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Creditors' Rights

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Co. v. *Alaska Barge Co.*, 79 Wash. 216, 140 Pac. 334 (1914); *Locomotive Exchange* v. *Rucker Bros.*, 106 Wash. 278, 179 Pac. 859 (1919).

Pensions—Pension Statutes as Imposed Obligations of a Contractual Nature. The case of *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), was an action by a former city policeman for an increase in his statutory pension. *P* began employment with the *D* city's police force in 1925. At that time a statute provided, inter alia, that a policeman for a first class municipality was eligible for retirement with a life pension after twenty-five years of service. The statute fixed the pension rate at one-half of the salary attached to the rank held by the retiring policeman for the year immediately preceding retirement. The pension fund was to be composed of compulsory non-refundable contributions by the members of the force, and matching funds contributed by the municipality. However, in 1937 this statute was amended. As amended it provided for various additional fringe benefits, but changed the formula for ascertaining the maximum pension payable to any retiring member. Under this amended formula no member could receive more than $125 per month (which in 1947 was an amount equal to one-half of the monthly salary of a police captain), and in no case were the member's contributions to exceed an amount equal to 2% of the salary rate at which the maximum pension was payable. In 1943 *P* was made a captain at a salary of $370 per month, yet his pension contributions were deducted as if his salary were only $250 per month. This was the proper procedure under the 1937 statute. In 1950 *P* retired and was awarded the maximum pension payable under the 1937 statute, $125 per month. *P* then began an action to compel *D* city to increase his pension to $185 per month, which amount was the proper amount as calculated under the statute in force in 1925 when *P* began work. *P* contended that his pension rights were to be determined by this 1925 statute, and that the 1937 amendment was void as to him.

Held, for *P*. The payments provided for by either statute were not gratuities, but were deferred compensation for services. The 1925 statute was therefore regarded as imposing upon the city an obligation of a contractual nature, and imparting to *P* a correlative right, both of which accrued at the time *P* began employment. The 1925 statute was thought to be part of *P*'s contract of employment; consequently, the 1937 amendment was held void as to *P* apparently on the ground that it violated the constitutional prohibition against state laws impairing the obligations of contracts. Following various California decisions, the court stated that the right to a pension, though conditional, accrues at the time employment is begun, and that subsequent legislation is ineffective to alter that right *unless* such legislation is reasonably necessary to maintain the flexibility and integrity of the system.

The dissenting opinion questioned the existence of any contract of employment, and maintained that even if one were presumed, *P* could be deemed to have assented to its modification since he acquiesced in the diminution of his contribution to the fund.

A critical discussion of the conflicting theories utilized by various courts to resolve similar statutory pension problems may be found in 56 COLUM. L. REV. 251 (1956).

CREDITORS' RIGHTS

Redelivery Bond—Waiver of Rights. In the recent case of *Adams v. Thibault*,[1] the court held that posting a redelivery bond by an attachment defendant who successfully defends against the court action of the attaching plaintiff does not waive the right to recover for wrongful attachment.

[1] 149 Wash. Dec. 22, 297 P.2d 954 (1956).

Defendant in this action, Thibault, had commenced an action against Adams and had attached the latter's automobile at the outset of the action. Adams posted a redelivery bond and regained possession of the automobile. Thibault's suit was dismissed with prejudice whereupon Adams brought the present suit for the tort of wrongful attachment. The trial court sustained a demurrer and on appeal, expressly overruling a case on all fours, the court reversed and remanded the cause.

There are two previous Washington cases that are directly in point: *Brady v. Onffroy*,[2] and *Gutter v. Joiner*.[3] In the *Brady* case the court considered a redelivery bond as an unconditional promise by the defendant to pay the judgment of the court, and, under the statute[4] it amounted to a discharge of the writ of attachment. Since the defendant's promise was unconditional, when plaintiff won his case, the bond became payable and defendant could not then contest the regularity of the attachment proceedings. The court held that since the attachment defendant had had an opportunity to question the regularity of the attachment at the attachment proceedings, the election to post a redelivery bond was a waiver of his rights to contest those proceedings.

The court in the *Gutter* case, relying on the *Brady* case, affirmed a judgment for the defendant in an action for wrongful attachment. It is important to note that in the *Gutter* case the attaching plaintiff did *not* recover in the original action of the debt, whereas in the *Brady* case the plaintiff *had* recovered. Despite a vigorous dissent, the court in the *Gutter* case applied the rule from the *Brady* case and quoted therefrom:

> ... the bond stands as security for any judgment that may *thereafter be rendered against him* in the action, and both he and his surety waive any right to attack the regularity of the attachment." (Emphasis added.)[5]

As was pointed out, however, the judgment in the *Gutter* case was *not* thereafter rendered against the defendant; it was rendered against the attachment plaintiff.

In the *Adams* case the court, sitting en banc, unanimously overruled the *Gutter* case. The court realized that the result of the original action should determine the effect of the posting of a redelivery bond. If the attachment plaintiff wins, the defendant has lost his right to question the attachment. However, if the defendant prevails, any wrongful

[2] 37 Wash. 482, 79 Pac. 1004 (1905).
[3] 56 Wash. 202, 105 Pac. 457 (1909).
[4] RCW 7.12.250, 7.12.270, and 7.12.290.
[5] 56 Wash. 202, 203, 105 Pac. 457, 458 (1909).

attachment thereby becomes actionable. The dissent in the *Gutter* case pointed this out, and the court now accepts the principle. It was also recognized by the Utah court[6] which directly rejected the majority opinion of the *Gutter* case and considered the dissent in that case as the proper expression of the law.

The reasoning of the *Adams* case appears sound. The fundamental purpose of a redelivery bond is to allow an attachment defendant the use of the attached property and at the same time indemnify the plaintiff from possible loss due to unlawful disposition by the defendant. The defendant has the right at the attachment proceedings to contest the regularity of the procedure. RCW 7.12.250[7] allows him the opportunity to post a redelivery bond to retain the property. The *Brady* case adopted the majority rule[8] that having elected to post a redelivery bond, the defendant had waived his right to contest the authenticity of the attachment. The reasons for this rule are: the defendant should not be able to cloud the issue of the alleged indebtedness in the original action; nor should he, by a later suit for wrongful attachment, unduly delay satisfaction of the judgment against him. But when the court hears the original suit and determines that the plaintiff has no cause of action, the defendant's promise in the bond to satisfy the judgment becomes a nullity. If the defendant can show in a new suit that the plaintiff's attachment was tortious, the mere promise made by the defendant to satisfy an adverse judgment should not preclude him from recovering from the tort-feasor. If a tort has been committed, damages should be allowed. The attachment plaintiff is not being treated unfairly; he is merely paying for his wrongful act.

Formerly, a person with a wholly unfounded claim could attach maliciously, and, if the defendant desired to retain the use of the property during the litigation, the posting of a redelivery bond assured the plaintiff that no matter how tortious his actions he could not be held accountable to the defendant. The rule established by the *Adams* case should deter unwarranted attachments. The holding allows an alleged debtor to retain his property and still recover for tortious attachment if the debt cannot be proved in the subsequent action.

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[6] St. Joseph Stock Yards Co. v. Love, 57 Utah 450, 195 Pac. 305 (1921).

[7] RCW 7.12.250: "If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of the defendant to the action."

[8] 72 A.L.R. 120 (1931).

Ambiguities of Conditional Sales Contract and Chattel Mortgage. In the recent case of *Smith v. Downs*[1] the court was again confronted with the problem of whether an agreement was a conditional sales contract or a chattel mortgage. The plaintiff-vendor brought an action in replevin for a car which had been sold on an agreement entitled a conditional sales contract which expressly stated that title was to remain in the vendor until the full purchase price was paid. The contract also provided that upon default of payment the vendor could either sue for the balance of the purchase price, or could repossess the car, sell it, and hold the vendee liable for any deficiency. The court held the agreement to be a chattel mortgage. It quoted extensively from the case of *West American Finance Co. v. Finstad.*[2]

In the *Finstad* case the court said the fact that the instrument was called a conditional sales contract was not controlling. Neither was the agreement a conditional sales contract by reason of the provision that title was to remain in the vendor until the price was paid in full. The court looked to all of the terms used in the agreement, including those relating to remedies as well as those relating to substantive rights.

In the *Finstad* case, as well as in the *Smith* case, the agreement provided, in essence, that in all events the purchaser was liable for the full purchase price, even though it provided expressly that title was to remain in the vendor. The vendor was not providing for an election of remedies, but for cumulative remedies. The result was that the intent of the parties was ambiguous. The agreement sets up a remedy which can follow only if title passes to the vendee, but also provides for a remedy which can arise only if title remains in the vendor. The court resolved the inconsistency in favor of title passing to the vendee. Consequently, a chattel mortgage resulted. In the *Smith* case the court felt itself bound to accept the line of cases based on the *Finstad* case. This prior authority holds an agreement to be a chattel mortgage when two elements are present: 1) a clause which provides for repossession and sale of the chattel in case of default, *and* 2) a clause which requires the vendee to pay any deficiency should there be one after the repossession and sale.

In the *Smith* case the vendor's brief called the court's attention to *Allis-Chalmers Mfg. Co. v. Hedlund Lmbr. and Mfg. Co.*,[3] but an

[1] 48 Wn.2d 165, 292 P.2d 205 (1956).
[2] 146 Wash. 315, 262 Pac. 636 (1928).
[3] 164 Wash. 296, 2 P.2d 708 (1931).

apparent conflict between the *Finstad* and *Allis-Chalmers* cases was ignored. In the latter case the facts were similar to the *Smith* case, and the agreement provided that upon default the vendor "... may pursue all legal remedies to enforce payment hereunder, but if unable to collect may thereafter repossess the property." The agreement also provided that title was to remain in the vendor until full payment had been made. The court in the *Allis-Chalmers* case stated that a vendor had merely an election of remedies and could not provide himself with both. The court then held that the provision which allowed the vendor to repossess the property if he should be unable to collect must be stricken from the agreement. The apparent conflict between the *Allis-Chalmers* and *Finstad* cases lies in the court's approach to the interpretation problem. In the *Allis-Chalmers* case the vendor, by stating cumulative remedies, attempted to stipulate a remedy which was not available under a conditional sales contract. However, in the *Finstad* case the court interpreted the remedies clause as expressing the intent of the parties to pass title to the vendee.

The result of *Smith v. Downs* appears to be another implied overruling of the *Allis-Chalmers* case. The *Finstad* case appears to be immune from attack.

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CRIMINAL LAW

Appeal—Preservation of Grounds—Misconduct of Prosecuting Attorney. In *State v. Case*[1] defendant appealed from a conviction of carnal knowledge, assigning as error a claim that he had been denied a fair trial because of improper and prejudicial argument by the prosecuting attorney. No objections, motions to strike, or instructions to disregard the remarks of the state's counsel had been made during the trial, nor did the defendant move for a new trial. On appeal the supreme court found that the prosecuting attorney had gone beyond the bounds of proper argument by asserting his personal belief in the guilt of the accused, by referring to the accused's "herd" of witnesses, and by making further prejudicial remarks in his closing argument to the jury. The court, on its own motion, granted a new trial, notwithstanding defendant's failure to preserve the record.

[1] 149 Wash. Dec. 71, 298 P.2d 500 (1956). This was a 7-2 decision. The dissenting judges, Ott and Mallery, disagreed with the majority's finding that the prosecuting attorney had made improper and prejudicial argument. They also felt that, even if there had been improper argument, defendant's failure to raise the question at the trial level precluded him from raising the question on appeal.