Washington Law Review

Volume 34
Number 3 *Washington Legislation—1959*

9-1-1959

Real Property

Harry M. Cross
University of Washington School of Law

when the state was a defendant, likewise the same rule applied to counties.

It would appear that under the statute as amended costs would now be allowed the private party in both of these cases. By the amending clauses the state and counties are liable for costs when they are defendants as well as when they are plaintiffs. Furthermore, they are liable for costs on appeal to the supreme court regardless of whether they are plaintiff or defendant.

One word of caution might be appropriate. The statute does not purport to affect the doctrine of sovereign immunity. The statute does not constitute a general consent to be sued by the state. It is simply a provision that in those instances in which the state or counties are proper parties, they shall be liable for costs to the same extent as private parties.

Jurors' Fees. Chapter 73 of the 1959 Session Laws amends RCW 2.36.150 to provide that jurors' fees in the superior courts shall be ten dollars per day instead of five dollars. This is in recognition of the fact that the old rate of compensation worked a real hardship on conscientious citizens who were called for jury service and who made no objection. The old rate also undoubtedly resulted in requests for excuse from service by other equally conscientious citizens who simply could not afford the financial sacrifice. Though the increase will be welcomed, one may question whether it is adequate. The Judicial Council, for example, had recommended that the compensation of jurors be increased to fifteen dollars per day. The compensation for jury service before a justice of the peace court and upon a coroner's jury remains the same, four dollars per day. Likewise, there has been no change in the mileage rate of ten cents per mile.

PHILIP A. TRAUTMAN

REAL PROPERTY

Rule Against Perpetuities in Trust Dispositions. By the enactment of chapter 146, labeled by the code reviser "Trusts—Rule against Perpetuities," Washington has joined the group of states deciding to "wait-and-see" whether the actually developed facts involve remote dispositions violating the Rule Against Perpetuities, rather than determining violations as the common law rule requires on the basis of possibilities, however unlikely to occur. This statute gives Washington only a limited membership, however, for it is restricted to trust dispo-

sitions, and at least in terms will not affect dispositions of legal interests (outside of those inherently involved in trust instruments). Theoretically much of the area of common law operation of the rule will remain undisturbed, but here two observations may be made. First, it would be possible for the court to decide the statute reflects a general policy decision by the legislature that the destructive force of the common law rule should be deflected from possible but not probable factual situations, thus limiting frustration of dispositive schemes to limitations which actually take effect at a point in time remote from the effective date of the creating instrument. Florida and New Hampshire took this position without the aid of any statute.[1] There is probably nothing in the decisions of the Washington court which indicates this extension, or judicial adoption of, "wait-and-see" is probable, but neither is there anything in the decisions which reflects particular argument that abandonment of the common law rule is undesirable. Second, it is almost certain that most litigated problems of perpetuities arise in trust dispositions. The policy of the rule, fostering full alienability, is to some extent invaded as a practical matter by the use of the acceptable trust device. If the settlor's desires are to have substantial weight in controlling dispositions, there will probably be some period of theoretical or practical inalienability because of the trust, so inapplicability of the rule during this period may very well not seriously invade the policy area. Modification of the application of the rule to trusts thus both meets situations most likely to arise and, perhaps, extends only slightly the invasion of the policy area of the rule.

The new statute is original. It does not follow the pattern used in other states or suggested elsewhere. The statute sort of backs into the problem. If the dispositive scheme does not violate the rule the statute has no application. If any provision of the trust instrument does violate the rule all provisions of the trust are nonetheless to remain valid during the "wait-and-see" periods which, by section 1 may be the full "life in being plus twenty-one years" of the common law rule, rather than merely expiration of life estates. By section 2 if during the period "in which . . . any provision . . . is not to be rendered invalid . . ." assets become distributable or interests vest, the distribution

[1] See 6 AM. L. PROP. § 24.8, p. 29, and supp. The literature on "wait-and-see" is cited and some discussion of the problem found in 6 AM. L. PROP. § 24.11 and supp.; 5 POWELL, REAL PROP., pars. 765, 766, 769; 3 SIMES AND SMITH, FUTURE INTERESTS (2d ed.), § 1230, and supp.; Legislators' Handbook on Perpetuities, Amer. Bar Assn. Section of Real Property, Probate and Trust Law; and the reports of the Committee on Rules Against Perpetuities, in the Proceedings of the Section.

and vesting are valid. At the end of the period, if the trust has not exhausted itself, the court is directed to distribute the assets "giving effect to the general intent of the creator of the trust." Section 3.

The immediate impetus for the proposal to the legislature in 1957 was *In re Lee's Estate,* 49 Wn.2d 254, 299 P.2d 1066 (1956), in which the court held void the trust limitation (after a life estate) to children of the life tenant living when the youngest reached 40 years of age, and certain alternative limitations over. The trust did not fail, however, because the court made some sense of an ambiguous additional alternative for distribution one day short of the full period permitted by law. It is the writer's understanding that the basic scheme of the Lee trust would almost certainly have been fully accomplished before 20 years, 364 days after the life tenant's death, and the result of the decision is to continue the trust longer than was probably contemplated. It was the writer's hope that resubmission of the proposal in 1959 would be preceded by extensive study and analysis of the whole perpetuity area and perhaps even other areas of property law long needing modernization in this state, but in 1959 the same proposal, modified only by the addition of the "cy pres" section 3, was introduced and became the law.

The writer has been told that only rarely in the experience of the sponsors has there been a trust which would not fully exhaust itself according to the basic scheme of the settlor within the new statutory "wait-and-see" periods. This circumstance, effectuation of the settlor's primary intent, is the principal justification for the legislation. Difficulties probably can arise in applying the statute though it appears unlikely there will be many, but unless the court extends the principle of the statute to antecedent trusts, there may be inchoate frustrations yet to come to light.

Assessment and Taxation of Easements. The enactment of chapter 129 will provide desirable protection for holders of easements against property tax defaults by the servient owner. Previously on foreclosure of taxes all outstanding rights were destroyed and the tax title was "new" with the consequence that an easement holder might be practically compelled to pay another's tax to preserve his easement. The statute declares the general property tax assessed on any "real property includes all easements appurtenant thereto, provided said easements are a matter of public record in the auditor's office . . " and, correlatively, that a tax deed issued pursuant to foreclosure of de-

linquent taxes "shall be subject to such easement . . . provided [it was] established of record prior to the year for which the tax was foreclosed."

Easements created by express grant or reservation, *i.e.* by adequate writing, and appearing of record unquestionably affect the value of both dominant and servient estates and therefore the assessed value, but their existence did not appear on tax rolls or in tax deeds. Thus the court held the full title, unrestricted by easement, passed by the tax deed of the former servient estate. Whether a tax deed of the dominant estate would pass title to an easement appurtenant to a tract foreclosed without the new statute is not clear, though consistency should indicate it would not. Such result would be a windfall to the servient owner. The statute can be construed to *declare* (not change) the law applicable to existing situations as regards taxation of dominant estates so that tax deeds will carry appurtenant easements without express mention as is true of private grants, but clearly there is a change in the effect of tax foreclosure of servient estates.

Ordinary easements by implication and implied ways of necessity are not covered by the new law. They may still be susceptible to destruction. Private easements in subdivisions may not be covered depending upon the interpretation chosen for the "matter of public record" and "established of record" language. If these latter easements are within the statute, acquisition of a dominant tract through a tax deed might now qualify the title holder to enforce his easement against other lot owners ("common grantees") to the confounding of the creation by estoppel reasoning previously suggested by the Washington cases. See 34 WASH. L. REV. 212, 215 (1959).

Aspects of the pre-existing law were discussed in King, *The Assessment and Taxation of Easements,* 16 WASH. L. REV. 36 (1941); Note, 23 WASH. L. REV. 75 (1948). HARRY M. CROSS

SECURITY TRANSACTIONS

Material and Equipment Suppliers' Liens—Time of Giving Notice of Lien to Property Owners and Priorities between Liens. RCW chapter 60.04, the basic construction-industry lien statute, has been amended again. Heretofore, a supplier of material to a contractor has had a lien only if he notified the owner within a period set in the statute[1] that material was being supplied and a lien might be claimed. (If notice is timely given the lien covers all material delivered by the

[1] Ten days in the instance of "any single family residence or garage" and sixty days in other instances. RCW 60.04.020.