jurat. On cross examination the defense counsel asked, "You never actually swore Mr. Dodd on any of those certificates, did you?" The State objected to this question as immaterial. In the absence of the jury the defense counsel made an offer of proof that he merely desired to ask the witness whether Mr. Dodd raised his hand and said: "I swear the foregoing facts to be true," or "I swear to the foregoing." The trial judge sustained the objection, ruling that the notary was estopped to deny the validity of his certificate.

On appeal the Washington Supreme Court held that there was sufficient proof of oath to sustain a perjury conviction, taking notice of the fact that the defendant knew the law required a county officer to take an oath and sign a certificate in order to collect an expense account. Also the court noted the fact that the defendant's signing of the affidavit was not disputed. In addition the court referred to RCW 9.72.050,[6] indicating that it was doubtlessly enacted to foreclose such contentions as were then before the court. In its decision the Supreme Court referred to, but did not actually adopt or reject, the estoppel theory of the trial court. The Supreme Court indicated that the ruling of the lower court was broader than the rule which had existed in Washington.[7] It also stated that whether the defendant raised his hand and swore—a question which defense counsel in its offer of proof indicated it desired to ask—was immaterial.

In the recent case of *State v. Heyes*,[8] the defendant was prosecuted for perjury for allegedly making false statements in a civil complaint which had been duly verified. The State was in the process of identifying the signatures of the defendant and the notary on direct examination. The prosecuting attorney asked whether the defendant "deposed and swore" before the notary at the time the jurat was

[6] This statute reads: "It shall be no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner or that defendant was not competent to give the testimony, deposition, certificate or affidavit of which falsehood is alleged. It shall be sufficient that he actually gave such deposition, certificate or affidavit."

[7] In Campbell v. Campbell, 146 Wash. 478, 263 Pac. 957 (1928), the court adopted the rule that a notary's act is ministerial in nature, rather than judicial or quasi-judicial. Therefore the testimony of the notary is competent to impeach his own jurat.

[8] 44 Wn.2d 579, 269 P.2d 577 (1954).

made. The notary answered, in effect, that no oath was administered. On appeal the Supreme Court reversed the perjury conviction, holding the prosecution failed to prove one of the essential elements of perjury, the swearing under oath. The court raised, but did not answer the question whether there would have been sufficient proof that an oath had been administered if the State had merely offered the complaint, including the verification, and had proved the signatures of the defendant and the notary. On the basis of the *Dodd* case such testimony would seemingly be sufficient, if there were no other evidence to the contrary.

One of the important questions which has not as yet been completely resolved is: who may introduce the evidence to show that no valid oath has been administered? Seemingly the State may, but by doing so it would defeat its own case.[9] But of much more practical significance, may the defendant introduce such evidence, or is he "estopped" by the holding in *State v. Dodd?*

In the *Heyes* case the State failed to prove that an oath had been taken by the defendant. Although it proved the signatures of the defendant and the notary on the complaint, it also proved *by its own witness* that no oath was in fact administered. Considering all of the evidence introduced by the State, it failed to sustain the burden of proving that an oath was administered.

In the *Dodd* case the signature of the defendant and that of the notary were identified. In addition it was shown that the defendant was a county official and should be presumed to know the significance of signing a verified expense account. This coupled with the terms of RCW 9.72.050 was sufficient proof of oath to sustain a perjury conviction.

It would seem that under the holding in the *Heyes* case the court does not intend to strictly apply RCW 9.72.050. The State cited the statute in its brief,[10] but the court made no mention of it in the decision. The court does not make it absolutely clear whether the defendant's conviction was reversed because the State failed to prove that an *oath of some kind* had been administered (thus making RCW 9.72.050 applicable) or because the State's evidence tended to show that no oath was in fact administered (in which case RCW 9.72.050 may not apply). If the reversal was due to its failure to prove the oath, then the question whether the defendant may introduce evidence

[9] State v. Heyes, *supra* note 1.
[10] Brief of Respondent, p. 19, 21; State v. Heyes, *supra* note 1.

to show lack of any oath, is still unanswered. But if the case was reversed because no oath had in fact been administered, then by logical hypothesis the defendant should be able to show lack of an oath as a basic part of his defense.

Until future decisions by the court settle the question as to what constitutes a valid oath, it necessarily must remain an area of uncertainty. The decisions of the Washington court fail to set a standard as to what proof the State must introduce to show a valid oath has been administered.

Burglary—Effect of Possession of Stolen Property Where the Possession Is Not Exclusive. In *State v. Jester*,[11] two defendants appealed from a conviction of burglary in the second degree. The conviction was based entirely on circumstantial evidence. The Supreme Court stated the Washington rule to be that possession, accompanied by inconsistent statements as to the source of goods recently taken in a burglary, constitutes a prima facie case of second degree burglary.[12] But this rule has been limited in application to a single defendant,[13] and will not apply in a situation where two defendants had equal opportunity to commit the burglary.[14]

FRANK D. HOWARD

Habeas Corpus—Scope of Inquiry and Attack of Illegal Sentence Before Legal Sentence Has Been Served. In 1947 petitioner was convicted of a felony, was sentenced, and was committed. In 1949, while on parole, he was sentenced for a second felony on a plea of guilty, and was committed. Petitioner applied to the Supreme Court for a writ of habeas corpus, alleging *inter alia* that he had been deprived of federal and state constitutional rights in that he had been coerced into pleading guilty to the second offense. He produced a letter and affidavit written by the prosecutor to the board of prison terms and paroles indicating that the plea of guilty had been induced by the threat of revoking petitioner's parole. Respondent argued that so long as petitioner was lawfully incarcerated under the first sentence he could not at present attack the second sentence by habeas corpus

[11] 145 Wash. Dec. 571, 277 P.2d 331 (1954).
[12] State v. Bobinski, 170 Wash. 120, 15 P.2d 291 (1932).
[13] State v. Bobinski, *supra* note 11.
[14] This would also seem to be the rule in other jurisdictions. In Harris v. State, 153 Miss. 1, 120 So. 206 (1929), the mere presence of stolen goods in a house occupied by two persons, each capable of committing the crime, was held to be insufficient to sustain a conviction for burglary. A similar result was reached in State v. Zoff, 196 Minn. 382, 264 N.W. 34 (1936), where stolen goods were found in a garage on premises occupied by defendant and others.

even though the second conviction was not legal. *Held,* in In re *Palmer,*[15] petition referred to the superior court for a hearing to determine if the plea of guilty was coerced. "There is no due process where a plea of guilty is involuntary because of coercion."[16] In answer to respondent's argument the court said that release was not the sole office of habeas corpus, and that to require petitioner to stay his attack until the end of the valid sentence would not only vitiate the statutes[17] but would be a denial of procedural due process.

The case is interesting because it illustrates the application of the 1947 amendment of RCW 7.36.130.[18] The amendment provides that the usual limitation on the scope of inquiry in habeas corpus proceedings shall not be applied when the petition alleges that rights under the federal or state constitution have been violated.[19] The case shows that where the allegations, if true, would compel a conclusion that constitutional rights were violated, the truth of the allegations will be determined.

The cases that have been decided since the 1947 amendment indicate that upon an allegation of denial of constitutional rights the petitioner can anticipate the following disposition:[20] (1) If the petition is filed originally with the Supreme Court the court may deny the writ either because the allegations fail to show a denial of constitutional rights,[21] or because the court is able to decide from the record at hand that the facts fail to support the allegations.[22] The petition may be referred to the superior court for a necessary fact determination when it is inexpedient for the Supreme Court to determine the facts.[23] The court may also refer the petition to the superior court for the initial determination of both constitutional and fact issues.[24] (2) If the petition is filed originally with the superior court

[15] 145 Wash. Dec. 258, 273 P.2d 985 (1954).
[16] Waley v. Johnson, 316 U.S. 101 (1942).
[17] RCW 7.36.130, RCW 7.36.140.
[18] For a more complete discussion of the 1947 amendment, and the scope of inquiry in general, see Lobdell, *One Limitation On The Use Of The Writ of Habeas Corpus,* 28 WASH. L. REV. 47 (1953).
[19] Collateral attack of a judgment by habeas corpus ordinarily cannot be maintained if the judgment is valid on its face. *In re* Thompson, 33 Wn.2d 142, 204 P.2d 525 (1949).
[20] RCW 7.36.140 makes it the duty of the Supreme Court to determine the validity of a contention that the petitioner has been denied a right guaranteed by the federal constitution. In the instant case the court stated that an allegation of facts was necessary in addition to the allegation of denial of federal constitutional rights so that the court might fulfill its duty.
[21] *In re* Payne, 30 Wn.2d 646, 192 P.2d 964 (1948); *In re* Pettus, 41 Wn.2d 567, 250 P.2d 542 (1952).
[22] *In re* Buckingham, 145 Wash. Dec. 107, 273 P.2d 494 (1954).
[23] *In re* Johnson, 43 Wn.2d 200, 260 P.2d 873 (1953); *In re* Palmer, *supra* note 15.
[24] *In re* Thompson, 33 Wn.2d 142, 204 P.2d 525 (1949); *In re* Gensburg, 35 Wn.2d

there must be a determination of the constitutional questions, and a further hearing where it is necessary to determine the facts.[25] (3) The petitioner can of course appeal from the determination of the superior court.[26]

There is a second and more significant aspect to the case. Prior cases seemingly indicated that if the petitioner was presently lawfully incarcerated he could not attack an invalid sentence by habeas corpus. This result was indicated where the sentence was partially invalid because it included an excessive minimum term and the prisoner had not yet served the legal minimum,[27] and where a cumulative sentence was claimed to be illegal in whole or in part and the prisoner had not yet served the prior legal sentence.[28] In the instant case the court cleared the ground by holding that in Washington release is not the sole purpose of habeas corpus, and that therefore the argued limitation did not apply. Where an attack on the legality of a conviction is based on sufficient constitutional grounds and a fact issue is raised there must be a speedy determination of fact if postponement would lessen the petitioner's opportunity to prove his allegations. Under these circumstances postponement would be a denial of procedural due process.

If a question of law only is involved there would seem to be no prejudice in postponing the application for the writ, for such a question can be as readily decided at the end of the valid sentence as now. Nevertheless the court has been lenient in ordering resentencing by the superior court,[29] or a redetermination of the sentence by the board of prison terms and paroles.[30] This practice is additional evidence that the writ, in Washington, is not used exclusively as a means toward securing release.

PHILLIP OFFENBACKER

Statutory Interpretation. The recent case of *State* ex rel. *Mason* v. *Superior Court*, 44 Wn.2d 67, 265 P.2d 253 (1954), was an original proceeding for an alternative writ of mandate. In 1939 petitioner was sentenced to the state penitentiary for fifteen years on a grand larceny conviction. He was subsequently released and given a discharge

849, 215 P.2d 880 (1950); *In re* Mason, 42 Wn.2d 610, 257 P.2d 211 (1953); *In re* Allen, 145 Wash. Dec. 22, 272 P.2d 152 (1954).

[25] *In re* Pennington, 35 Wn.2d 267, 212 P.2d 811 (1949); *In re* Thorne, 39 Wn.2d 43, 234 P.2d 517 (1951).

[26] Cases cited notes 23, 24, and 25 *supra*.

[27] *In re* Blystone, 75 Wash. 286, 134 Pac. 827 (1913).

[28] *In re* Miller, 129 Wash. 538, 225 Pac. 429 (1924); *In re* Grant, 24 Wn.2d 839, 167 P.2d 123 (1946); *In re* Mooney, 26 Wn.2d 243, 173 P.2d 655 (1946).

[29] *In re* Towne, 14 Wn.2d 633, 129 P.2d 230 (1942); *In re* Horner, 19 Wn.2d 51, 141 P.2d 151 (1943); *In re* Bass, 26 Wn.2d 872, 176 P.2d 355 (1947); *In re* Sorenson, 34 Wn.2d 659, 209 P.2d 479 (1949); *In re* Siipola, 38 Wn.2d 848, 232 P.2d 920 (1951).

[30] *In re* DeLano, 44 Wn.2d 63, 265 P.2d 263 (1954).

from parole supervision on July 13, 1949. On March 11, 1950, he was sentenced for forgery committed while on parole. Petitioner asks for a construction of RCW 9.92.080 that would prevent his confinement for the latter offense to begin until the expiration of his previous fifteen year maximum sentence. The statute reads *inter alia:* ". . . whenever a person while under sentence of a felony commits another felony and sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms. . . ." The Supreme Court denied the petition, holding that the statute in question should be interpreted as if the italicized words were added: ". . . whenever a person while under sentence of a felony commits another felony and is sentenced to another term of imprisonment, such latter term shall not begin until expiration of *incarceration under* all prior terms. . . ."

DAMAGES

Damages for a Private Nuisance. In the two recent cases of *Riblet v. Spokane-Portland Cement Co.*,[1] the plaintiff sought damages for injury caused by dust from defendant's cement plant. Plaintiff had built his "dream house" on high ground overlooking the plant; and was continually troubled by such annoyances as sludge in his swimming pool, encrustation of cement dust on his house, and a dusty sensation in his respiratory system. On the first trial, the trial court dismissed the action, relying on the case of *Powell v. Superior Portland Cement, Inc.*[2]

The decision in the well-known *Powell* case was handed down by the Washington Supreme Court in 1942. In that case it was held that one who voluntarily purchases property in a manufacturing community cannot be compensated for any injury caused by such inconveniences as dust, smoke or gases that are a necessary incident of lawful industrial operations. Neither injunction nor damages were granted. The concurring judges rested their opinion on the proposition that plaintiff had failed to prove any substantial injury to his property, and that no damages could be allowed for mere diminution of personal enjoyment of one's property. The court had ample authority for denying the injunction;[3] but in denying damages, it overruled much Washington authority to the contrary.[4] Shortly after the *Powell* decision, an excellent comment in the *Washington Law Review*[5] soundly criticized

[1] 41 Wn.2d 249, 248 P.2d 380 (1952), and 145 Wash. Dec. 323, 274 P.2d 574 (1954).
[2] 15 Wn.2d 14, 129 P.2d 536 (1942).
[3] Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924); Mattson v. Defiance Lumber Co., 154 Wash. 503, 282 Pac. 848 (1929).
[4] Bartel v. Ridgefield Lumber Co., *supra* note 3; Mattson v. Defiance Lumber Co., *supra* note 3; Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 Pac. 450 (1916); Sterrett v. Northport Mining and Smelting Co., 30 Wash. 164, 70 Pac. 266 (1902).
[5] Comment, *Recovery of Damages for Private Nuisance,* 18 WASH. L. REV. 31 (1943).