Washington Law Review

Volume 34
Number 2 *Washington Case Law—1958*

7-1-1959

Tax

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that an *owner* of property acquired a vested right to put his property to any use sanctioned by the zoning law in effect at the time he made an application for a permit. The court has now renounced the majority rule and not merely created another exception.

In the *Hull* case, apparently the fact that the permit was issued before the new ordinance became effective was not important. In taking its stand contrary to the weight of authority, the court said, "The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, *applies* for his building permit, if that permit is thereafter issued." (Emphasis added.)

Charter Amendment of Municipal Corporation-Notice. In the case of *Burns v. Alderson,* 51 Wn.2d 810, 322 P.2d 359 (1958), the validity of a Yakima election, in which its city charter was amended by initiative, was challenged as being unconstitutional. The court decided (5 to 4) that the election results were void because the proponents of the charter amendment had failed to comply with the state constitutional requirement in art. X, § 10, of giving voters thirty days notice of pending elections. The principal differences of opinion revolved around the question of whether the constitutional requirement of notice was meant to apply to the initiative method of amending city charters or whether it was limited to methods existing at the time the constitutional provision was adopted. Under the majority view, the constitutional notice was held a mandatory requirement applicable to methods unknown at the time the constitution was adopted.

The fact that the legislature stated, via the 1903 statute creating the initiative mode of change, that it was to be a concurrent and additional method did no dissuade the majority from their position. The court concluded that, although fifteen per cent of the voters had signed a petition prior to the election, this was not compliance with the thirty-day notice requirement of the constitution.

Four judges dissented, contending that, since the obvious purpose of the constitutional language was to insure notice to interested voters, the subsequently conceived initiative method of amendment substantially accomplished this purpose. The dissenting view was that the substantive effect should have over-ridden the strict literal meaning given the constitution.

TAX

Excise Tax on Sale of Real Estate—Effect of Subsequent Rescission. In *Perkins v. King County,* 51 Wn.2d 761, 321 P.2d 903 (1958), the Supreme Court of Washington affirmed a dismissal by the Superior Court of King County of an action against King County for the refund of an excise tax paid by the appellant. The tax was imposed upon the execution of a contract of sale under which the appellant was to transfer certain real estate to a purchaser. Subsequently, the parties to the contract of sale made an agreement to rescind. Appellant then applied for a refund of the excise tax on real estate sales which he had paid and was refused. He then brought an action to recover.

The court, in affirming the lower court action, referred to the language of RCW 28.45.010, which states that "the term 'sale' . . . shall include . . . any contract for . . . conveyance . . . or transfer" of ownership or title to real property. The court then reasoned that, since a contract of sale falls within the definition of the term "sale" in RCW 28.45.010, it was a taxable event at the time it occurred. The court rejected the appellant's contention that the operative effect of an agreement to rescind is to make the contract void at its inception—in effect, as though it never happened.

The contract to rescind is a separate and distinct agreement between the parties, under which each releases the other from further contract obligations under the

original agreement. RESTATEMENT, CONTRACTS, § 406, points out that "an agreement by the parties to a contract to rescind their *contractual* duties . . . discharges such duties if the agreement is . . . based on sufficient consideration. . . ." (Emphasis added.) Thus, in this type of situation the making of the original contract of sale is the event upon which the excise tax is imposed.

Washington cases in accord with § 406 of the RESTATEMENT, CONTRACTS, include *McMillan v. Bancroft,* 162 Wash. 175, 298 P. 460 (1931), and *Carter v. Miller,* 155 Wash. 14, 283 P. 470 (1929).

One might also ask whether there should not be a second excise tax upon the rescission agreement involved in the principal case. The statutory definition of a taxable event found in RCW 28.45.010 includes the clause, "or other contract under which possession of the property is given to the purchaser, or [to] any other person by his direction. . . ." It should be noted that the shifting of possession as well as the making of the contract is required for the creation of a taxable event. Thus, in a situation similar to the principal case, where there is a rescission and also a shifting of possession, it might well be questioned whether the result is another taxable event within the meaning of the statute.

Inheritance Tax—Cash Value of Insurance Policy Subject to Taxation. In deciding *In re Leuthold's Estate,* 152 Wash. Dec. 250, 324 P.2d 1103 (1958), the Washington court overruled a position formerly taken in *In re Knight's Estate,* 31 Wn.2d 813, 199 P.2d 89 (1948). The rule in Washington now is that the cash surrender value of a life insurance policy is property, which, if bought with community funds, produces a community interest in the cash surrender value in the non-insured spouse. It follows, consequently, that upon the death of the non-insured spouse, this community interest is property of his or her estate which is subject to an inheritance tax.

The facts of the *Leuthold* case are as follows: the wife died testate, predeceasing her husband, upon whose life the community held six life insurance policies with cash surrender value provisions. The state contended that the wife's death was a taxable event because it passed her half of the community interest in the surrender value of the policies to her legatees. The wife's executor, however, convinced the lower court that the *Knight* rule ("the cash surrender value of a life insurance policy is not property which passes by will or the statute of inheritance") should control. The supreme court, upon the first hearing, reported in 150 Wash. Dec. 227, 310 P.2d 872 (1957), affirmed, five to three. On rehearing, the court reversed its former position and overruled the *Knight* case by a five-to-four decision, in which a judge who had not previously participated and the judge who had written the original majority opinion, voted to reverse the earlier decision.

TORTS

Constitutional Taking and Constitutional Damaging—Wrongful Activity by Municipal Corporation—Recovery Against Airport by Adjacent Property Owners—Airspace Ownership. *Ackerman v. Port of Seattle*[1] is the first case in Washington to consider the relative rights of the owner of an airport, here a municipal corporation, and the owners of property near the airport. Sixty-one owners of real property situated near the Sea-Tac airport, which is owned and oper-

[1] 152 Wash. Dec. 663, 329 P.2d 210 (1958).