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Practice and Procedure

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followed by a suffix, indicating his representative capacity. . . ." If this rule were to be followed it would necessitate finding that the note in question was endorsed by the payee.

Do the provisions of the Uniform Negotiable Instrument Act require that a contrary result be reached? There are no express provisions in the N.I.L. that require that the endorsement take any special form or that the payee's name be included in the endorsement of an instrument negotiated by an agent. The older cases which hold that it is not necessary that the payee's name be included in the endorsement have not been overruled, but the case law that has been reported since the general adoption of the N.I.L. has allowed only slight variations between the name of the payee and the name appearing as an endorsement.[4]

The *Glaser* case illustrates the court's thinking upon this matter and places Washington among those jurisdictions requiring a substantial similarity between the name of the payee as it appears in the instrument and the signature appearing on the reverse side of the instrument before it will be held that the instrument is endorsed so as to enable the transferee to claim as a holder in due course.

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PRACTICE AND PROCEDURE

Default Judgment—Failure of Complaint to State Facts Sufficient to Constitute Cause of Action—Waiver of Right to Attack Complaint. In *Moody v. Moody*,[1] the wife obtained a divorce by default judgment on a complaint which alleged, "That for some time last past, through incompatability [*sic*] of temperment [*sic*], plaintiff has been the victim of mental cruelty inflicted on her by the defendant, which has made her home-life [*sic*] and wellbeing [*sic*] burdensome, to the point it has become impossible for her to live and cohabit with the defendant; that all of said acts were without just cause or provocation on the part of the plaintiff." That this complaint was ambiguous in the least is apparent, for the question immediately presents itself, "What

[4] First Nat. Bank of Shenandoah v. Kelgard, 91 Neb. 178, 135 N.W. 548 (1912) (note payable to "Wonder Stock Powder Company" and endorsed, "James J. Doty, Prop." was held to be defectively endorsed); Nokomis Nat. Bank v. Hendricks, 205 Ill. App. 54 (1917) (note payable to "Centeral Rate and Routing Agency" and endorsed "Centeral Route and Rating Agency" was held to be defectively endorsed); Young v. Henbree, 181 Okla. 202, 73 P.2d 393 (1937) (check payable to "Horn & Faulkner Oil Trust" and endorsed "Horn & Faulkner, by L. H. Horn" was held to be defectively endorsed).

[1] 147 Wash. Dec. 355, 288 P.2d 229 (1955).

were the acts which were without just cause or provocation?" However, its greatest fault was not its ambiguity, but as the majority of the court point out, its failure to come within any of the ten stated grounds for divorce set forth in RCW 26.08.020. RCW 26.08.020 (5) provides as a ground for divorce, "Cruel treatment of either party by the other, or personal indignities rendering life burdensome." In comparing this complaint with the RCW section, the majority opinion states that neither incompatibility, uncongeniality, dissatisfaction, nor unhappiness constitute grounds for divorce, nor does mental cruelty in and of itself constitute such grounds.[2]

In alleging mental cruelty through incompatibility of temperament, plaintiff had in effect alleged that she and her husband were of different temperament, and that as a result, she became a victim of mental cruelty. The majority opinion holds that this complaint would have been demurrable and it would have been the duty of the trial court to sustain a demurrer to such complaint.

RCW 4.32.190 provides that, "If no objection be taken either by demurrer or *answer*, the defendant shall be deemed to have waived the same, *excepting always* the objection that the court has no jurisdiction, or *that the complaint does not state facts sufficient to constitute a cause of action*, which objection can be made at any stage of the proceedings, either in the superior or supreme court." (Emphasis added) Since the court has decided that the complaint was demurrable in that it *did not state facts sufficient to constitute a cause of action*, it would seem logical and incumbent upon the court to next hold that the default judgment awarding the plaintiff a divorce was void, as granting relief in excess of what the plaintiff's complaint had shown her to be entitled.[3]

But at this point the court holds that "by sitting idly by" and allowing a default judgment to be entered against him, the defendant has waived his right to attack the complaint. Is not this exactly the situation which RCW 4.32.190 was meant to govern?[4]

The court did not need to rely on waiver to reach this result. As both the majority opinion and the concurring opinion by Judge Finley point out, the court has consistently relaxed the provisions of RCW 4.32.190 relating to complaints which *fail to state facts sufficient to constitute a cause of action*, both by rules allowing amendments,[5] and

[2] On the authority of Neff v. Neff, 30 Wn.2d 593, 192 P.2d 344 (1948).
[3] 23 Cyc. 740; State *ex rel.* First Nat. Bank v. Hastings, 120 Wash. 283, 306, 207 Pac. 23 (1922).
[4] See also, Rule on Appeal 43, 34A Wn.2d 47, as amended effective January 2, 1953.
[5] Rule of Pleading, Practice and Procedure 6, 34A Wn.2d 71.

by court interpretation of the complaint.[6] Where the defendant has not raised the objection to the complaint, the court has, on appeal, brought to the support of the complaint, every possible intendment and legitimate inference that might be drawn from its allegations, and only where the defect in the complaint is one of substance which cannot be cured by amendment or evidence has the court ordered a dismissal.[7]

Thus, in full consistency with former holdings, the court could have interpreted the defects in the plaintiff's complaint as being curable by amendment, and treated it as so amended. In concluding, the majority opinion takes this stand, and holds that this is a second reason for reaching this result of affirmance.

We are left now to determine which of the two reasons given is the basis for the majority decision. If it be the latter, then we may quarrel only with their liberal interpretation of the complaint, to which attack the concurring opinion of Judge Finley is also open. If it be the former, then we must conclude that the court has chosen to look upon the provisions of RCW 4.32.190 with disfavor, and that in future decisions, a failure to attack a cause of action, either by answer or by demurrer, will result in a waiver of such objection.[8]

If the court desired this latter conclusion, it would have been more clear had the court utilized the provisions of RCW 2.04.200, which provides that all laws in conflict with rules of court are of no further effect.[9] Thus, by amending Rule on Appeal 43, 34A Wn.2d 47, both the undesirable part of that rule and of RCW 4.32.190 would be abrogated. This method would appear more cogent than the circuitous route followed by the majority in holding first that the complaint did not state a cause of action, but that the defendant had waived his right to object, and then concluding that the complaint, by liberal interpretation does state a cause of action.

Judge Finley, in his concurring opinion, finds fault with the majority's circuitous methods, and treats the complaint from the beginning as stating a cause of action, if read liberally and not with an eye to

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[6] Hamilton v. Johnson, 137 Wash. 92, 241 Pac. 672 (1925); Bonne v. Security Savings Society, 35 Wash. 696, 78 Pac. 38 (1904); O'Day v. Anbaum, 47 Wash. 684, 92 Pac. 421 (1907); Kelly v. Lum, 75 Wash. 135, 134 Pac. 819 (1913); Yeisley v. Smith, 82 Wash. 693, 144 Pac. 918 (1914). It is interesting to note that none of these cases involved a default judgment, and it would appear that a distinction would be warranted between cases of judgment by default and a case decided on its merits, for in cases by default, it may be assumed that the defendant has had no benefit of counsel to advise him on making objections.

[7] See note 6, *supra.*

[8] See note 4, *supra.*

[9] Note, 30 WASH. L. REV. 166 (1955).

technicalities. He admits in his opinion that his interpretation is subject to argument, and with this statement this writer must agree, for he finds in the effect complained of, *viz.*, mental cruelty, grounds for divorce, although the statutory language of RCW 26.08.020 (5) calls for "cruel treatment of either party by the other . . ." and the complaint in this case does not allege that the complained of mental cruelty was inflicted by the conduct of the defendant, but as a result of "incompatibility of temperment [*sic*]."

If, as the majority holds, only mental cruelty caused by the conduct of the defendant provides grounds for divorce, then the majority's second reason for affirmance and the basis of Judge Finley's concurring opinion marks a departure from the former holdings of the court in *Fix v. Fix*[10] and *Donaldson v. Donaldson*[11] where the court has said that they are limited, in granting divorces, to the enumerated grounds of the statutes.

It is clear from the decision of this case, that the court looks with disfavor upon RCW 4.32.190 and the applicable section of Rule on Appeal 43, 34 A Wn.2d 47, and in cases of default judgment will search beyond the plain wording of the complaint in ruling upon objections to the failure of the complaint to state sufficient facts to constitute a cause of action.[12]

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PROBATE

Probate—Removal of Guardian—Vacation of an Order Authorizing Settlement of Claims. *In re Whitish*, 147 Wash. Dec. 585, 289 P.2d 340 (1955), was an action by minors to remove their putative guardian and to set aside an order authorizing her to execute releases and to settle claims. The guardian *ad litem* contended that the putative guardian was not qualified to receive letters of guardianship. The putative guardian's petition had recited that the minors were the owners of a claim totaling $5,500 but that, after settlement of creditors' claims, the minors' estate would not

[10] 33 Wn.2d 229, 204 P.2d 1066 (1949).
[11] 38 Wn.2d 748, 231 P.2d 607 (1951).
[12] The decision in this case was of unusual importance to the defendant in that its outcome held a direct bearing on a criminal prosecution for murder. The superior court of Asotin County entered the default judgment of divorce against the defendant on May 18, 1954. On June 8, 1954, the defendant was charged with the crime of first degree murder in the same county. Eight days later, on June 16, 1954, the defendant gave notice of appeal from the judgment of divorce. As was pointed out by the court in its second paragraph of its opinion, neither the defendant nor the prosecuting attorney of Asotin county, who appeared in the divorce appeal as amicus curiae, were as interested in the "maintenance or the sanctity of the marriage relationship" as they were in the ability of the plaintiff in the divorce action to appear as a witness against the defendant in the murder trial.

Because of this highly important collateral issue, it would seem to furnish an additional reason for the court to abide by the legislative dictates as manifested in both RCW 26.08.020 and RCW 4.32.190.