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Workman's Compensation

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bank deposits, recognized in Washington by statute.[8] This tenancy has been extended broadly by the court to the end that the survivor is not required to have knowledge of the tenancy prior to the depositor's death.[9] The tentative trust differs in effect in that the beneficiary cannot withdraw funds until the depositor's death.

Implied in the *Madsen* decision are several correlative results. The majority rule is that a deposit of funds in a savings account labeled a trust for a designated person creates only a revocable trust in the absence of further evidence.[10] The language used by the court implied that they regarded the deposit as a trust as of the time of deposit subject to a right of revocation rather than as an exception to the statute of wills. Where the beneficiary predeceases the depositor the trust is usually held to be automatically revoked and the successors to the beneficiary take nothing upon the depositor's death.[11]

The tentative trust is simple and reliable to use. The depositor's intent is a controlling factor, and the Washington lawyer making use of this tool would be well advised to follow the pattern of the instant case and have the settlor make a clear statement of intent upon the signature card, though that procedure is not necessary under the Totten doctrine. No better evidence of his intent could be secured. For clients with a small amount of cash to dispose of upon death who wish to retain it for security purposes and to avoid probate of the estate, no means seems more ideally suited than the revocable trust savings bank deposit.

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WORKMAN'S COMPENSATION

Substitution of a Personal Representative of Deceased Claimant. In *Curry v. Department of Labor and Industries*[1] the Washington Court refused to permit a deceased claimant's widow to be substituted in her own right, and as administratrix, in an action in which neither a verdict nor a judgment was returned in favor of the claimant prior to his death. It is questionable whether the entering of a verdict or a judgment should determine the survivorship of an action under the Workman's Compensation Act.

[8] RCW 33.20.030.
[9] *In re* Green's Estate, 46 Wn.2d 637, 283 P.2d 989 (1955).
[10] *In re* Totten, note 4, supra; 1 RESTATEMENT, TRUSTS § 58 (1935).
[11] Matter of United States Trust Co., 117 App. Div. 178, 102 N.Y. Supp. 271 (1907), *aff'd* 189 N.Y. 500, 81 N.E. 1177 (1907); Collopy's Estate, 33 D. & C. 169 (Pa. 1938).

[1] 149 Wash. Dec. 95, 198 P.2d 485 (1956).

Roland Curry had been awarded partial disability by the Department of Labor and Industries for an injury received in extra-hazardous work, but the Department had refused to make an allowance for a heart condition allegedly resulting from the same accident. Roland ultimately appealed to the superior court where the jury's verdict upheld the Department's position. A motion for judgment n.o.v. or, in the alternative, for a new trial, was filed on the date of Roland's death. Grace Curry, the claimant's widow, was substituted in her own right and as administratrix, and the trial court entered judgment n.o.v. On appeal by the Department, the supreme court reversed the judgment n.o.v. without prejudice to the right of the widow to apply for a pension under RCW 51.32.050.[2]

> When Curry died, neither a verdict nor a judgment had been rendered in his favor. His claim had not ripened into an award. No property, in connection with his claim, descended to his personal representative for the benefit of his estate. His claim was personal to himself and abated at his death.[3]

The *Curry* case thus indicates that the cause of action abates at the death of the claimant unless such claimant has received an award *or a jury verdict or a judgment in his favor* prior to his death.

The Workman's Compensation Act[4] as construed in the leading case of *Ray v. Industrial Insurance Commission*[5] indicates that the cause of action abates at the death of the claimant *unless a warrant has been delivered* to such claimant prior to his death.[6] In the *Ray*

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[2] RCW 51.32.050 provides for death benefits for the widow of a deceased workman. See also Beels v. Department of Labor and Industries, 178 Wash. 301, 34 P.2d 917 (1934) which held that a wife cannot be deemed, during her husband's lifetime, a party in interest to any proceeding instituted by him to enforce any claim for workman's compensation. Her rights, as a widow, arise the instant her husband dies.

[3] 149 Wash. Dec. at 98, 298 P.2d at 488 (1956).

[4] RCW 51.32.040: The main body of the statute, aside from its provisos, is derived from Wash. Laws of 1911, c.74, § 10: "No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, or garnished, nor shall the same pass to any other person by operation of the law. Any such assignment or charge shall be void."

[5] 99 Wash. 176, 168 Pac. 1121 (1917). After the holding in the *Ray* case, the Legislature of 1923 by amendment, expressly provided for substitution of a widow or a child or children of the deceased in specific instances, none of which is relevant here. See Wash. Sess Laws 1923, C.136, § 4 p. 399 ([*Cf.*] Rem. Rev. Stat. 7684); RCW 51.32.040.

[6] In reaching its result the court stated that "the test of survivorship of a cause of action is its assignability, and conversely, the test of assignability is survivorship, which is to say assignability and survivability are convertable terms." 99 Wash. 176, 178, 168 Pac. 1121, 1122 (1917). This test was first advanced in Slauson v. Schwabacher Bros. & Co., 4 Wash. 783, 31 Pac. 329 (1892). The case is frequently cited as authority in Washington but its holding is anomalous when examined in the light of the language of RCW 4.20.040 and its interpretation: "All ... causes of action ... by one person against another, whether arising on contract or otherwise, survive to the per-

case, the deceased received an injury which, under the schedule of allowances as fixed by the Department, entitled him to an award of $850. He properly filed his claim for compensation with the commission but before a warrant in payment thereof had been delivered to him, he was accidentally killed. The plaintiff, as administrator, demanded payment and received a judgment in his favor. The judgment was reversed on appeal.

> As all compensation for injuries received in such extra hazardous employment and all causes of action therefor are abolished, except as the act provided, it necessarily follows that, unless the statute confers the right upon the plaintiff, the cause of action does not exist; moreover, the granting power may likewise limit, control or take away the rights conferred.[7]

After setting out the express language of the statute the court continued:

> The expression 'operation of law' is defined . . . as: 'A term applied to indicate the manner in which a party acquires rights without any act of his own.' The right asserted by the plaintiff was so acquired; and inasmuch as it is not conferred by the statute under consideration, but, on the contrary is expressly denied thereby, the action cannot be maintained. The language is plain and unambiguous. It leaves no room for construction. To hold otherwise is not to interpret the statute but to annihilate it.[8]

In the light of the express language in the *Ray* opinion, one might wonder how the *Ray* case and the *Curry* case can stand simultaneously as valid authority in the same jurisdiction.

The "exception" as to judgments was first pronounced by the court in *Calkins v. Department of Labor and Industries.*[9] In that case a judgment for the claimant was entered by the superior court while the appeal was pending the claimant died. Substitution of the plaintiff-administrator as a party to the action was resisted but an order was made by the court directing the substitution. To do so, the court construed RCW 51.32.040 as not purporting to apply to judgments since it does not mention them. The court then looked to prior decisions[10] which had held that a judgment is property which descends

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sonal representatives of the former and against the personal representatives of the latter." See 28 WASH. L. REV. 201 (1951).

[7] 99 Wash. at 177, 78, 168 Pac. at 1121 (1917). See RCW 51.04.010.

[8] 99 Wash. at 178, 168 Pac. at 1122 (1917).

[9] 10 Wn.2d 565, 117 P.2d 640 (1941).

[10] Wright v. Northern Pacific R. Co., 45 Wash. 432, 88 Pac. 832 (1907); Gordon

to the representatives of the deceased for the benefit of the estate and thereby allowed the substitution.

The result was extended to include jury verdicts in *Carl v. Department of Labor and Industries.*[11] Carl appealed to the superior court from a decision for the Department. He received a jury verdict in his favor but died before judgment was entered on the verdict. By looking beyond the Workman's Compensation Act to other statutory provisions[12] and prior decisions,[13] the court permitted the legal representative of the claimant's estate to be substituted.

In the *Curry* case, the court refused to extend the exception further to include instances wherein the claimant had a cause of action at the time of his death. In so refusing, the court relied upon a conclusion that Curry had only an unliquidated claim at the time of his death. Assuming this to be true, its relevance is questionable since the Workman's Compensation Act does not discuss liquidated or unliquidated claims. The Act, as interpreted in the *Ray* case, provides for payment to a personal representative only if there is a pre-existing partial or total disability *award* made to the workman prior to his death.

The Washington Court did not expressly answer whether or not a judgment or a verdict is an award in the sense of the statute. It merely drew the line. Under the present law in Washington, if the claimant has either a verdict or a judgment in his favor prior to his death, the court will look beyond the Workman's Compensation Act and permit a substitution. If a verdict was returned against the claimant or if the action is merely pending at the date of the death of the claimant, the Workman's Compensation Act is controlling, and the cause of action in the claimant's behalf is abated. The effect then, is a partial rather than complete ignoring of the provisions of the Workman's Compensation Act.

JEROME FARRIS

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v. Hillman, 102 Wash. 411, 173 Pac. 22 (1918). Neither case pertained to a claim under the Workman's Compensation Act.

[11] 38 Wn.2d 890, 234 P.2d 487 (1951).

[12] RCW 51.52.115: Rem. Rev. Stat. (Sup.) § 7697-2 (P.P.C. § 704-3) to the effect that the jury's verdict in every such appeal shall have the same force and effect as in actions at law.

[13] Garrett v. Byerly, 155 Wash. 351, 284 Pac. 343 (1930); Nenezich v. Elich, 183 Wash. 657, 49 P.2d 33 (1935). In actions at law, where the action would otherwise abate upon death of one of the parties, if the jury's verdict has been entered prior to death, a judgment, the entry of which is delayed by the trial court or the opposing party will be entered *nunc pro tunc* as of that date for the purpose of avoiding abatement.

Recovery of Independent Contractors. In two recent Washington decisions,[1] the Washington Supreme Court reappraised its past decisions concerning the recovery of independent contractors under the Workmen's Compensation Act.[2] The court redefined those elements necessary in the contract to enable the independent contractor to recover under the Act.[3]

In *White v. Department of Labor and Industries*,[4] the claimant, Lucinda White, and her husband, William White, entered into an oral contract with the Steiner mill, in which the Whites were to use a donkey engine, owned by themselves, to yard and cold deck logs at the mill for $12 per thousand board feet. It was understood that the claimant was to assist. The Whites had been working as per contract for about three weeks when the Steiner mill fired the man they had hired to do the falling and bucking. The Steiner mill agreed to pay the Whites $20 per thousand if they would accept the responsibility for the falling and bucking. The Whites hired a Mr. Lydey to do this work at the same pay the Steiner mill had paid their own man, $8 per thousand board feet, or the exact amount of the increase given the Whites by the Steiner mill.

Work progressed under the latter arrangement for another three weeks when the claimant, Mrs. White, was seriously injured. Mrs. White applied for benefits under the Workmen's Compensation Act. This claim was rejected on the grounds that, as an independent contractor, she was not covered. Upon appeal to the superior court, it was determined that, "... at the time of her injury [Mrs. White] was an independent contractor doing extra hazardous work in the logging industry and the essence of her contract was her personal labor;"[5] and judgment was entered for Mrs. White on that conclusion.

The Department of Labor and Industries appealed from that finding and the supreme court reversed, holding that the essence of the contract between the Whites and the Steiner mill was not their "personal labor" as required by RCW 51.08.180.[6] The court stated that the con-

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[1] White v. Department of Labor and Industries, 48 Wn.2d 470, 294 P.2d 650 (1956); Dieckman v. Department of Labor and Industries, 149 Wash. Dec. 367, 301 P.2d 763 (1956).

[2] Chapter 51 RCW.

[3] RCW 51.08.180.

[4] 48 Wn.2d 470, 294 P.2d 650 (1956).

[5] 48 Wn.2d at 476, 294 P.2d at 654.

[6] RCW 51.08.180 states, "The term workman within the contemplation of this act means every person in this state who is engaged in the employment of or who is work-

tract of an independent contractor must be one "... the essence of which is his personal labor,"[7] in order for him to recover under the Workmen's Compensation Act. This was further defined so as to exclude an independent contractor,

> (a) who must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract, or (b) who obviously could not perform the contract without assistance, or (c) who of necessity or choice employs others to do all or part of the work he has contracted to perform.[8]

The court held that (1) under their original contract the Whites had to furnish heavy machinery (the donkey engine), (2) under their modified contract the Whites could not personally perform all of the contract, and (3) under their modified contract the Whites did hire another to do part of the work contracted for.

Judge Finley, with Judges Ott and Rosellini concurring, wrote a dissenting opinion in which he stated that the majority was construing the statute[9] too narrowly, and that the personal labor of the Whites was the essence of their contract. Judge Finley said that the hiring of Lydey should not change the essence of the contract for it was merely an accommodation to the Steiner mill with the Whites acting as an agent. Further, the dissenting opinion stated that it was difficult to see how the use of mechanical equipment could change the status of an independent contractor when the use of identical equipment by an employee or workman would not change his status under the act. Judge Finley said, "The question determining the matter of coverage under the act is not whether the work in fact could be done by another workman, but whether work done by someone other than the contracting party or worker would have constituted performance of the particular contract."[10] Since both Mr. and Mrs. White were to work, Mrs. White's personal labor was the essence of the contract.

In *Dieckman v. Department of Labor and Industries*,[11] the department rejected the claimant's application for a widow's pension after her husband was killed in a logging accident. The deceased and his brother had contracted to move some logs with a cherrypicker owned by the latter. The claimant appealed to the superior court which dis-

ing *under an independent contract, the essence of which is his personal labor* for any employer coming under this act *whether by way of manual labor or otherwise* in the course of his employment." (emphasis added)

[7] RCW 51.08.180.

[8] 48 Wn.2d at 474, 294 P.2d at 653.

[9] RCW 51.08.180.

[10] 48 Wn.2d at 482, 294 P.2d at 657.

[11] 149 Wash. Dec. 367, 301 P.2d 763 (1956).

missed the appeal with prejudice. From that judgment the claimant appealed to the supreme court which stated that the *White* case was controlling in this instance. Although an employer may contract with two men, the essence of which is their joint personal labor, their personal labor is not of the essence of the contract where they, of necessity, must supply machinery other than hand tools.

Judge Finley, with Judge Rosellini concurring, again dissented, saying that where an individual performs acts for an employer coming under the act, which are similar to the labors of ordinary employees covered by the act, he should be entitled to industrial insurance benefits even though the work is done under an independent contract and not as an ordinary employee. The fact that other equipment was used, should not preclude an independent contractor from benefits under the Workmen's Compensation Act if the essence of the employment contract was his personal labor, manual or otherwise.

The court supported the result reached in the *White* case largely on the strength of three earlier decisions: *Haller v. Department of Labor and Industries*,[12] *Crall v. Department of Labor and Industries*,[13] and *Cook v. Department of Labor and Industries*.[14] In the *Haller* case, there was a contract to clean a well. The court found that the contract could not have been performed without assistance, that this must have been within the knowledge of the contracting parties, and that, therefore, the personal labor of the independent contractor was not the essence of the contract. In the *Crall* case, there was a contract to haul logs. Although heavy equipment was to be used in the performance of the contract, Crall was known by the employer to have several trucks and other drivers. Nothing in the contract said that Crall alone was to do the hauling, and, therefore, the court concluded, it was completed by the parties that others might satisfactorily perform the contract and Crall's personal labor was not of the essence. In the *Cook* case, heavy equipment was also used, but the court found that the claimant's wife assisted him in loading the truck, a job which was impracticable for one person to attempt. Since the contracting parties must have known the work could not be carried out without assistance, the personal labor of the claimant could not have been the essence of the contract.

In two of the three forementioned cases, there was heavy equip-

[12] 13 Wn.2d 164, 124 P.2d 559 (1942).
[13] 45 Wn.2d 497, 275 P.2d 903 (1954).
[14] 46 Wn.2d 475, 282 P.2d 265 (1955).

ment involved.[15] More important might be the fact that in each of the three cases, it was specifically found that either the work contracted for could not be performed by the contracting party alone,[16] or it was intended that the work need not be performed by the individual contracting.[17] It is possible to conclude from this analysis that in the *Haller, Crall,* and *Cook* cases the essence of the contract could not have been the personal labor of the independent contractor, regardless of the presence or absence of any equipment.

In the *White* case, heavy equipment owned by the independent contractor was to be used in performance of the contract. But further, the original contract called specifically for the labor of both Mr. and Mrs. White, whose personal labors were known to be sufficient to carry out the contract. If the hiring of the bucker and faller is viewed as an accommodation for the Steiner mill,[18] it would appear that the Whites were, ". . . working under an independent contract, the essence of which is (their) personal labor . . . *by way of manual labor or otherwise* . . . " (emphasis added)[19]

In the *Dieckman* case, heavy equipment, owned by one of the two independent contractors, was necessary for the completion of the contract. The court stated that an employer could contract for the personal labor of two parties, which was the situation here. Therefore, the only reason for holding that the personal labor of the Dieckman brothers was not the essence of the contract was the presence and use of a cherrypicker owned by them.

It appears from the decisions in the *White* and *Dieckman* cases, that where an independent contractor must, of necessity or by the terms of the contract, provide any tools or equipment for the completion of the contract, the essence of that contract is to be determined primarily by the size and nature of the tools needed to complete performance. Thus, a carpenter, working as an independent contractor, would probably come within the Act if he used only a hammer and saw, because they are hand tools. [20] But what is his status when, of choice or necessity, he uses a power skillsaw, a portable power

[15] Crall v. Department of Labor and Industries, 45 Wn.2d 497, 275 P.2d 903 (1954). Cook v. Department of Labor and Industries, 46 Wn.2d 475, 282 P.2d 265 (1955).

[16] Haller v. Department of Labor and Industries, 13 Wn.2d 164, 124 P.2d 559 (1942); Cook v. Department of Labor and Industries, 46 Wn.2d 475, 282 P.2d 265 (1955).

[17] Crall v. Department of Labor and Industries, 45 Wn.2d 497, 275 P.2d 903 (1954).

[18] See dissent of Judge Finley 48 Wn.2d 470, 294 P.2d 650 (1956).

[19] RCW 51.08.180.

[20] Norman v. Department of Labor and Industries, 10 Wn.2d 180, 116 P.2d 360 (1941).

planer, a portable table saw, or larger lumber working tools? It is difficult to see how the use of mechanical equipment can change the status of an independent contractor when use of the identical equipment by an employee or workman would not change his status under the Workmen's Compensation Act.[21]

Although the principles set forth in the two cases under discussion will probably provide the basis on which similar cases are to be decided, it would seem, if the intent of the legislature was to broaden the act,[22] that a better formula for deciding whether or not the personal labor of an independent contractor is the essence of the contract, was set down in the *White* case by Judge Finley in his dissenting opinion, wherein he said, "The test should be whether the work or job performed by someone other than the claimant *would constitute performance of the particular contract.*"[23]

DAVID J. WHITMORE

Aggravation of Previously Impaired Condition—Cancer. In *Harbor Plywood Corporation v. Department of Labor and Industries,* 48 Wn.2d 553, 295 P.2d 310 (1956), Ash had received an industrial injury for which compensation had been awarded by the department. The injury reactivated a malignant cancer condition which caused Ash's death. Grace Ash, widow of the deceased workman, filed for a widow's pension and received an award, from which the employer, Harbor Plywood Corporation, appealed to the superior court which affirmed the award. The employer then appealed to the supreme court on the grounds that the finding of the trial court that the deceased's death was accelerated by the aggravation of a malignant cancerous condition, was a conclusion of law and not a finding of fact.

In affirming the award the court said that, although the cause of cancer is unknown, medical science has learned enough about it to substantiate medical testimony regarding its symptoms and effects. Competent medical testimony showing death to be accelerated by aggravation of a cancer condition will sustain an award so based regardless of the fact that death would ultimately have resulted from the condition without the aggravation by injury. If an injury, as defined in the act, reactivates a latent condition caused by disease, the resulting disability is attributed to the injury and not to the pre-existing condition.

Workmen's Compensation—Election of Remedies—Right to Remedy Against Third Party Tort-Feasor. In *Hand v. Greyhound Corporation,* 149 Wash. Dec. 167, 299 P.2d 554 (1956), the plaintiff, Hand, sought to recover for personal injuries sustained in a collision with the defendant's bus operated by one of the defendant's employees. At the time of the accident both Hand and the bus driver, and also their employers, came within the provisions of the Workmen's Compensation Act, as being

[21] See dissent of Judge Finley 149 Wash. Dec. 367, 301 P.2d 763 (1956).

[22] Norman v. Department of Labor and Industries, 10 Wn.2d 180, 116 P.2d 360 (1941). Although this case held that ,"...it was the intention of the legislature to broaden the industrial insurance act," the later decisions have tended to restrict the operation of the section under discussion.

[23] 48 Wn.2d at 482, 294 P.2d at 657.

engaged in extrahazardous employment. The trial court granted the defendant's motion for summary judgment relying on RCW 51.24.010. This statute gives the injured workman an election either to take under the act or to pursue his remedy against another not in the same employ to whose negligence or wrong the injury is attributed. However, it is further provided that no action may be brought against any employer or workman who at the time of the accident was covered by the act.

On appeal the plaintiff challenged the constitutionality of the applicable provision, in that it placed him in an arbitrary and unreasonable classification and deprived him of his common-law cause of action. The majority of the court said that under the act, the constitutionality of which has been repeatedly upheld, employees in extrahazardous employment are barred from pursuing their common-law tort actions for injuries received. There is one exception to this bar. Where there is an injury through the negligence or wrong of a third party tort-feasor not covered by the act, the injured workman is given his election to recover under the act or seek his statutory remedy against such third party. But for this sole exception, employees injured in the course of extrahazardous employment are placed in one inclusive classification. The court concluded that this classification was neither arbitrary nor unreasonable.

In a lone dissent Judge Rosellini said that a workman had a right to recovery for injuries received. The plaintiff, here, had received severe burns and disfigurement, items for which the act provided no compensation. Since the classification results in a denial of a remuneration which may be due but not compensable under the act, it is not effectuating the purpose of the act. The trial court should have been reversed.

Although the court properly construed the statute in this case, an opposite result would have to be reached in applying a 1957 legislative enactment to the same *fact situation.* In the Session Laws of 1957, Chapter 89, § 23, the legislature amended RCW 51.24.010 so that an injured workman may elect whether to take under the act or seek his remedy against a third-party tort-feasor not in the same employ whether or not he is an employee or an employer covered by the act.