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Bills of Sale—Chattel Mortgages—Conditional Bills of Sale—Filing; Criminal Law—Trial by Jury—Waiver; Evidence—Admissibility of Evidence of Past Crimes to Show Motive; Instructions to the Jury—Preponderance of the Evidence—Qualifing Words; Insurance—Breach of Cooperation Clause

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RECENT CASES

BILLS OF SALE—CHATTEL MORTGAGES—CONDITIONAL BILLS OF SALE—FILING. Vendee purchased goods which he left in possession of the vendor, and obtained a bill of sale which he filed eleven months later, although the recording statute provided that recording be within ten days. Six days subsequent to the recording of the bill of sale, the vendor executed a chattel mortgage to defendant on the vendee's goods which had been left in his possession. This was filed the following day. Vendee brought action to cancel the chattel mortgage and quiet his title. *Held:* Under REM. REV. STAT. § 5827, a bill of sale, even though not recorded within the required ten-day period, when recorded, will be good as against all who have not at that time acquired a specific lien against the property. Chattel mortgage canceled. *Umbarger v. Berrian,* 95 Wash. Dec. 289, 80 P. (2d) 818 (1938).

The Washington bill of sales act provides, "No bill of sale for the transfer of personal property, shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made." REM. REV. STAT. § 5827.

The Supreme Court of Washington, in an early case construing the bill of sale statute (See HILL'S CODE § 1454, BALLINGER'S CODE § 4578), which was the same *mutatis mutandis* as the coexisting conditional sales statute (See BALLINGER'S CODE § 4585) and the chattel mortgage statute (*Id.* § 4558), held that a failure to record the bill of sale within the required ten-day period would protect only such parties as had obtained intervening rights after the execution of the instrument and before it was finally filed for record. *Sayward v. Nunan,* 6 Wash. 87, 32 Pac. 1022 (1893). Intervening rights were impliedly defined as specific liens acquired on the property. See also *Malmo v. Rendering & Fertilizing Co.,* 79 Wash. 534, 140 Pac. 569 (1914).

An identical result was reached in cases involving the application of the conditional sales statute, *Malmo v. Rendering & Fertilizing Co., supra; Eilers Music House v. Ritner,* 88 Wash. 218, 154 Pac. 789 (1915); and the chattel mortgage statute, *Heal v. Evans Creek Coal & Coke Co.,* 71 Wash. 228, 123 Pac. 211 (1912); *Pacific Coast Biscuit Co. v. Perry,* 77 Wash. 352, 137 Pac. 483 (1914).

The conditional sales statute and the chattel mortgage statute, however, were amended by the Laws of 1915, Chap. 95 and 96, pp. 276, 277, wherein it was provided that all creditors, whether or not they had or claimed a lien on the property would be protected by the statutes; with the result that a chattel morgage will be void, and a conditional sale absolute, as to all creditors or encumbrancers unless the instrument is filed within ten days; and that a filing later than the ten-day period will carry no legal effect. *Clark v. Killian,* 117 Wash. 532, 199 Pac. 121 (1921); *Fleming v. Lincoln Trust Co.,* 124 Wash. 31, 213 Pac. 480 (1923); see Ayer, *Conditional Sales,* 13 WASH. L. REV. 47, 48.

The bill of sales statute has not been amended or changed, and by the instant case it is clear that a distinction now exists between the recording of a bill of sale on one hand, and the filing of a conditional bill of sale

or chattel mortgage on the other, namely: a conditional bill of sale will be absolute and a chattel mortgage void unless filed within the ten-day period, even though thereafter filed; whereas a bill of sale will be valid whether filed before or after the statutory period as against all who have not acquired a lien on the property before the actual filing.

M. D. L.

CRIMINAL LAW—TRIAL BY JURY—WAIVER. Defendant, charged with homicide, waived trial by jury. The result of trial before the court was a conviction of the crime of manslaughter. *Held:* Appellant is entitled to a trial by jury, a right which was not afforded him. *State v. Karsunky*, 97 Wash. Dec. 76, 84 P. (2d) 390 (1938). Likewise, where defendant is on trial for a misdemeanor. State v. McCaw, 98 Wash. Dec. 308, — P. (2d) — (1939).

In absence of statutory authority the general rule is that one who is charged with the commission of a felony cannot, on pleading not guilty, waive his right to trial by jury. Annotations 48 A. L. R. 767 and 58 A. L. R. 1031.

The instant case did not come under the general rule but was decided on the basis of express statutory provision. REM. REV. STAT.. § 2309. This was held to repeal by implication, Wash. Laws 1854, p. 119, § 108, REM. REV. STAT. § 2144, authorizing a waiver in other than capital cases. The court here ruled, "Not only is there an absence of statutory authority to waive trial by jury but the right to waive, except in the two instances cited, is taken away." (Plea of guilty or confession in open court: § 2309.)

This construction of the statute would seem to mean not only that it is for the protection of the accused, but also the policy of the state that the accused be tried by a jury. Certain constitutional and statutory provisions for the protection of the accused my be waived in this state. *State v. Alexander*, 65 Wash. 488, 118 Pac. 645 (1911) (right to speedy trial); *State v. Miller*, 72 Wash. 154, 129 Pac. 1100 (1913) (same); *State v. Quinn*, 56 Wash. 295, 105 Pac. 818 (1909) (right to be served with a copy of the information); *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N.S.) 611 (1912) (plea of former jeopardy).

The theory that public policy requires that the accused be tried by jury may be questioned. Situations may arise in which the defendant would rather be tried by the court. In cases involving crimes of a shocking nature or race prejudice public sentiment may run high. The defendant might receive a more just trial before the court than before men who are apt to be swayed by current feeling. Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, (1927) 25 MICH. L. REV. 695.

The guarantee found in the U. S. CONST. Art. III, § 2, clause 3, and the Sixth Amendment confers a privilege upon the defendant which he may be allowed to waive. *Patton v. United States*, 281 U. S. 276 (1929). These provisions seem as mandatory as that contained in the WASH. CONST. art. 1, § 21. In a case decided before the enactment of REM. REV. STAT. § 2309, under facts similar to those in *Patton v. United States, supra*, it was held that the court was without jurisdiction to try a case with but eleven jurors, even with the consent of the defendant, as no provision for such tribunal had ever been made. *State v. Ellis*, 22 Wash. 129, 60 Pac. 136 (1900). On this question see Annotations 70 A. L. R. 279. Dictum in the case is to

the effect that while the legislature cannot take the right away, it may authorize waiver.

The right to trial by jury is not of such fundamental importance as to be included within the "due process" clause of the Fourteenth Amendment to the Federal Constitution. *Maxwell v. Dow*, 176 U. S. 581 (1900). It would seem inconsistent that the right to a jury trial in criminal cases is not within the "due process" clause, but is of such fundamental importance to the state that it cannot be waived by the accused. It is submitted that the accused should have the right to waive trial by jury in criminal cases. If he were to have this privilege criminal procedure might be expedited. There are numerous decisions upholding the constitutionality of positive legislative enactments to such effect, collected in 48 A. L. R. 772. Whether such legislation here would be upheld depends upon the interpretation of our constitutional provision. The court might feel that it is for the personal security of the accused, in which case it could be waived; or it might be construed as declaring a general state policy to require jury trial, in which case no waiver would be possible without a constitutional amendment to that effect.

H. A. B.

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF PAST CRIMES TO SHOW MOTIVE. In a prosecution for first degree murder, evidence of former crimes and misconduct by the defendants was admitted, the state contending that the evidence was relevant to show motive. Particularly, the state's contention appears to have been that because the evidence indicated that the deceased knew of the former crimes, it was permissible to infer that the motive for the homicide consisted in the desire of the defendants to prevent disclosure by the deceased. There was no evidence tending to show that the deceased had threatened to make such disclosure or that the defendants had reason to believe that she was going to do so. *Held:* That the evidence of the former offenses and misconduct was properly admitted. *State v. Richardson*, 97 Wash. Dec. 137, 84 P. (2d) 699 (1938).

Ordinarily, evidence of other offenses, even though of a similar sort, is not admissible. But evidence which is relevant to some particular issue does not become inadmissible merely because it tends to establish the commission of some other offense by the defendant. *State v. Gaines*, 144 Wash. 446, 258 Pac. 508 (1927); *State v. Larson*, 119 Wash. 123, 204 Pac. 1041 (1922). "A party cannot by multiplying his crimes diminish the volume of competent evidence given against him." *People v. Thau*, 219 N. Y. 39, 113 N. E. 556 (1916). It is always proper and relevant for the state to show motive, and such proof becomes particularly important where the state's case depends, as it did here, upon circumstantial evidence. *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471 (1889); *State v. Gaines, supra;* 1 WHARTON, CRIMINAL EVIDENCE (11th ed., 1937) § 351.

But was the evidence in the principal case relevant to show motive? Without some evidence that the deceased had threatened to make disclosure of the defendants' criminal acts and misconduct or that the defendants believed or had reason to believe that she would do so, there is doubt of the probative value of the evidence. The question of relevancy in a situation of this nature should be scrutinized with unrelaxed vigilance by the court because of the prejudicial character of the evidence, if misused by the jury. *Billings v. State*, 52 Ark. 303, 12 S. W. 574 (1899); *State*

v. Hakon, 21 N. D. 133, 129 N. W. 234 (1910); *Commonwealth v. Habecher*, 113 Pa. Super. 335, 173 Atl. 831 (1934). The possibility, if not the likelihood, of such prejudicial misuse grows more apparent where, as in this case, the former crimes and misconduct were of a sordid and repulsive character. 1 WHARTON, CRIMINAL EVIDENCE § 360. ". . . If we are too liberal or too loose in exacting relevancy or probative value for the allowable purposes, we admit evidence whose dominant bearing is a dangerous and forbidden one. Greater care and caution is thus called for in applying to this class of evidence the tests of relevancy for design, motive, and the like." 1 WIGMORE, EVIDENCE (2d ed. 1923) § 216.

It is submitted that to permit evidence of prior crimes and misconduct to come in upon the mere showing that the deceased knew of them is to cut very deeply into the exclusionary policy against such evidence and to establish a precedent fraught with considerable danger.

J. H. J.

INSTRUCTIONS TO THE JURY—PREPONDERANCE OF THE EVIDENCE—QUALIFYING WORDS. In an action to recover double indemnity under a policy of life insurance, the defense was suicide. The trial court instructed the jury that the burden was upon the defendant "to establish to your satisfaction, by a preponderance of the evidence, that the death of [the assured] was not accidental and unintentional but that he committed suicide." Defendant excepted to the instruction as putting upon it too great a burden. *Held:* That the instruction was not improper. *Alverson v. Kansas City Life Insurance Co.*, 96 Wash. Dec. 43, 82 P. (2d) 149 (1938).

At the trial defendant conceded that the burden of persuasion as to suicide rested upon it and upon this concession was permitted to open and close the case. Defendant contended, however, that its burden was merely to produce a preponderance of evidence on the issue, not necessarily to "satisfy" the jury of the fact of suicide. But the court, relying on *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404 (1901) (preponderance of the evidence satisfactory to your minds), which had been predicated on *Callan v. Hanson*, 86 Iowa 420, 53 N. W. 282 (1892) (if from a preponderance of the evidence you are satisfied), held that the instruction, in effect, did no more than require the jury to "find" or "believe" (from a preponderance) that deceased committed suicide. Yet it seems there is substantial merit to the contention that the instruction, as it was likely to be understood by the jury, did require the defendant to do something more than merely produce a preponderance, i. e., to produce a preponderance which "satisfied" the jury of the fact of suicide. While the difference may be technical, even slight, it is perhaps worth noting that in the instructions in the cited cases the phrase objected to was "tacked on", while in the principal case it is placed in a stronger position and is also likely to receive more emphasis in view of the fact that *satisfaction* is a term familiar to and well understood by the juror, while *preponderance of the evidence* probably is not.

In *Oregon Railroad & Navigation Co. v. Owsley*, 3 Wash. Terr. 38, 13 Pac. 186 (1888) not cited by either counsel or the court in the principal case, an instruction which required the defendant to establish an affirmative defense "by a preponderance of the evidence, and to your satisfaction" was condemned as too rigorous, the court holding that "from this the jury would naturally understand that the burden was on the defendant to

prove his defense to a greater degree of certainty than that afforded by a mere preponderance of the evidence. Indeed, they might even be led to think that this defense needed to be established beyond every reasonable doubt." The use of the conjunctive may be a difference of substance, but still the instruction in the *Owsley* case appears very close, at least in its meaning to a lay auditor, to that in the principal case.

In *State v. Harris*, 74 Wash. 60, 132 Pac. 735 (1913), an instruction putting upon the defendant the burden of proving insanity by a preponderance and that the jury "must conscientiously believe", "must really believe" the defendant to have been insane, and that "your verdict must be the truth", was also held erroneous, as was the phrase "to establish to your minds and conscience by a preponderance of the evidence". *McKay v. Seattle Electric Co.*, 75 Wash. 257, 136 Pac. 134 (1913).

The *Owsley* case appears to be in line with outside authority. *New York Central Railroad Co. v. Sentle*, 132 Ohio State 387, 8 N. E. (2d) 149 (1936), which probably represents the prevailing view, condemned an instruction identical in terms with that in the principal case. *Accord: Midland Valley R. Co. v. Barnes*, 182 Okla. 44, 18 P. (2d) 1089 (1933); *cf. Teter v. Spooner*, 305 Ill. 198, 137 N. E. 129 (1922). There are cases to the contrary: *Sale v. Illinois Electric Co.*, 114 Cal. App. 71, 299 Pac. 564 (1931); *Sufferling v. Heyl & Patterson*, 139 Wis. 510, 121 N. W. 251 (1909).

H. M. T.

INSURANCE—BREACH OF COOPERATION CLAUSE. In an action against plaintiff's indemnity insurer, defendant pleaded breach of the cooperation clause, in that plaintiff's testimony at the trial that his truck at the time of the accident was loaned, deprived defendant of a defense based upon plaintiff's prior signed statement that it was leased. *Held:* To cooperate means to give a full, frank, and fair disclosure of all information reasonably requested by the insurer to enable it to determine whether it had a defense, and that the total variance between testimony and statement constituted a breach of the cooperation clause relieving defendant of liability. *Hilliard v. United Pacific Casualty Insurance Company*, 95 Wash. Dec. 399, 81 P. (2d) 513 (1938).

The cooperation clause in the case read, ". . . the assured must cooperate fully with the company in immediately disclosing all the facts known to him about the happening of every accident . . ." In general, breaches of such a clause are either by some form of conduct, or by a variation between statement given after the accident and the testimony given on trial. Where *conduct* of the assured is involved, the question becomes one of fact in each case to determine whether the non-cooperation was material. 72 A. L. R. 1454.

In Washington, the signing of a statement admitting negligence is a breach of the clause. *Koontz v. General Casualty Co.*, 162 Wash. 77, 297 Pac. 1031 (1931). Failure to appear at the trial is a breach, *Eakle v. Hayes*, 185 Wash. 520, 55 P. (2d) 1072 (1936), unless the assured has been transferred by his employer and will not come because the insurance company will not pay his wages plus expenses. *Lienhard v. Northwestern Mutual Fire Assn.*, 187 Wash. 47, 59 P. (2d) 916 (1936). It is not a breach to disclose to the other party the fact of insurance. *Hopkins v. American Fidelity Co.*, 91 Wash. 680, 158 Pac. 535 (1916).

It is generally held that a change in the account of the facts as given

by the assured will not alone avoid the policy when there is no finding of bad faith. *Guerin v. Indemnity Insurance Co. of North America*, 107 Conn. 649, 142 Atl. 268 (1928); *Finkle v. Western Automobile Ins. Co.*, 224 Mo. App. 285, 26 S. W. (2d) 843 (1930). The only two Washington cases dealing with this point prior to the instant case were *Moran Bros. Co. v. Pacific Coast Casualty Co.*, 48 Wash. 592, 94 Pac. 106 (1908); and *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 132 Pac. 393 (1913). In the *Moran Bros.* case the assured sent to the insurer a statement that the injured person was contributorily negligent; which was false. On discovery of this at the trial, the insurance company withdrew, alleging breach of the cooperation clause, but it was held that a mistake, in good faith, in giving a version of the facts is not a breach. In the *Taxicab Motor Co.* case, the officer of the plaintiff gave testimony at the inquest which differed from that he gave at the trial, and which was used at the trial to impeach him. This was held not sufficient to avoid the policy since the answers were made in good faith and were not wilfully false, and since the prior inconsistent testimony did not affect the jury.

Thus, until the *Hilliard case*, the Washington cases on this point followed the majority rule, holding that where no bad faith was shown, the mere fact that testimony at the trial differed from the statement made to the insurer, was insufficient in itself to avoid the assured's policy. The test as laid down in the *Hilliard* case seems to be whether or not the testimony at the trial is "wholly at variance" with the previous story of the assured. If the testimony is "wholly at variance" there need be no finding of bad faith or of wilfully false testimony. It will remain for the court to define just what the phrase "wholly at variance" means, and whether the general rule that some bad faith must be proved before the clause will be said to be breached, is to be overthrown.

J. M. D.