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# Domestic Relations

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bility in the law of damages in this state; but that it missed an excellent opportunity to make a much greater one.

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**Cost Plus Contract.** *Walsh Services, Inc. v. Feek,* 145 Wash. Dec. 269, 274 P.2d 117 (1954) involved a contract to remodel a house on what the court construed to be a cost plus basis. When the job was finished, plaintiff building contractor presented a bill to defendant that came to about double the price quoted in plaintiff's original estimate. The defendant refused to pay the bill and plaintiff sought to foreclose a mechanic's lien on defendant's property. The Supreme Court affirmed the trial court's decision that plaintiff could recover only what the job *should have cost.* This figure was arrived at by the computations of a reputable architect. It was held that a cost plus contractor must exercise the same skill and ability he would use on a contract for a fixed sum, and that the contractor must show that money he claims to have expended on the job was *necessarily* expended for labor and materials on the job. If the contractor cannot show these facts, he may recover only the reasonable cost, plus his percentage.

**Reasonableness of Expense Incurred.** In *Cudmore v. Tjomsland,* 44 Wn.2d 308, 266 P.2d 1058 (1954), plaintiff sued for defendant's breach of a warranty that certain livestock was free from disease. The only issue before the Supreme Court was the amount of damages. The court sustained defendant's contention that the amount of a veterinarian's bill was not established by competent evidence, since there was no testimony as to the reasonableness of the bill. The court relied on *Carr v. Martin,* 35 Wn.2d 753, 215 P.2d 411 (1950), as authority for its holding. The *Carr* case and those cited therein involved medical, hospital and nursing expenses incurred as a result of personal injuries, however, and may be rather dubious authority for the holding in the *Cudmore* case.

## DOMESTIC RELATIONS

**Divorce—Child Custody.** In *Habich v. Habich*[1], the mother was awarded the custody of the children, then six and four years of age, in 1948, in an interlocutory decree of divorce. For three years the children had lived at the respective homes of the mother's mother, the father's parents, and of the mother, followed by nearly two years at the home of the father. This had been due to the father's failure to make support money payments, the mother's past ill health, and the father's unwillingness to surrender the children during school terms. When the mother remarried and desired to take the children back, the father instituted this proceeding to modify the divorce decree by transferring the custody of the children to him. The court found that the mother and her new husband were "very suitable as guardians for these growing children"[2] and that there were adequate school, church, and recreational facilities,

[1] 44 Wn.2d 195, 266 P.2d 346 (1954).
[2] *Id.* at 200, 266 P.2d at 349.

and scouting organizations at their home. Notwithstanding these findings, the court held that the circumstances of where the children had become happily established in the home of their father for a considerable period of time outweighed the desirability of having the children live with their natural mother.

This decision would seem to be inconsistent with the rule, long followed by the courts in divorce cases where the custody of a child is at issue, that the paramount concern of the courts is the welfare of the child, and, if the child is of tender years, its welfare will ordinarily be best served by awarding its custody to the mother unless it clearly appears that she is so far an unfit and improper person that her custody of it would endanger its welfare.[3]

The reasoning behind the rule was set forth in an early Washington case[4] on the problem in language which has been quoted with approval many times as follows: "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover a child needs a mother's care even more than a father's."[5]

However, in support of this complete deprivation of the mother's custody, the court cited a Washington case[6] where, because of the settled condition of the children in school in Vancouver, Washington,

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[3] Allen v. Allen, 38 Wn.2d 128, 228 P.2d 151 (1951). The courts have felt compelled to disregard this rule, known as the "tender years doctrine", in exceptional cases such as Broech v. Broech, 159 Wash. 409, 293 Pac. 464 (1930), where an older brother of bad repute lived with the mother.

[4] Freeland v. Freeland, 92 Wash. 482, 483, 159 Pac. 698, 699 (1916).

[5] Thus, the fact that a mother's conduct is not what others might think the most proper is not of itself sufficient to deprive her of the right to the custody of her child. See the following cases in which the mother was awarded custody: Sorge v. Sorge, 112 Wash. 131, 135, 191 Pac. 817, 818 (1920) ("had been somewhat reckless in her manner"); Prothero v. Prothero, 137 Wash. 349, 350, 242 Pac. 1, 1 (1926) ("was guilty of certain indiscretions"); Mason v. Mason, 163 Wash. 539, 540, 1 P.2d 885, 885 (1931) ("on a few occasions . . . may have been somewhat indiscreet"); Ostrander v. Ostrander, 176 Wash. 669, 670, 30 P.2d 658, 658 (1934) ("was self willed, unstable and indiscreet" and boarded her child out at several places from the time the parents were separated in September, 1929 until October, 1930); Flint v. Flint, 15 Wn.2d 443, 131 P.2d 426 (1942) (suffered from a mental illness, as did her two sisters, which was of a recurring nature); Hansen v. Monagahan, 21 Wn.2d 695, 152 P.2d 712 (1944) (boarded her children in Washington and lived in California); Rogers v. Rogers, 25 Wn.2d 369, 380, 170 P.2d 859, 864 (1946) ("was guilty of indiscretionate [sic] acts and misconduct"); Norman v. Norman, 27 Wn.2d 25, 29, 176 P.2d 349, 351 (1947) ("admits she is an adulteress"); Sewell v. Sewell, 29 Wn.2d 190, 195, 186 P.2d 372, 375 (1947) ("neglected her baby, especially during the first few months after his birth when her motherly care was most needed"); Pearce v. Pearce, 37 Wn.2d 918, 924, 226 P.2d 895, 899 (1951) ("absented herself from her home on occasion to the possible prejudice of the children"); Bigelow v. Bigelow, 39 Wn.2d 824, 825, 239 P.2d 317, 317 (1951) ("was guilty of drinking and improper conduct"); Guiles v. Guiles, 41 Wn.2d 377, 379, 249 P.2d 368, 369 (1952) (did not have "control of her emotions").

[6] Hathaway v. Hathaway, 23 Wn.2d 237, 160 P.2d 632 (1945).

where they had lived from 1942[7] until 1945, the court awarded divided custody to the father during the school year and to the mother during the vacation periods. But in that case there were additional circumstances against awarding the mother complete custody in that each parent had been granted a divorce from the other because of mutual misconduct and the trial court had "admonished both parties that certain changes of conduct must take place so far as the children were concerned."[8] Further, it was found that the father and his married sister, who kept house for him, were in a better position to take care of the children than the mother who lived in the "modest family home"[9] in Long Beach, Washington and engaged in "various kinds of employment."[10]

A Washington case, perhaps more in point, is *Schorno v. Schorno*[11] where the mother was awarded a divorce together with the custody of the children. After several months in a vain attempt to live and support her two children upon the amount she was receiving from the father she surrendered the children to him temporarily. Two years later the father petitioned for and was awarded the custody of the children. In reversing the trial court and awarding custody to the mother the court said, "We are convinced that appellant then did the only thing that she could do when she turned the children over to respondent. Her right to the custody of her sons is nowise prejudiced by her act."[12]

It would seem that in the balance of what is best for the child's welfare, if the mere establishment in the home of the father for less than two years outweighs "the mother's gentle care and affection,"[13] then we have come to a point where the courts no longer assign much weight to what the courts previously considered "the birthright of every child."[14]

**Divorce—Alimony.** The criterion or standard that the Washington courts have adopted respecting the allowance of alimony is based on two factors: (1) The necessities of the wife; and (2) the financial ability of the husband.[15] The only way a decree granting alimony can be modified is by the showing of a material change in the conditions

[7] Brief of Appellant, page 3.
[8] Note 6 *supra*, at 240, 160 P.2d at 634.
[9] *Id.* at 239, 160 P.2d at 234.
[10] *Ibid.*
[11] 26 Wn.2d 11, 172 P.2d 474 (1946).
[12] *Id.* at 20, 172 P.2d at 479.
[13] Delle v. Delle, 112 Wash. 512, 515, 192 Pac. 966, 967 (1920).
[14] Mason v. Mason, *supra* note 4 at 541, 1 P.2d. at 886.
[15] Patrick v. Patrick, 43 Wn.2d 139, 260 P.2d 878 (1953).

and circumstances of the parties since the decree was rendered which is still existing at the time of application for its modification.[16] From the decisions, it is apparent that the change in the conditions and circumstances contemplated has reference, as in the first instance, to the necessities of the wife and the financial ability of the husband.[17]

*Gordon v. Gordon*,[18] a 1954 Washington case, and *Warning v. Warning*,[19] a 1952 Washington case of very similar facts, were actions to modify a decree granting alimony. In each case, when the wife was awarded alimony, prices were low and she was able to work and when she sought to increase the alimony, prices were high, she was unable to engage in heavy labor due to an arthritic condition of the back, and the husband had a large increase in earning power.

Notwithstanding the similarity of facts, the courts arrived at different results. In the *Warning* case the court took judicial notice of the shrinkage in the purchasing power of the dollar, held that there was a material change in the conditions and circumstances of the parties, and awarded an increase in alimony. But in the *Gordon* case the court refused to award an increase in alimony and stated that "the fact that the wife's financial requirements have increased is not alone sufficient to establish need for increased alimony payments. It must also be shown that there is no other practicable way of meeting the financial problems."[20]

Thus, the *Warning* case inferentially adopts the rule that the wife is not obliged to seek employment, if able to work, to relieve the husband of the obligation of support when he has the ability to support. But the *Gordon* case holds that, when possible, the wife must either obtain employment or make economies in her living expenses.

The decision of the *Gordon* case would seem to be a return to the doctrine that if the wife is able to work and there is no good reason why she should not do so, she ought not to be encouraged to remain in idleness. This doctrine originated in *Lockhart v. Lockhart*[21] where it appeared that at the time of the divorce the community property had been divided, and that the husband had paid $9,100 in alimony in four years, but that the wife, who had no children, had made no effort to obtain work. The court said, in effect, that it was against the policy of the law

[16] Bartow v. Bartow, 170 Wash. 409, 16 P.2d 614 (1932).
[17] Bartow v. Bartow, 12 Wn.2d 408, 121 P.2d 962 (1942).
[18] 44 Wn.2d 222, 266 P.2d 786 (1954).
[19] 40 Wn.2d 903, 247 P.2d 249 (1952).
[20] Note 18 *supra*, at 227, 266 P.2d at 789.
[21] 145 Wash. 210, 259 Pac. 385 (1927).

to give a divorced wife a perpetual lien upon her divorced husband's future earnings, except under the most unusual circumstances.

This doctrine, however, has not been in accord with the settled law in this state. Viewing the *Lockhart* case in its legal aspect, it is to be observed that no cases are cited in support of the decision.[22] The Washington courts have distinguished the *Lockhart* case or have refused to follow the rule declared therein in several cases[23] and have applied its policy in but one case.[24] But whether or not this is a return to the *Lockhart* doctrine, the fact remains that the court has apparently switched its position with respect to the obligation of the wife to seek employment.

RICHARD D. BONESTEEL

**Divorce—Right to Collateral Attack.** In re *Englund's Estate*,[25] was a proceeding on petition of decedent's sister to remove decedent's purported wife as administratrix of his estate. Petitioner alleged that the purported wife's marriage was void because her divorce from her previous husband was granted by an Idaho court at a time when neither of the parties to the divorce was domiciled in Idaho. The trial court found that the purported wife was not domiciled in the state of Idaho at any time during the divorce proceedings. Judgment was entered removing her as administratrix and this appeal followed. In determining, as a matter of first impression in this state, whether decedent's sister, for herself and other collateral heirs, strangers to the divorce, should be permitted to attack the Idaho divorce, the Supreme Court in a 5-4 decision held that a stranger to a divorce decree had no standing to attack it in an action to determine private property rights unless the divorce decree affected some right or interest which the stranger had acquired prior to or at the time of entry of the final decree of divorce.

To this opinion a vigorous dissent was entered by four members of the court. They argued that RCW 26.08.200[26] is an expression of strict public policy declared by the legislature and that it was not within the

[22] Bartow v. Bartow, *supra* note 17.

[23] Underwood v. Underwood, 162 Wash. 204, 298 Pac. 318 (1931); Warning v. Warning, 5 Wn.2d 383, 105 P.2d 715 (1940); Bartow v. Bartow, *supra* note 17; Warning v. Warning, 21 Wn.2d 85, 150 P.2d 64 (1944); Duncan v. Duncan, 25 Wn.2d 843, 172 P.2d 210 (1946) (see the separate concurring opinion of Simpson, J., which states that the Lockhart case should be overruled); Warning v. Warning, 40 Wn.2d 903, 247 P.2d 249 (1952).

[24] Murray v. Murray, 26 Wn.2d 370, 174 P.2d 296 (1946).

[25] 145 Wash. Dec. 660, 277 P.2d 717 (1954).

[26] "A divorce obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for divorce was commenced."

purview of the court to whittle such public policy away by decision. They also emphasized that it has always been recognized at the common law that ". . . the invalidity of void marriages could be maintained in any proceeding, either direct or collateral, before or after the death of the parties."[27]

The majority answered the public policy argument advanced by the dissent by reasoning that ". . . the public is interested only in the sanctity and retention of the marital status and not in property rights.[28] . . . Public policy is not concerned with and does not extend to a situation where an action is commenced for the purpose of determining private property rights. In such an action a stranger to the decree has no standing to attack it unless such decree affected some right or interest which he had acquired prior to its rendition."[29] The argument of the minority of the court pertaining to the common law right of collateral attack was also dismissed by the majority who apparently recognized that such a common law doctrine existed, yet held it inapplicable where a stranger to the divorce proceeding, who has acquired no right or interest prior to the rendition of such decree, seeks to collaterally attack the divorce.

It was further indicated by the dissent that some of the authorities relied upon by the majority to sustain their decision ". . . are beside the point with which we are here concerned."[30] Indicative of such authority is *Crockett v. Crockett*,[31] which held as did the majority in

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[27] 145 Wash. Dec. 660, 668, 277 P.2d 717, 722 (1954), citing *In re* Romano's Estate, 40 Wn.2d 796, 805, 246 P.2d 501, 506 (1952).

[28] 145 Wash. Dec. 660, 665, 277 P.2d 717, 720 (1954).

[29] *Id.* at 666, 277 P.2d at 721. A further argument suggested by the court as militating against public policy requiring the non-recognition of these irregular foreign divorces is that "It is questionable whether the legislature intended to extend its declaration of public policy to situations which would result in bigamous marriages and illegitimate children, the result of such marriages." However would such children necessarily be illegitimate in view of RCW 26.08.060 which provides for the legitimacy of those children conceived or born during the existence of a marriage of record which is later declared void and entitles such children to all the rights of legitimate children notwithstanding the subsequent annulment of the marriage? Does not this statute substantially eliminate the threat of such children being declared illegitimate?

[30] *Id.* at 670, 277 P.2d at 723.

[31] 26 Wn.2d 877, 181 P.2d 180 (1947). This case concerned an action by the administrator of his deceased mother's estate against his father. He alleged that a final decree of divorce obtained by his father from the deceased should be set aside because of fraud and that he be decreed to be the owner of one-half of the property belonging to the parties at the time of the divorce. The court held that the plaintiff being a stranger to the divorce decree and having no interest in the subject matter of the divorce action or the property therin involved, at the time the final decree of divorce was entered, was not entitled to bring the action. The dissent in the Englund case, distinguished Crockett v. Crockett upon the basis that, "There the divorce under attack was only voidable and the language used was directed at the point that, the divorce decree being only voidable, the death of the party having the sole right to challenge it ended further inquiry." The

the present case. However there was no question in that case involving jurisdiction or of a void decree of divorce.

The cases of *Dietrich v. Dietrich*,[32] *Union Bank & Trust Co. v. Gordon*,[33] and In re *Romanski's Estate*[34] were also cited by the majority. As to their lack of persuasive authority in the principal case the dissent stated. "It is universally recognized that a litigant, by his own conduct, can estop himself from invoking a statute such as the one with which we are here concerned. These three cases are estoppel cases and as such are beside the point with which we are here concerned."[35]

As further support for their decision the majority cited the rule as stated in Freeman, *Judgments:* "It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, who are permitted to impeach the judgment. Being neither parties to the action nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition."[36]

In the footnote supporting the general rule announced, Freeman cited thirty-four cases in which this general rule was applied. However not one of these thirty-four cases concerned a divorce collaterally attacked as void for lack of jurisdiction. In the same note the author then cited *Estate of Pusey*, "limiting the rule that a third party's pre-existing rights had been adjudicated, and holding it inapplicable where a divorce decree, coming collaterally in question in a proceeding to probate a will, is attacked as void."[37] Hence it would seem that this qualifying note to

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majority of the court in the Englund case although interpreting the decision in Crockett v. Crockett in a somewhat different light, nevertheless admitted that there was no question in that case involving jurisdiction, or of a void decree of divorce.

[32] 41 Cal.2d 497, 261 P.2d 269 (1953).

[33] 116 Cal. App.2d 681, 254 P.2d 644 (1953).

[34] 354 Pa. 261, 47 A.2d 233 (1946).

[35] 145 Wash. Dec. 660, 670, 277 P.2d 717, 723 (1954).

[36] 1 FREEMAN, JUDGMENTS § 319 (5th ed. 1925). *In re* Tamke's Estate, 32 Wn.2d 927, 204 P.2d 526 (1949) cited by the majority, similarly was an estoppel case.

[37] *In re* Pusey's Estate, 180 Cal. 368, 181 Pac. 648 (1919). The appellants attacked the order of the lower court which admitted the will of testatrix to probate, upon the ground that the will was revoked by the alleged marriage of the testatrix. The respondents contended that the testatrix never in fact became married in that her purported husband had never been validly divorced from his former wife and hence that the will in question had never been revoked. The basis of the appeal is that the lower court improperly overruled appellants objection that it is not proper for a stranger, who had no interest in the outcome of a judgment at the time it was made, to collaterally attack it, even upon the ground that it is void for want of jurisdiction. The court in overruling the objection of the appellants and allowing the respondent to

the general rule should eliminate Freeman, *Judgments*[38] as an authority for the proposition advanced by the majority in the principal case.[39]

Notice should also be taken of the impossible position in which a claimant, such as the respondent in the principal case, is placed by virtue of the rule announced in the *Englund* case. Such a claimant being a stranger to the divorce decree can have no standing to attack the decree in an action to determine private property rights in that, since a living person can have no heirs, he can acquire no right or interest prior to or at the time of entry of the final decree of divorce.

JOHN R. TOMLINSON

**Divorce—Distribution of Property.** *Bernier v. Bernier,* 44 Wn.2d 477, 267 P.2d 1066 (1954). Holding 1: "We know of no divorce case . . . in which . . . the issue has been presented . . . and an award of property to the parties as tenants in common has been approved." But see *Wells v. Wells,* 130 Wash. 578, 228 Pac. 692 (1924), which held, "We do not feel warranted in disturbing the decree, in so far as it awards to each an undivided one-half interest in the farm." See 29 *Wash. L. Rev.* 115 (1954). Holding 2: "While a property settlement agreement, fairly reached, should have great weight with the court in determining the property rights of the parties to a divorce action, it is not binding on the court." But c.f. *Parsons v. Tracy,* 127 Wash. 218, 220 Pac. 813 (1923), which held, referring to a property settlement agreement, ". . . yet courts will not set aside a contract deliberately entered into unless it clearly appears that there was such overreaching as amounted to a deliberate fraud."

**Child Custody—Change in Conditions Based on Interference with Visitation Rights.** In *Joslin v. Joslin,* 145 Wash. Dec. 333, 274 P.2d 847 (1954), the divorce decree awarded the father the custody of the children subject to the mother's right to visit said children. Subsequently the father removed the children from Spokane, Washington to Phoenix, Arizona and the mother filed to modify the divorce decree based on a change of circum-

collaterally attack the purported husband's divorce, states that "a judgment absolutely void . . . may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever. . . . It is indeed stated in 23 Cyc. 1068, that strangers to the record can attack a judgment only when rights accruing to them prior to its rendition are affected. We have examined all the cases cited to support this statement. In each case property rights had been the subject of adjudication, and the rights of the party attacking the judgment had arisen with respect to the property in question after the judgment had been rendered. The judgment was in no case alleged to be void. Obviously no rule based on these cases had any application to the case at bar."

[38] 1 FREEMAN, JUDGMENTS § 319 (5th ed. 1935).

[39] However it should be mentioned that the Florida court in deMarigny v. deMarigny, 43 So.2d 442 (Fla., 1949), invoked 1 FREEMAN, JUDGMENTS § 319 (5th ed. 1925) to preclude collateral attack by a third party in a situation somewhat similar to that of the Englund case. In the deMarigny case the plaintiff brought suit to annul a marriage upon the ground that the defendant never was legally divorced from his first wife in that the Florida court which granted the divorce did not have jurisdiction. It was contended that the state was a third party and was not estopped to collaterally attack the divorce. The court upon the basis of the rule in FREEMAN, JUDGMENTS, *supra,* denied the collateral attack and dismissed the annulment upon the ground that the decree of divorce under attack had not adversely affected the rights of plaintiff which existed at the time of entry of the decree.

stances interfering with the rights of visitation granted in the original decree. The trial court granted the father's motion for judgment on the pleadings and the mother appealed. The court, deciding for the first time whether an allegation of such facts is a sufficient allegation of change of circumstances to require a hearing on a petition to modify the divorce decree, held that ". . . the welfare of innocent children, victims of a broken marriage, is too important and too sacred to be disposed of by a judgment on the pleadings, unless it clearly appears from the face of the record that the petitioner (mother) has no right to a modification of the divorce. Here the application alleges facts showing at least an interference with, and perhaps a deprivation of the right of visitation granted in the original decree. Those alleged facts show a change of condition entitling appellant (mother) to a hearing on her application for modification."

**Annulment of Voidable Marriages.** *Saville v. Saville,* 44 Wn.2d 793, 271, P.2d 432 (1954), concerned a wife's suit to annul a marriage upon grounds that she was induced to enter it by the fraudulent misrepresentations of her husband. The Superior Court of King County entered a decree of annulment upon the default of the husband, and the prosecuting attorney pursuant to the authority vested in him by RCW 26.08.080, appealed to the Supreme Court. There was no question but that the wife was induced to enter into the marriage through the fraud of the defendant. However, it was the appellant's contention that whatever jurisdiction the court formerly had to annul voidable marriages was withdrawn by the divorce act of 1949, and that only void marriages could now be annulled. The court refused to accept fully the argument of the appellant, and expressed no opinion as to his broad thesis that it was the legislative intent that the remedy of annulment no longer was to be available in cases where the marriage was voidable. Rather, the court narrowed the decision to only those marriages described as voidable by RCW 26.04.130 and for which the remedy of divorce is provided by RCW 26.08.020(1). As to these marriages the court held that annulment no longer is available and that divorce is now the exclusive remedy. However as to those marriages which are voidable and are not included within RCW 26.08.020(1), such as marriages prohibited by RCW 26.04.030, the remedy of annulment apparently will still be allowed. For a comprehensive discussion of the ramifications of the *Saville* case and of the general problem of annulment of voidable marriages under the divorce act of 1949 see Comment, *Annulment Under the Washington Divorce Act of 1949,* 30 WASH. L. REV. 62 (1955).

## EQUITY

**Mandamus—Taxpayer's Capacity to Maintain Action Against State Officers.** In *State* ex rel. *Lemon v. Langlie*[1] four taxpayers (relators) commenced an action in the Superior Court seeking a writ of mandate to compel the governor of the State and the individual commissioners, etc., of thirteen state administrative agencies or departments (respondents) to return the offices, books, records, and functions from Seattle, where they were located, to Olympia, the State Capitol. It was alleged that the relators had addressed a written demand to the Attorney General of the state requiring him to act in the premises, and that

[1] 145 Wash. Dec. 74, 273 P.2d 464 (1954). See also *Constitutional Law* at page 92.