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Wills and Estates

W. Roger Johnson

Negligence—Instructions. *Blassick v. City of Yakima,* 145 Wash. Dec. 287, 274 P.2d 122 (1954), was an action for injuries sustained by a pedestrian falling on an allegedly defective alley crosswalk. The trial court instructed that the plaintiff to recover must prove one or more acts of negligence "and that such negligence *proximately caused* or *materially contributed* to the accident." The court pointed out that the *materially contributed* test is synonymous with the *substantial factor* test proposed by the *Restatement of Torts,* 1159, § 431 (1938), but the test should not be used either as a definition of or a substitute for *proximate cause* in determining what is actionable negligence. It was also pointed out that the *materially contributed* test should be confined to the fact of causation alone, as distinguished from *proximate cause* which embraces all policy considerations that limit liability even though the defendant's conduct is a materially *contributing cause.*

Malicious Prosecution—Necessity of Special Injury. In *Petrich v. McDonald,* 44 Wn.2d 211, 266 P.2d 1047 (1954), the defendant had brought an action in Admiralty with a libel for a foreclosure on a preferred ship mortgage and the issuance of an attachment *in rem* against the plaintiff's vessel. The action was dismissed in Admiralty, whereupon the plaintiff brought this suit for malicious prosecution alleging injury as a result of the attachment of his vessel. In reversing a judgment for the plaintiff the court held that while a seizure of property may afford occasion for the maintenance of an action for malicious prosecution such seizure must constitute special injury *"which would not necessarily result in all like prosecutions."* As the attachment of the plaintiff's vessel was a necessary incident to the defendant's maintenance of his action in Admiralty such attachment did not constitute special injury, and on which a suit for malicious prosecution could not properly be grounded.

Libel—Defenses of Qualified Privilege and Fair Comment or Criticism. In *Cohen v. Cowles Pub. Co.,* 145 Wash Dec. 241, 273 P.2d 893 (1954), an action for libel, the court indicated that the defense of fair comment or criticism must be based on statements of fact which are true, and not merely on facts which are reasonably believed to be true. This is the first clear statement of the court's position. The rule was previously considered in the dissenting opinion in *Gaffney v. Scott Pub. Co.,* 41 Wn.2d 191, 248 P.2d 390 (1952). For a discussion of the confusion surrounding the defenses of qualified privilege and fair comment or criticism, see Comment, *An Outline of the Law of Libel in Washington,* 30 WASH. L. REV. 36 (1955).

WILLS AND ESTATES

Attestation of Wills—Personal Knowledge of the Genuineness of Decedent's Signature is Necessary. The case of In re *Cronquist's Estate*[1] tests the meaning of *attestation* by witnesses as used in RCW 11.12.020, which provides, in part: "Every will . . . shall be attested to by two or more competent witnesses, subscribing their names to the will. . . ."[2] In the *Cronquist* case, neither of the persons who signed as witnesses saw the decedent affix his signature to the will nor did the decedent acknowledge to either that he had so affixed his signature.

[1] 145 Wash. Dec. 321, 274 P.2d 585 (1954).
[2] RCW 11.12.020.

The court held that this will was not "attested" within the meaning of this statute, attestation requiring *personal knowledge* of the genuineness of the decedent's signature. The opinion points out, however, that the court is not here faced with the issue whether the requisite personal knowledge can result solely from an acknowledgment by testator to witnesses that the signature on the will is his.

The instant case is supported by In re *Jones' Estate,*[3] where, however, lack of personal knowledge of the genuineness of the decedent's signature constituted only one of several valid grounds upon which the will was rejected as improperly executed.[4] The Cronquist will is held invalid solely upon that ground.

Other jurisdictions having similar statutes have held almost unanimously that an acknowledgement alone is sufficient authentication of the testator's signature.[5] But until the Washington Supreme Court settles the point in this jurisdiction, it appears advisable for the testator to sign his will in the presence of all witnesses.

Revocation of Will by Subsequent Marriage—Contingent Bequest Held Sufficient to Nullify Statutory Revocation. In In re *Steele's Estate,*[6] decedent's will, after leaving his entire estate to his brother, provided that "in the event that my said brother predeceases me then I do give my said entire residue estate to Betty Ann Bergman. . . ." Subsequent to the making of the will in question, decedent married Miss Bergman. He was survived by both his wife and his brother. RCW 11.12.050 provides that if a testator marries after making a will the will is revoked by operation of law "unless provision has been made for the survivor by marriage settlement, or unless such survivor is provided for in the will or in such way mentioned therein as to show an intention not to make such provision." In the instant case the court, in holding that decedent's will was not revoked, pointed out that the sole purpose of the statute is to guard against unintentional disinheritance of the surviving consort,[7] and concluded that "unintentional disherison [sic] is here negatived by the naming of Mrs. Steel in the distributive clause of the will."

Significantly, the court did not decide whether by virtue of this

[3] 101 Wash. 128, 172 Pac. 206 (1918).
[4] This fact was subsequently recognized in *In re* Chambers' Estate, 187 Wash. 417, 60 P.2d 41 (1936).
[5] For Comment on this area, see Goodner, *Does Washington Law Require Testator to Sign His Will in Presence of Attesting Witnesses?* 6 WASH. L. REV. 84 (1931).
[6] 145 Wash. Dec. 54, 273 P.2d 235 (1954).
[7] Koontz v. Koontz, 83 Wash. 180, 145 Pac. 201 (1915).

contingent bequest the spouse was "provided for." Nor did the court hold that the spouse was "mentioned therein in such way as to show an intention not to make such provision." After noting that Mrs. Steele was *mentioned* in the distributive clause of the will, the court reasoned that this mention must have been either with the intent to provide for her or with the intent not to provide for her. The court concluded that it was not necessary to determine which *intent* existed, because either alternative precludes statutory revocation.

Historically, the disposition of property by will has been considered not as an absolute right but, rather, as a privilege, subject to such restrictions as the state may impose.[8] The common law has never absolutely prohibited the disinheritance of heirs at law but has, throughout its development, maintained safeguards to assure that such disinheritance is effected only where it is clearly so intended by the testator. Prior to the English Wills Act of 1837, the common law provided that a marriage followed by birth of issue constituted a sufficient change of circumstances to create a presumption that the testator no longer intended any will made before the marriage to stand.[9] In Washington, similar purposes are served by RCW 11.12.050, dealing with subsequent marriage, and by RCW 11.12.090, dealing with pretermitted heirs. Further limitations upon the power of disposition, operating for the protection of the spouse, are the "award in lieu of homestead" statute (RCW Chapter 11.52) and the law of community property.

RCW 11.12.090, the Washington statute as to pretermitted heirs, grants special rights to children "not named or provided for." The Washington Supreme Court has held that the purpose of this statute is to assure that no child shall be overlooked by the testator,[10] that the terms "named" and "provided for" are to be considered disjunctively,[11] that the designation of testator's children as a class is sufficient naming[12] whereas the designation "heirs" is not,[13] and that the term "provided for" "calls for some beneficial provision which vests directly and absolutely in the child and becomes legally available."[14]

The *Steele* case appears consistent in tenor, if not in analysis, with prior Washington holdings respecting RCW 11.12.050, the subsequent

[8] Magaun v. Illinois Trust and Savings Bank, 170 U.S. 283 (1898).
[9] 57 AM. JUR. § 572; ANN. CAS. 1913D 1319.
[10] Gehlen v. Gehlen, 77 Wash. 17, 137 Pac. 312 (1913).
[11] *In re* Ridgway's Estate, 33 Wn.2d 249, 205 P.2d 360 (1949).
[12] Gehlen v. Gehlen, *supra* note 10.
[13] *In re* Ridgway's Estate, *supra* note 11.
[14] 33 Wn.2d at 254, 205 P.2d at 363.

marriage statute.[15] In In re *Adler's Estate*[16] the court, noting that wills are ambulatory and speak as of the time of death and that revocation of wills by operation of law is not favored, held that a provision need not be in contemplation of marriage in order to satisfy the statute. The court expressly stated in the *Adler* case that the provisions of this statute are in the disjunctive. The later case of In re *Hall's Estate*[17] upheld a will which provided that, in the event of subsequent marriage, testator's "husband" should take all of her interest in their community property but none of her separate property. But in the *Hall* case, the court in so holding found that the husband was "provided for in the will or in such way mentioned therein as to show an intention not to make such provision," without specifying whether either or both alternatives appear. Although no community property existed for distribution in the *Hall* case, it is notable that the bequest thereof to the husband was absolute by the terms of the will.

In the *Steele* case, the Washington court was faced for the first time with a bequest contingent by the terms of the will. The rationale adopted by the court in the *Steele* case made it unnecessary to determine whether by such a bequest the spouse was "provided for," and the court gave no indication as to whether such is the case. Indeed the *Steele* opinion indicates that the validity of a will in the face of marriage after its execution hinges solely upon adequate mention of the spouse in the distributive clause of the will. It would appear that in future cases regarding the effect of RCW 11.12.050 the court will be concerned with determining what constitutes a distributive clause and what constitutes adequate mention rather than with determining whether a spouse is in a given case provided for or mentioned to show the intent not to so provide.

Allegation of Revocation by Subsequent Marriage Does Not Constitute a Will Contest. The controversy in In re *Gherra's Estate*[18] centered around a petition by the surviving widow to declare decedent's will revoked by subsequent marriage, as provided by RCW 11.12.050. The petition in question was filed more than six months after the admission of the will to probate but before the final distribution of the estate. Respondents maintain that the widow is now barred from filing

[15] See Note, *Wills—Revocation—Marriage*. 6 WASH. L. REV. 36 (1931).
[16] 52 Wash. 539, 100 Pac. 1019 (1909).
[17] 159 Wash. 236, 292 Pac. 401 (1930).
[18] 44 Wn.2d 277, 267 P.2d 91 (1954).

this petition because of RCW 11.24.010, the probate statute of limitation, which provides:

> If any person interested in any will appears within six months immediately following the probate or rejection thereof, and by petition to the superior court having jurisdiction contests the validity of the will, or appears to have a will proven which has been rejected, he shall file a petition containing his objections and exceptions to the will, or to the rejection thereof. Issue shall be made up, tried, and determined respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will.
>
> If no person appears within the time aforesaid, the probate or rejection of the will shall be binding and final as to all the world.

The Supreme Court here held that an allegation of revocation by subsequent marriage does not fall within the scope of this statute and, hence, an action on this ground may be initiated at any time before the final distribution of the estate.

To properly evaluate the significance of the *Gherra* holding, it is necessary to examine certain prior cases which have contributed significantly to the interpretation of RCW 11.24.010. In the early case of *Horton v. Barto*,[19] the court, in dismissing an allegation of improper execution of a will, stated broadly that the statute is all-inclusive, embracing *any* cause effecting the validity of the will at the time of probate. In In re *Hoscheid's Estate*,[20] decided four years later, the court held on facts similar to those in the instant case that a claim of revocation by subsequent marriage falls within the scope of the statute. The *Hoscheid* case restated and approved the "all-inclusive" interpretation established in the *Horton* case.

This interpretation was not seriously questioned until the advent of In re *Elliott's Estate*,[21] in which the Supreme Court held that the offer of a later will does not constitute a "contest" within the meaning of the statute here in question and that a court of probate has authority to admit such a will to probate at any time prior to the distribution of the estate. The court's reasoning in the *Elliott* case merits attention. After reviewing prior Washington decisions on point, the court concluded that the question had not been definitely settled in this jurisdiction. The opinion then cited a number of holdings from other juris-

[19] 57 Wash. 477, 107 Pac. 191 (1910).
[20] 78 Wash. 309, 139 Pac. 61 (1914).
[21] 22 Wn.2d 334, 156 P.2d 427 (1945).

dictions supporting the position that courts of probate have an inherent power to set aside their own orders admitting wills to probate upon discovery of later inconsistent wills,[22] and announced that the Washington court is in accord with those authorities. To bolster the adoption of this position, the court expressed the belief that such a rule increases the certainty that distribution will be in accord with the wishes of the testator without unduly interfering with the settlement of estates.

Having adoped the view that offers of subsequent wills do not fall within the scope of RCW 11.24.010, the court was then faced with the apparently inconsistent "all-inclusive" interpretation placed upon the statute in the earlier *Horton* and *Hoscheid* cases. The court disposed of this question on two grounds: (1) that the *Horton* case and the *Hoscheid* case are both distinguishable factually, neither involving a subsequent will; and (2) that the court no longer adheres to the interpretation of the statute as set forth in the *Horton* and *Hoscheid* cases, stating:

> Furthermore, it is now our considered opinion that the term "validity," as used in that clause in Rem. Rev. Stat., § 1385 [RCW 11.24.010], reading "or for any other cause affecting the validity of such will," has reference only to the genuineness or legal sufficiency of the will under attack, raising the question whether the will is legally sufficient in form, contents, and compliance with the statutory requirements as to execution; it does not relate to the operative effect of the will or the period of its operation. In other words, the former will may, as in this instance, meet all the formal and statutory requirements necessary to make it a valid will when executed, but yet may cease to have any operative effect simply because it has been supplanted by a later will. . . .[23]

It may be seen that, while the *Elliott* opinion made the court's position clear concerning admission of subsequent wills, it created and left unanswered the question of what *other* circumstances, *if any,* "relating to the operative effect of the will or the period of its operation" fall beyond the scope of RCW 11.24.010. The *Gherra* case takes a major step toward settling that question. Against the contention of the respondent and the determination of the trial court that this case is controlled by In re *Hoscheid's Estate,* the Supreme Court, in the *Gherra* case, affirms its interpretation of this statute as expressed in the *Elliott* case and holds that an allegation of revocation by subsequent marriage is not governed by the statute. In deciding the *Gherra*

[22] *In re* Elliott's Estate, *supra* note 21 at 352. See also 107 A.L.R. 238 (1937), 157 A.L.R. 1335 (1945); 1 BANCROFT'S PROBATE PRACTICE, 299 (2d ed. 1950).
[23] 22 Wn.2d 334, 357; 156 P.2d 427, 438 (1945).

case, the court does not expressly overrule the *Hoscheid* case, recognizing that a factual distinction "may" exist. But the court is express in repeating its disapproval of the "all-inclusive" interpretation given the statute in the *Hoscheid* case.

The *Gherra* case goes further: by way of dictum it states that actions based upon the burning, cancelling, etc. of the will (RCW 11.12.040), the subsequent divorce of testator (RCW 11.12.050), a surviving pretermitted child (RCW 11.12.090), or a lapsed legacy or devise (RCW 11.12.120), do not fall within the scope of RCW 11.24.-010 and, like claims of revocation by subsequent will or subsequent marriage of the testator, may be initiated at any time before final distribution of the estate.

W. ROGER JOHNSON

WORKMEN'S COMPENSATION

Employers Covered by Act—Nonresident Motor Carrier. *McClung v. Pratt*, 44 Wn.2d 779, 270 P.2d 1063 (1954), was an action for personal injuries arising out of a collision which took place within the State of Washington. Plaintiffs were Boeing employees who were riding in the bus of their employer; defendant was a non-resident trucker who was engaged solely in interstate commerce within the State of Washington. The defendant contended that under the provisions of RCW 52.24.010 the suit of the plaintiffs was barred, and that the plaintiffs would have to seek recovery through the procedures provided in the Workmen's Compensation Act. The trial court found that the defendant was not covered by the act and held for the plaintiffs. This decision was affirmed on appeal. The Supreme Court said that the provisions of the act which made it applicable to employers engaged in intrastate and also in interstate commerce, did not make it applicable to a carrier engaged in interstate commerce only within the state. On this ground it was held that the defendant was not covered by the act, and was not entitled to the immunity granted therein.