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Constitutional Law—Construction of Constitutional Provisions; Constitutional Law—Due Process—Closing Hours of Barber Shops; Criminal Law—Argument and Conduct of Counsel—Death Sentence; Divorce—Power of Court to Modify Decree as to Alimony; Insurance—Fidelity Bonds—Recovery for Defalcation; Lis Pendens—Affect on Holders of Unrecorded Deeds or Encumbrances

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RECENT CASES

CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS. In the recent case of *State v. Henry*, 25 Pac. (2d) 204 (N. Mex. 1933), the New Mexico supreme court held unconstitutional a statute passed by the New Mexico legislature providing an eight hour day for the employees of mercantile establishments, on the ground that it violated the "due process" clause of the New Mexico Constitution. In so doing the court said that economic arguments as to the constitutionality of this statute were inadmissible regardless of their merit since the people had decided what was constitutional under the "due process" clause when they adopted the Constitution in 1910. The court said, in effect, that the people of New Mexico adopted the "due process" clause of the New Mexico Constitution from the Federal Constitution at the time of the ratification of the Constitution in 1910, they adopted along with that clause the interpretation thereof which was at that time given to the clause in the Federal Constitution; that since that interpretation represented the will of the people at the time of the adoption, it was binding upon the court; and, most important of all, that the interpretation thus inherited was immutable and unchangeable irrespective of changing conditions and circumstances.

From an investigation of the cases, it seems fairly clear that a court when it interprets a constitutional provision can arrive at any conclusion within reason which it desires; but the means or rationalizations used to achieve the desired interpretation are numerous and varied. First the court must determine whether the particular constitutional provision in question is general or ambiguous. If it is neither, it is not open to construction.

When a court decides that the provision, the construction of which is in question, is general or ambiguous, a problem of construction and interpretation arises. The minority view in such cases, represented by the majority opinion of the court in *Home Building and Loan Ass'n v. Blausdell*, 54 S. Ct. 231 (1933) says that the Constitution is by definition a dynamic, living thing changing with the needs of society. The intent of the framers is unimportant from the standpoint of this group. According to their reasoning, each constitutional question should be decided *de novo* each time the question of its interpretation comes up, and although previous decisions may have some effect, its present interpretation should be such as will make it a part of a workable frame of government. *Niesel v. Moran*, 80 Fla. 98, 85 So. 346 (1920) *People v. Groves*, 219 App. Div. 233, 219 N. Y. S. 189 (1927)

In the great majority of cases, however, the court looks at the intent of the framers and/or of the people to determine how to construe a constitutional provision, keeping in mind the object sought to be accomplished thereby and the evils, if any, sought to be prevented or remedied. *Lybrand v. Wafford*, 296 S. W 729 (Ark. 1927) *Perry v. Industrial Accident Commission of California*, 180 Cal. 497, 181 Pac. 788 (1919) *People v. Stanley*, 255 Pac. 610 (Colo. 1927) *Raymer v. Trefry*, 239 Mass. 410, 132 N. E. 190 (1921) *State v. Becker* 290 Mo. 560, 235 S. W 1017 (1921) *Hemitch v. Floyd*, 130 S. C. 434, 126 S. E. 336 (1925) *State v. Reeves*, 44 S. D. 568, 184 N. W 993 (1921) *Williams v. Castleman*, 112 Tex. 193, 247 S. W 263 (1912) *Cann v. Lumsden*, 204 S. W 115 (Tex. Civ. App. 1918) Thus the rule is that when a provision is adopted from a prior constitution or from the constitution of another state, the interpretation given to the provision in its prior setting by the judiciary is presumptively adopted along with the provision itself. *Ex Parte Western Union Telegraph Co.*, 200 Ala. 496, 76 So. 438 (1917) *Arizona Eastern Rr Co. v. Hinton*, 20 Ariz. 266, 179 Pac. 963 (1919) *Ludlow-Sayre Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W 196 (1918) *Lyle v. State*, 80 Tex. Cr. Rep. 606, 193 S. W 680 (1917). But the court uses this rule only as a means of rationalization for achieving desired interpretations.

ness existing prior to the making of such assignment, and thereafter such assignor shall be freed from any liability on account of any unsatisfied portion of the indebtedness existing prior to the making of the assignment."

The presumption is that it was the intent of the people in adopting the constitutional provision to adopt the interpretation therewith, but it is not controlling if in the court's opinion it is unreasonable on the ground that the people did not intend to adopt that construction. *State ex rel. Pollock v. Becker* 289 Mo. 660, 233 S. W. 641 (1921).

In finding the intention of the framers and/or of the people at the time of the adoption of the constitution, the courts should not and have not restricted themselves to a technical and literal meaning of the words used. Just how far the court will go in each particular case depends on the personnel of the court, their political and social convictions, the particular constitutional question involved, the particular law the validity of which is in question, and the general economic and social situation then existing in the state in which the law is applicable. The most liberal view very closely approximates the view expressed by the majority opinion in the case of *Home Bldg. & Loan Ass'n v. Blaisdell*, 54 S. Ct. 231 (1933). These liberal courts say that the constitution was created and adopted with the intent that it be a frame of government suitable to the needs of a dynamic and progressive society, and so they say that they are best effecting the intent of the framers by interpreting the provision in question liberally. *City & County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 184 Pac. 604 (1919) *Potter v. Dark Tobacco Growers' Co-op. & Ass'n*, 201 Ky. 441, 257 S. W. 33 (1923) *Moore v. State Board of Charities and Corrections*, 239 Ky. 729, 40 S. W. (2d) 349 (1931) *State v. Keating*, 53 Mont. 371, 163 Pac. 1156 (1917) *Goodell v. Judith Basin County*, 70 Mont. 222, 224 Pac. 1110 (1924) *Buffalo Rapids Irr District v. Colloran*, 85 Mont. 466, 279 Pac. 369 (1929) *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294 (1930) *Arps v. State Highway Commission*, 90 Mont. 152, 300 Pac. 549 (1931).

Other courts have, however, limited very sharply the breadth of meaning which they are willing to give to the intentions of the framers and/or of the people. They adopt the view that the courts have nothing to do with arguments of convenience in the construction of a constitution, that it is their duty only to declare what the constitution has said and not necessarily to interpret the constitution so as to be a workable system of government. They will not bend the constitution to suit the law of the hour. It is their belief that if the law does not work well, the people can amend it and the inconvenience can be borne long enough to await that process. *State v. Clausen*, 142 Wash. 450, 253 Pac. 805 (1927) *Carter v. Cann*, 14 S. W. (2d) 250 (Ark. 1929) *Greencastle Township in Putnam County v. Black*, 5 Ind. 557, 565 (1854) *Broune v. City of N. Y.*, 213 App. Div. 206, 211 N. Y. S. 306 (1925) *State v. Schunz*, 194 Wis. 397, 216 N. W. 509 (1927) Compare the minority opinion in *Home Bldg. & Loan Ass'n v. Blaisdell*, *supra*.

How far a court will go in any given case is a matter depending on the individual court and the rationalization it chooses to adopt. It is quite incorrect to say of any court that it is liberal or conservative in its decision of constitutional questions. It is much better to say that in a particular case before the court at a particular time the court has arrived at a liberal or at a conservative conclusion. Each constitutional question which comes before the court is considered *de novo* and each decision must be considered individually. The court in every case has sufficient modes of rationalization at hand to arrive at any result within reason which it desires.

Even if the New Mexico court is taking the proper attitude in its interpretation of the rules of constitutional construction, it is submitted that the view which it takes of the "due process" clause as interpreted under the Federal Constitution is weak in that the "due process" clause has always been a living, changing thing as interpreted by the Supreme Court of the United States. The change under the Federal interpretation can easily be shown by a comparison of the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394 (1873) and *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747 (1932). In the former case the court refused to apply the "due process" clause to a state statute regulating slaughter-houses, while in the latter case the court held an Oklahoma statute regulating the ice business unconstitutional on the basis of the self-same "due process" clause. Would it not have been better for the

New Mexico court to have taken the view that the people in adopting the "due process" clause intended that it would be given the flexible construction given thereto by the Federal courts rather than the rigid construction which the New Mexico court gave it?

It is submitted that the New Mexico court was too strict in limiting the intent of the framers to the interpretation of the "due process" clause given it by the Supreme Court of the United States in 1910.

L. D. B.

CONSTITUTIONAL LAW—DUE PROCESS—CLOSING HOURS OF BARBER SHOPS. Plaintiff's barber shop was required to close at six P. M. by a city ordinance. A statute gave cities of the first four classes the right to regulate the opening and closing hours of barber shops. In a suit to have the enforcement of the ordinance enjoined, the court granted the restraining order on the ground that the ordinance was an unreasonable exercise of police power because it did not in any real or substantial manner bear any relationship to sanitation or health or any other legitimate purpose, and as a consequence it is unconstitutional as violating the due process clause. The fact that beauty parlors were not included in the ordinance did not discriminate against barber shops. *McDermott v. City of Seattle*, D. C. W. D. Wash. N. D., 4 Fed. Supp. 855 (1933).

The power of a state to make any restrictions and regulations reasonably necessary to protect the health, safety and general welfare of its members is beyond dispute. The rule is simple enough, but the application is difficult, and is constantly giving rise to problems most perplexing to the courts. In determining how far private rights must necessarily be invaded to affect the required protection the courts are torn between individual guaranteed rights on one hand and the welfare of the general public on the other. A statute denying bakers the right to work longer than ten hours a day has been held unreasonable because the hours a baker worked had no bearing on public health. Although considerable evidence was submitted showing that flour dust and fatigue greatly shortened the lives of bakers. *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937 (1905). Twelve years later the same court upheld a ten hour law for mills and factories because the state supreme court was satisfied that it was reasonable and it was shown that ten hours was the customary working day. The rule was announced that where reasonable men might differ as to its reasonableness, then the court will not inquire into the wisdom of the legislative act. *Bunting v. Oregon*, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. Rep. 435, Ann. Cas. 1918A, 1043 (1917).

Although courts take divergent views of close questions, from the decisional law the numerical weight of authority is in accord with the principal case. The one case contra is *Falco v. Atlantic City*, 99 N. J. L. 19, 122 Atl. 610, (1933), which suggested that the legislature might have seen the need of this stringent regulation to prevent the spread of disease, but in any event the act of the legislature was reasonable unless plainly unreasonable.

Statutes providing for the proper sanitary conditions of shops, and an examining board to determine qualifications of barbers, with necessary restrictions and regulations to accomplish that end, have been upheld as a reasonable exercise of police power. *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893 (1903) *State v. Walker*, 48 Wash. 8, 92 Pac. 775 (1907) note in 20 A. L. R. 1111.

Five states recently have declared void, ordinances fixing the closing hours of barber shops. The leading case is *Chaves v. City of Atlanta*, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 230 (1927) which held that it was unreasonable to single out one lawful business from others, there being no real basis for the discrimination. See 55 A. L. R. 242. An ordinance which applied to barber shops only and not to beauty parlors has been declared void as being discriminatory. *Ernesti v. City of Grand Island*—251 N. W. 899 (Neb. 1933), or as unreasonable and discriminatory *State v. City of Laramie*, 40 Wyo. 74, 275 Pac. 106 (1929). *Knigh v. Johns* 137 So. 509 (Miss. 1931) *City of Alexandria v. Hall*, 131 So. 722 (La. 1930).

It is apparent that hours of labor could be controlled by regulations other than by closing shop. Our state statutes have seen fit to prescribe

extensive precautions against the spread of disease, but they have not seen fit to close shop at six o'clock every evening as the necessary method to prevent disease from spreading. Nor is it reasonable to provide for more convenient hours for inspection, since the shops are inspected on the average of once a week. It would seem that the restriction does not bear a real or substantial relation to purposes regarded as a legitimate exercise of police power, and hence is a deprivation of property without due process of law

D. N.

CRIMINAL LAW—ARGUMENT AND CONDUCT OF COUNSEL—DEATH SENTENCE—Defendant appeals from a conviction of murder in the 1st degree with a recommendation for the death penalty on the ground that the closing argument of the prosecuting attorney, consisting of statements that, "In eight or ten years, the defendant would be pardoned by some weak-kneed governor, that the record shows a life sentence in this state amounts to but eight years, and that if the defendant were given a life sentence, he would be pardoned in that time or less," was such misconduct as to constitute reversible error. The supreme court upheld the sentence with three judges dissenting. *State v. Bradley*, 75 Wash. Dec. 416, 27 Pac. (2) 737 (1933).

The records of this state, according to a recent compilation, show that the correct average for a life sentence in this jurisdiction is nine and thirty-one hundredths years. But this average, like other life term averages in this country includes sentences completed by death as well as by discharge and is therefore of little or no value in determining when a "lifer" will probably be turned back on society.

It now seems fairly well settled in this state, in view of the instant case and *State v. Stratton*, 170 Wash. 666, 17 Pac. (2) 621 (1932), that remarks of the type used here do not constitute reversible error. The dissenting opinions in both of these cases, however, besides attacking the accuracy and propriety of such statements, contend that the jury has no right to consider them.

The majority of the cases on this question have held that while such arguments are improper and should not be permitted, they alone are insufficient to constitute reversible error. *State v. Junkins*, 147 Ia. 588, 126 N. W 689 (1910) *Wechter v. People*, 53 Col. 89, 124 Pac. 183 (1912) *Jacobs v. State*, 103 Miss. 658, 60 So. 723 (1913) *People v. Murphy*, 267 Ill. 304, 114 N. E. 609 (1916) *Chappell v. Commonwealth*, 200 Ky. 429, 255 S. W 90 (1923) *Tiernay v. Commonwealth*, 241 Ky. 201, 43 S. W (2) 661 (1931). A few cases, as a matter of policy or circumstance, have held arguments of this nature to constitute reversible error. *State v. Johnson*, 151 La. 627, 92 So. 139 (1922) *Berry v. Commonwealth*, 227 Ky. 528, 13 S. W (2) 521 (1929) *Dingus v. Commonwealth*, 149 S. E. 414 (Va. 1929). The minority hold that such statements are not objectionable, *McNeill v. State*, 102 Ala. 121, 15 So. 352 (1894) and that the prosecutor has a right to make them. *Lucas v. State*, 146 Ga. 315, 91 S. E. 72 (1916) *Lawler v. Commonwealth*, 182 Ky. 185, 206 S. W 306 (1918). *Miller v. Commonwealth*, 236 Ky. 448, 33 S. W (2) 590 (1930).

As shown by the *United States Census Bureau Reports*, a large number of those sentenced to life imprisonment in this country are released each year before their sentences expire, many of these having served only comparatively short sentences. In this jurisdiction and in others, where the death sentence in a murder case depends entirely upon the jury's recommendation, they should be entitled to know that in the average case a life sentence will probably not mean life.

P. L.

DIVORCE—POWER OF COURT TO MODIFY DECREE AS TO ALIMONY. W obtained an interlocutory decree of divorce by which she was awarded \$100 a month for her support with provision that H might pay her \$10,000 within six months and thereby be released from all future payments. Upon failure to pay any alimony installments totalling \$2,587.50, H was cited for contempt. In the show cause proceeding that followed, H was ordered to pay \$1,000 in full satisfaction of all claims. *Held*: that the court was without power to modify the decree for alimony as to the accrued installments. *Keck v. Keck*, 26 Pac. (2d) 300 (Cal. 1933).

As to the power of courts to modify decrees as to alimony a distinction must be made between *accrued* and *unaccrued* installments. As to the installments *which have accrued*, the law in Washington is in accord

with the recent California case above, to the effect that the moment the installments become due and unpaid, the rights and liabilities of the parties with reference to them, become absolute and fixed, and as to such, the decree is not subject to a subsequent modification. *Beers v. Beers*, 74 Wash. 458, 133 Pac. 605 (1913) *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2 (1911) *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634 (1911) *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673 (1912) *Phillips v. Phillips*, 165 Wash. 616, 6 Pac. (2d) 61 (1931) *Sistare v. Sistare*, 218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. 682 (1909). Even where the court expressly reserves jurisdiction in the interlocutory decree for the purpose of "changing the amount" the court is powerless to cancel or modify the accrued alimony. *Kinne v. Kinne*, 137 Wash. 234, 242 Pac. 388 (1926). So far as accrued installments are concerned, a judgment thereon affords a legal basis for the issuance of a writ of garnishment. *Boudwin v. Boudwin*, 159 Wash. 262, 292 Pac. 1017 (1930).

As to the power of the court to modify its decree as to *unaccrued installments*, the law in Washington, prior to the recent enactments of the 1933 Legislature, was succinctly expressed by Judge Webster in *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917 F 721 (1917) permitting the court to modify its decree in only five situations: (1) *Where the decree was one granting a divorce a mensa et thoro*, viz., suit for separate maintenance. In this situation, it was said that the continued existence of the status of marriage, upon which the power to grant decrees of alimony depends, carried with it the continuing power to modify or alter the allowance of alimony to meet new conditions. *State ex rel. Buttneck v. Superior Ct.*, 127 Wash. 101, 219 Pac. 862 (1923). (2) *Where the alimony awarded was temporary or pendente lite as distinguished from permanent*. In this situation, the court had the same power to modify its order with respect to temporary alimony that it had to make any other appropriate order in a case pending in court. (3) *Where there were minor children of the parties to the divorce action*, the power to modify the decree continued as long as the minor children remained within the protection of the court. *Holter v. Holter* 108 Wash. 519, 185 Pac. 598 (1919) *Hodge v. Hodge*, 125 Wash. 347, 215 Pac. 1044 (1923) *MaGill v. MaGill*, 133 Wash. 597, 234 Pac. 273 (1925) *Hart v. Hart*, 74 Wash. Dec. 301, 24 Pac. (2d) 620, (1933). (4) *Where the power to modify was expressly reserved in the decree*. (This was the most general custom) *State ex rel. Bushnell v. Superior Ct.* 168 Wash. 326, 11 Pac. (2d) 1071 (1932) *Bartow v. Bartow*, 170 Wash. 409, 16 Pac. (2d) 614, (1932). However where the sum awarded was for "maintenance, support and as a final settlement of the community property rights of the parties," the court construed the award as a property settlement, and hence was without power to modify the decree in view of Rem. Comp. Stat. 988, which provided that the order "as to the custody, management and division of property shall be final and conclusive upon the parties subject only to the right of appeal." *Cassut v. Cassut*, 126 Wash. 17, 217 Pac. 35 (1923). (5) *Where the power to modify was expressly granted by statute*. At the time the *Ruge* case was decided, no statute conferring upon the court such power, was in existence. Thus it was held that where the divorce was absolute, the alimony permanent, there being no children, nor any reservation in the decree, the court was powerless to modify the decree, other than on grounds which warrant an attack on judgments generally. *Ruge v. Ruge*, *supra*; *Rehberger v. Rehberger* 153 Wash. 591, 280 Pac. 8 (1929).

However the 1933 Legislature by amending section 988 of Rem. Com. Stat., and adding thereto sec. 988-2, has removed the necessity for the requirements enunciated in the *Ruge* decision. The amended portion of section 988 provides: "which order as to alimony and the care, support, and education of children may be modified, altered and revised by the court from time to time as circumstances may require." The new section, Rem. Rev. Stats. 988-2 provides: "All orders and judgments heretofore made and entered in divorce actions relative to alimony and support money may be modified, altered and revised by the court from time to time as circumstances may require." Thus after sixteen years, the prayer of Judge Chadwick in his concurring opinion in the *Ruge* case, when he said: "Every reason, the dictates of common sense, the interest

of society, and the logic of our statutes defining the status of married persons,—save the law—call for a different rule. It might well behoove the legislature of this state to put us in line with other states where the evil to which we are bound by authority has been cured by appropriate legislation," was answered.

J. J. L.

INSURANCE—FIDELITY BONDS—RECOVERY FOR DEFALCATION. Action to recover on a fidelity bond, conditioned to cover losses sustained through any defalcations of certain of plaintiff's employees. A, plaintiff's cashier, was covered by the bond. Plaintiff did a general mortgage and loan business and was also agent for a N. J. Ins. Co., making various collections for them. It was plaintiff's practice to take such payments in advance, giving interest on them until the date they were due. In 1926, A began to appropriate these funds, taking a total of about \$6,000 over a two-year period. The shortages thus created were concealed by applying subsequent advance payments to the shortened account. After 1928, A made no fresh appropriations but continued to cover up the existing shortages in the manner noted. The bond was taken out in 1931 and was not retroactive. After the bond went into effect, A continued to apply present payments to the credit of persons who had made prior payments, so that the specific shortage which existed when the bond took effect was made up and a new shortage created. Subsequently plaintiff discovered A's dishonesty for the first time, and an action was brought on the bond. The court directed a verdict for the defendant on the theory that there had been no misappropriation during the period covered by the bond. *Held*: It was error to direct a verdict on this theory. *White & Bollard, Inc. v. Standard Accident Ins. Co.*, 75 Wash. Dec. 149, 27 Pac. (2d) 123 (1933).

There are no previous decisions in this jurisdiction on the question presented, except one criminal case where the indictment for embezzlement charged a use by the defendant agent of his principal's money to cover up a prior defalcation, in which the conviction was affirmed. *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942 (1904). In the instant case, the court relied in part on this decision. However, the value of the case is doubtful, since conceding the wrongful application to be an embezzlement, yet it does not necessarily follow that any loss resulted from it.

There are two lines of cases in this country which split over the exact question presented in the instant case. The cases in accord almost uniformly go on the theory that the first defalcation creates a debtor-creditor relationship between the defaulter and his principal, and that the subsequent misapplication of the principal's money made during the currency of the bond, is a payment of the defaulter's debt, being the same as if he had used his principal's money to pay his debt to some third person. Hence, the first defalcation is wiped out, and there is a fresh misapplication which causes a loss to the principal. *American Bonding & Trust Co. v. Milwaukee Harvester Co.*, 91 Md. 733, 48 Atl. 72 (1900) *Fidelity & Deposit Co. v. Cunningham*, 177 Ark 638, 7 S. W. (2d) 332 (1928). However, to test the court's reasoning, suppose that the money is actually appropriated during the period covered by the bond, but the shortage is covered up in the manner employed in the instant case, so that after the term of the bond, the specific shortage which existed at the end of such term is made up and a new one created. If the principal now discovers the defalcations and brings an action, will the surety be allowed to say that the debt has been paid? The reasoning adopted by the Washington court necessarily permits the surety to thus deny his liability though such a result is illogical. *Detroit v. Weber* 29 Mich. 24 (1874)

The opposing line of cases generally take the stand that there is no actual loss, thus holding that the surety is not liable for any sums which actually go to the principal, even though they are improperly applied. *Golden Seal Assurance Society v. Aetna Casualty & Surety Co.*, 207 App. Div. 628, 202 N. Y. S. 674 (1924) *Royal Indemnity Co. v. American Vitri-fied Products Co.*, 117 Ohio St. 278, 153 N. E. 827, 62 A. L. R. 407 (1927).

What may be termed the "actual loss" theory seems preferable from a logical standpoint. Granting that the defaulter's application of the money to the wrong account to cover up his prior defalcation is a fresh defalcation, yet it is difficult to see how the principal can show that he is

damaged. *Royal Indemnity Co. v. North Texas Nat. Bank*, 25 S. W (2d) 822 (Texas 1930), affirmed in 34 S. W (2d) 249 (Texas 1931), which reverses the decision of the Court of Civil Appeals, 14 S. W (2d) 88 (Texas 1929).

R. E. Y.

LIS PENDENS—AFFECT ON HOLDERS OF UNRECORDED DEEDS OR ENCUMBRANCES

Action to quiet title by P, claiming under a decree issued in a divorce suit in which notice of the pendency was duly filed. After the commencement of the suit but prior to the filing of the *lis pendens* notice, P's husband, the recorded owner of the property in dispute, issued the deed under which D claimed, which was recorded subsequent to the filing of the *lis pendens* notice. Although both parties were actually aware of the other's claim prior to the issuance of the decretal order, D was not made a party to the suit. *Held*: Wash. Rem. Rev. Stat., sec. 243, providing for the filing of *lis pendens* notice, does not affect substantive rights as it is only procedural; the decree entered will not bar a superior outstanding unrecorded title of which P had actual notice, since such person was not made a party to the suit. *Chadown v. Claypool*, 74 Wash. Dec. 551, 25 Pac. (2d) 1036 (1933).

At common law all parties dealing with land involved in a pending suit were charged with notice of such suit and with the rights of the litigants. It was uniformly held, as a matter of necessity, that where the court had complete jurisdiction, purchasers from parties to a suit, of the land involved in the litigation, were bound by the judgment or decree entered thereon, whether such purchaser had actual notice or not. *Sorrel v. Carpenter* 2 P. Wms. 482, 24 E. R. 325 (Eng. 1728) *Garth v. Ward*, 2 Atk. 174, 26 E. R. 509 (Eng. 1741) *Murray v. Ballou*, 1 Johns. Ch. R. 566 (N. Y. 1815) *Newman v. Chapman*, 2d. Rand. 93, 14 Am. Dec. 766 (Va. 1823).

In Washington the common law rule of *lis pendens* has been modified by statute. In the absence of such modification the court in the principal case would have reached an opposite conclusion. Wash. Rem. Rev. Stat., sec. 243 provides that constructive notice is not effectual until it is filed in strict accordance with the statute, and that holders of unrecorded deeds filed for recording subsequent to the notice shall be bound by all proceedings subsequent thereto, as if, they had been made parties to the action. In construing this statute it was held in *Eldridge v. Stenger* 19 Wash. 697, 54 Pac. 541 (1898) *Biggs v. Hoffman*, 60 Wash. 495, 111 Pac. 576 (1910) *Tallyn v. Cowden*, 158 Wash. 335, 290 Pac. 1005 (1930) that the filing of a notice of the pendency of an action involving real property, even though prosecuted to judgment, will not foreclose or bar the assertion of a superior outstanding unrecorded title of which the plaintiff in the action had notice; *Gust v. Gust*, 78 Wash. 414, 139 Pac. 228 (1914) *Merrick v. Pattison*, 85 Wash. 240, 147 Pac. 1137 (1915) held that the filing of the notice will not prevent the holder of a superior outstanding unrecorded title of which the plaintiff in the action does not have notice, from appearing in the action and asserting such title; *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429 (1905) *Wright v. Jessup*, 44 Wash. 618, 87 Pac. 930 (1906) are to the effect that it is no longer necessary to make the owner of an inferior title or claim in right and subordinate to that of the plaintiff, which accrued prior to the commencement of the suit and filing of the *lis pendens*, a party to the suit as it was at common law. *Ellis v. McCoy*, 99 Wash. 157, 169 Pac. 973 (1918), holds that a holder who records his conveyance subsequent to the filing of a *lis pendens* notice by a plaintiff in an action brought against the holder's grantor, involving his title, is bound by the decree or judgment rendered against the grantor, if the plaintiff has no notice at the time of his filing the *lis pendens*, and, if he acquires no actual notice until after the judgment or decree is rendered.

O. K. A.