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Probate

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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]

ROGER L. WILLIAMS

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.

exceed $500. The probate court had not required the posting of a bond before issuing letters of guardianship. *Held:* RCW 11.88.100 provides that when the estate of a minor exceeds $500 posting of a bond is a condition precedent to issuing letters of guardianship. "It is the gross value of the minor's estate, not claimed net value, which determines whether a guardian's bond is necessary." The court below had no jurisdiction to enter an order directing the putative guardian to settle the minors' claims and to execute a valid release.

Probate—Filing of Creditor's Claims. In *Shumate v. Ashley,* 46 Wn.2d 156, 278 P.2d 787 (1955), *P* filed a conformed copy of a creditor's claim with the executor of the decedent's estate. The executor rejected it contending that the claim was not in accordance with RCW 11.40.010-.030. *Held:* that the original claim, with its disposition noted thereon, must be filed and become a part of the court record; that, while the Washington State Bar Association's probate form No. 28 provides for the use of two duplicate originals, it is not controlling, being drawn only in an excess of caution. Thus, the executor must be satisfied with a conformed copy served by regular mail.

REAL PROPERTY

Power of Revocation. In *Grove v. Payne*[1] a power of revocation was found to have been reserved in the grantor of an interest in real property. A deed conveying a fee simple was conditioned with the words ". . . subject to [grantor's] will made prior to this date, with such codicils as may be added. . . ."[2] The grantee had leased a life estate to the grantor subsequent to the grant. The lessor retained a right of entry conditioned upon, *inter alia,* an attempt to assign the leasehold interest without permission. The grantor-lessee thereafter attempted to assign the leasehold interest by quitclaim deed to a third party. This attempted assignment caused the grantee-lessor to seek an ejectment of the defendant and a quieting of title.[3] In sustaining the plaintiff's claim to a right of entry the court, after holding that the quitclaim deed failed to pass the leasehold interest, also held that it was not valid as a conveyance of the grantor's power of revocation by testamentary disposition. There was no elaboration to why the provision in the deed constituted a power of revocation by testamentary disposition. The court's silence raises a question concerning the distinguishing elements delineating a power of revocation from a power of appointment. The two concepts bear a close relationship but the authorities prefer to distinguish them.[4]

[1] 147 Wash. Dec. 411, 288 P.2d 242 (1955).
[2] *Id.* at 412, 288 P.2d at 243.
[3] The plaintiff relied on RCW 7.28.010.
[4] See, *e.g.,* RESTATEMENT, PROPERTY § 318, comment *i* (1940); Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N.E. 801 (1928).