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Statutory Construction

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lien holder. Draftsmen of purchase-money mortgages in Washington should be extremely thorough in determining whether or not there are in fact prior mechanics' or matterialmen's liens against the interest of the "reputed" owner-mortgagor.

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STATUTORY CONSTRUCTION

Statutory Construction—Retroactivity of Legislation—Workman's Compensation Act—Host-Guest statute. In *Hammack v. Monroe St. Lumber Co.*[1] the Washington court held that the 1957 legislative act[2] amending Washington's Workman's Compensation Act[3] and abolishing the immunity proviso contained therein would not be construed retroactively.

Appellant (plaintiff in trial court) was injured in a traffic accident due to the negligent operation of a truck driven by respondent's employee. The appellant sued for both personal injuries and property damage. As both parties were in the course of extrahazardous employment as defined by the act, the trial court dismissed the action. The dismissal was based on the immunity proviso which was then in effect: "[N]o action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act."[4]

Upon appeal,[5] the supreme court reversed in part, holding that the immunity extended only to actions for personal injury and not to an action for property damage. The case was remanded for further findings to determine what had been the final disposition of the appellant's claim for compensation under the act.[6]

The case was pending in superior court on remand on the effective date of the repealing statute.[7] Appellant then claimed that the respondent was no longer entitled to the defense provided by the statutory immunity, but the trial court held that the immunity proviso was

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[1] 154 Wash. Dec. 217, 339 P.2d 684 (1959).
[2] Wash. Sess. Laws 1957, c. 70 § 23.
[3] RCW title 51.
[4] Wash. Sess. Laws 1929, c. 132 § 1.
[5] Hammack v. Monroe St. Lumber Co., 49 Wn.2d 581, 303 P.2d 1095 (1956).
[6] The court's theory was that a rejection of the claim on the ground that the workman was not in the course of his employment would be res judicata in a subsequent action against the employer. Young v. Department of Labor & Indus., 200 Wash. 138, 93 P.2d 337 (1949); Prince v. Saginaw Logging Co., 197 Wash. 4, 84 P.2d 397 (1938).
[7] Technically, the 1957 act was an amendment which simply dropped the immunity provision and not a direct repealing act.

still applicable to the action. The supreme court affirmed and it is this decision that forms the basis of this Note.

A majority of the court felt that since the appellant had no cause of action at the time of the accident (because of the immunity proviso), to apply the repealing act retroactively would be to impose liability where there was none at the time of the act in question. Such an attempt, thought the court, would be unconstitutional. The majority held that the act abolishing the immunity proviso was not procedural, but dealt exclusively with substantive rights, and as the legislature had evinced no clear intent that the act should apply retrospectively, the act would not be given that construction.[8]

Three judges dissented on the ground that the immunity proviso had not abolished the cause of the action but only raised a bar thereto—a statutory defense. This, being granted by the legislature, could also be taken away at any time in the same manner that it was created. Thus, the repealing statute, being remedial legislation (in that it removed the bar to the injured workman's remedy of suing the third party tort-feasor) came under a different rule of construction[9] and should have been applied retroactively. The dissenters could see no logical distinction between the construction to be given to a statutory cause of action and a statutory defense, and since the court had always held that a statutory cause of action could be divested at any time prior to final adjudication,[10] they felt that the same construction should apply to the statutory immunity.

The focal point of divergence between the two conflicting views[11] stems from the different interpretations of the immunity proviso. The majority held that the proviso abolished the injured workman's statu-

[8] The general rule of statutory construction is that statutes will be construed as prospective only unless the legislature has evinced a clear intent that the act should be applied retroactively. *In re* Wind's Estate, 32 Wn.2d 64, 200 P.2d 748 (1948); Lynch v. Department of Labor & Indus., 19 Wn.2d 802, 145 P.2d 265 (1944); State *ex rel.* Chapman v. Edwards, 161 Wash. 268, 295 Pac. 1017 (1931).

[9] Remedial legislation has been held to be an exception to the general rule of construing statutes to operate prospectively only, and in the absence of legislative intent to the contrary, remedial legislation is to be construed retroactively. Pape v. Department of Labor & Indus., 43 Wn.2d 736, 264 P.2d 241 (1953); Nelson v. Department of Labor & Indus., 9 Wn.2d 621, 115 P.2d 1014 (1941); Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039 (1927).

[10] Hansen v. West Coast Wholesale Drug Co., 47 Wn.2d 825, 289 P.2d 718 (1955); Denning v. Quist, 160 Wash. 681, 296 Pac. 145 (1931); Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 (1930); Bruenn v. School Dist., 101 Wash. 374, 172 Pac. 569 (1918).

[11] The opposite rules of construction urged by the two factions of the court afford a beautiful example of the "thrust and parry" technique. See Llewellyn, *Remarks on Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

tory cause of action against the third party tort-feasor. The minority claimed that it was only a bar to such an action—a statutory defense. While the immunity statute was in effect, the distinction was not important since in either case the plaintiff could not win. The distinction had never been expressly made in prior decisions, and the court did not seem to have been aware that one existed.[12] In the instant case the distinction is crucial. If the dissenting view is correct, the constitutional issue posed by the majority would never be reached, for instead of "creating a cause of action where none existed before," the repealing statute would have removed only the bar to an already existing action. This would not have affected the "substantive rights" of defendants, as many Washington cases point out. Washington is firmly entrenched in the view that if a cause of action is presently barred by a statutory limitation, when that limitation period is extended[13] (or abolished[14]) the original action may be brought at any time within the extended period.[15] The same rule should be applicable to any cause of action barred only by virtue of some statute.

The majority rationale that the cause of action was abolished by the immunity proviso is not convincing. The language of the immunity statute is more meaningful if interpreted as creating only a bar to the action. The language is permissive only: "no cause of action *may* be brought . . ." Had the legislature intended to abolish the cause of action, the proper language would have been "no cause of action *can* be brought." The majority relied on *Hand v. Greyhound Corp.*[16] to support their position, but that case pointed out that the action was only *barred* by the immunity proviso.[17]

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[12] See Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 (1930), where the court makes the conflicting statements that "it was the intention of the Legislature to take away the right of action . . ." and "we can reach no other conclusion than that this action . . . is effectively barred . . ."

[13] Lane v. Department of Labor & Indus., 21 Wn.2d 420, 151 P.2d 440 (1944), and cases cited therein.

[14] Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039 (1927).

[15] Lane v. Department of Labor & Indus., 21 Wn.2d 420, 426, 151 P.2d 440, 444 (1944), contains the following statement: "There are cases contrary to *Campbell v. Holt* and *Herr v. Schwager,* which hold that, if the remedy is barred, the immunity from suit is a right that cannot be impaired by a statute of revival, but we definitely declined in the *Herr* case to follow them, and we have not departed from the doctrine of that case."

[16] 49 Wn.2d 171, 299 P.2d 554 (1956).

[17] "In the exercise of our best judgment we are inclined to the view that [the immunity proviso] . . . does not involve an arbitrary unreasonable classification, that it is constitutional and a *bar* to appellant's common law tort action for personal injuries." [Emphasis added.] Hand v. Greyhound Corp., 49 Wn.2d 171, 179, 299 P.2d 554, 558 (1956). See also Latimer v. Western Mach. Exch., 42 Wn.2d 756, 259 P.2d 623 (1953); Jewett v. Kerwood, 43 Wn.2d 691, 263 P.2d 830 (1953); Koreski v. Seattle Hardware Co., 17 Wn.2d 421, 135 P.2d 860 (1943).

Although not mentioned in either opinion, there is another argument that deserves attention. The court has always held that the immunity proviso was not applicable to a cause of action if either party thereto was not within the coverage of the Workmen's Compensation Act.[18] However, the burden of pleading and proving that the immunity attached to a certain action has always been placed on the one claiming the immunity.[19] This is sound only if (as the minority contend) the immunity proviso is considered as creating an affirmative defense[20] to an otherwise applicable action. If, as the majority reasoned, the cause of action was abolished (except when either party thereto was not within the scope of the act) the burden should have been on the plaintiff to prove that the exception applied and, hence, the cause of action attached. For example, the 1933 host-guest statute[21] provided that all causes of action by the injured guest were abolished except for an intentional tort by the host. Under that statute, the burden has always been placed on the plaintiff-guest to prove that the tort was intentional (within the exception) and that the action could be brought.[22] Analogously, if the majority view is sound, the burden of proof should have been on the injured workman to bring his otherwise nonexistent cause of action within the statutory exception.

It is stated within the Workmen's Compensation Act itself that the act is remedial.[23] Washington[24] and other jurisdictions[25] have so held. When the immunity proviso was first enacted,[26] the court, in *Robinson v. McHugh*[27] and *Denning v. Quist*,[28] held that the immunity was applicable to injuries occurring before its effective date.[29] Its theory

[18] McClung v. Pratt, 44 Wn.2d 779, 270 P.2d 1063 (1954); Latimer v. Western Mach. Exch., 42 Wn.2d 756, 259 P.2d 623 (1953).

[19] McClung v. Pratt, *supra* note 18; Jewett v. Kerwood, 43 Wn.2d 691, 263 P.2d 830 (1953).

[20] Other sections of the act have been construed as affirmative defenses. See Madden v. Northern Pac. Ry., 242 Fed. 981 (W.D. Wash. 1917); Acres v. Frederick & Nelson, 79 Wash. 402, 140 Pac. 370 (1914).

[21] Wash. Sess. Laws 1933, c. 18 § 1.

[22] Taylor v. Taug, 17 Wn.2d 533. 136 P.2d 176 (1943).

[23] RCW 51.04.010.

[24] Pape v. Department of Labor & Indus., 43 Wn.2d 736, 264 P.2d 241 (1953); Nelson v. Department of Labor & Indus., 9 Wn.2d 621, 115 P.2d 1014 (1941); Denning v. Quist, 160 Wash. 681, 296 Pac. 145 (1931).

[25] Foster v. Buckner, 203 F.2d 527 (6th Cir. 1953); Rookledge v. Garwood, 340 Mich. 444, 65 N.W.2d 785 (1954); LARSON, WORKMEN'S COMPENSATION LAW §§ 71-77 (1952).

[26] Wash. Sess. Laws 1929, c. 132 § 1.

[27] 158 Wash. 157, 291 Pac. 330 (1930).

[28] 160 Wash. 681, 296 Pac. 145 (1931).

[29] In order to avoid this retroactive application of the immunity proviso, the legislature enacted Wash. Sess. Laws 1931, c. 90 § 1, which provided that the immunity proviso was not to affect any cause of action or right of appeal existing before its effective date. Thus, it could have been argued in the Hammack case that since it

was that before final adjudication no one has a vested right to a cause of action which arises only by virtue of a statute.[30] Thus, it was held that the legislature could divest the *action* at any time before final adjudication. It would seem that the same rule ought to apply to an *immunity* created only by virtue of a statute. The dissent stated the argument as follows:

> In the present case, the respondent had no immunity at common law from answering in damages to persons injured as a proximate result of its negligent and tortious conduct. The right to such immunity arose only by virtue of the benefits afforded it as an employer coming within the scope of the workmen's compensation act. This immunity, having been granted by the legislature, may be taken away by it, removing the bar to the exercise of a workman's remedy for injuries suffered. [Citing *Robinson v. McHugh*]. . . . The removal of the immunity provision of the 1957 statute, being remedial in effect and not disturbing a vested right, comes within the exception to the general rule against retrospective statutory construction. [Citing *Pape v. Department of Labor & Indus.*][31]

The majority met this argument by stating that this was confusing rights with remedies and that the distinction was "too fundamental to be misunderstood." A "right," said the majority, is a "legal consequence" which applies to certain facts[32] and a "well founded or acknowledged claim,"[33] while a "remedy" is the procedure used to enforce a right.[34] The majority concluded that the repealing act could not be remedial because it would create a cause of action where, before, there was none, (which would impose liability where, before, none existed) and, hence, the act dealt exclusively with "substantive rights." This whole line of reasoning is predicated upon the assumption that the immunity proviso abolished the cause of action, and it is this issue that is determinative.[35]

To sustain their position the majority quoted from the Idaho case of *Ford v. City of Caldwell*,[36] as follows:

> A statute will not be given a retroactive construction by which it will

required a special legislative enactment to avoid retroactive application at the inception of the immunity proviso, the absence of specifically expressed intent in the repealing act can be construed as legislative intent that this act should operate retrospectively. This argument was not considered by the court.

[30] Wash. Sess. Laws 1911, c. 74 § 1, RCW 54.01.010, abolished all common law and other remedies except those otherwise provided by the act.

[31] 154 Wash. Dec. 217, 231, 339 P.2d 684, 692 (1959).

[32] Quoting from Mikkelson v. Pacific S.S. Co., 46 F.2d 124, 125 (W.D. Wash. 1930).

[33] Quoting from Chelentis v. Luckenbach, 247 U.S. 372, 384 (1918).

[34] See notes 32 and 33 *supra*.

[35] In the language of the logician this is known as "begging the question."

[36] 79 Idaho 499, 321 P.2d 589, 594 (1958).

> impose liabilities not existing at the time of its passage. . . . A statute affecting vested rights will be construed as operating prospectively only, and not retrospectively. *'A right of defense,* not technical, but substantial, *resulting in immunity from liability, which has fully vested,* is as sacred and as important as a right of action, and is protected from any retroactive legislation in like manner as a vested right of action. . . . [Emphasis added.]

The use of the *Ford* case presents an imposing problem, since that case was concerned with a statutory waiver of sovereign immunity. If the Washington court agrees with the Idaho Court's classification of sovereign immunity as a "right of defense," then it would follow that statutory immunity would also be a right of defense. However, sovereign immunity is a common-law defense, while the immunity under consideration is only statutory; and as it is a statutory defense, its repeal should be applied retroactively in the same manner as is the repeal of the statutory defense created by a statute of limitations.[37]

Further, did the court imply that the respondent in the *Hammack* case had a vested right in his statutory immunity in the same sense that the city of Caldwell had a vested right in its sovereign immunity? The basic theory of sovereign immunity is that the "sovereign can do no wrong." Hence, there is no liability at all, and the sovereign cannot even be sued unless it waives its immunity. It has never been contended that the third party tort-feasor under the Workmen's Compensation Act could not be sued unless he waived the statutory immunity. Such a construction would be tantamount to saying that once one joins the "Workmen's Compensation Club," he can injure another club member with impunity. This was the very reason the Illinois court, in *Grasse v. Dealers Transp. Co.*,[38] held a similar statutory immunity proviso to be unconstitutional.[39] Yet in *Hand v. Greyhound Corp.*,[40] when the same argument was raised, the Washington court distinguished the *Grasse* case on the ground that the Illinois act was an "employer liability act," while the Washington statute was only an "industrial insurance act." Thus, as the immunity was granted only as an incidental benefit subordinate to providing industrial insurance, the immunity proviso was constitutional. (This was the view taken in the dissenting opinion in *Hammack,* under the rule that no one has a vested right in a policy of

[37] See cases cited in notes 10 and 15 *supra.*

[38] 412 Ill. 179, 106 N.E.2d 124 (1952).

[39] The statute was held to be arbitrary and violative of both the United States and the Illinois constitutions in that it extended immunity to third parties within the act but did not apply to parties outside the scope of the act. (The Washington immunity statute applies in exactly the same manner. See cases cited in note 18 *supra*).

[40] 49 Wn.2d 171, 299 P.2d 554 (1956).

legislation, prior to final judgment, which entitles him to insist that the policy be maintained for his benefit.[41])

The majority position was somewhat extricated from this dilemma by its holding that the repealing act affected only "substantive rights." However, the distinction between "vested rights" and "substantive rights" was not made clear and no "guiding principles" were established. Apparently the court is not aware of any distinction, as the recent case of *Nogosek v. Truedner*[42] points out. In that case the court, sitting en banc, construed the *Hammack* decision as holding that the legislative enactment affected *vested* rights and, thus, would not be retroactively applied. The *Nogosek* case was a host-guest action instituted by the injured guest. After the accident but before the trial, the 1957 amendment[43] to the host-guest statute took effect. Under the 1933 statute,[44] the injured guest was allowed an action against the host only for an intentional tort. The 1957 act allows, also, an action for gross negligence, reinstating the pre-1933 status.[45] The trial court refused to instruct the jury as to gross negligence and the supreme court affirmed, citing *Hammack*. The difficulty lies not in applying the reasoning of the *Hammack* case (which is strictly in point, as the 1933 statute did abolish all causes of action other than for an intentional tort[46]) but in citing *Hammack* as dealing with vested rights. This raises many new questions which the court did not answer: Is there a difference between vested rights and substantive rights? If so, what test is determinative? And, further, how substantial must a substantive right be to be protected from retroactive application of legislation?

It is difficult to see how one can have a vested right to a purely statutory defense unless he has relied on such a defense in committing the tort. Thus, it would be easy to find a vested right in the immunity provided to Senators while speaking on the floor of the Senate. Remarks are often made there which would not be uttered save for the protection of the immunity, much as libelous statements are often made in reliance on the defense of privilege.[47] To destroy these de-

[41] This rule was announced in Bailey v. School Dist., 108 Wash. 612, 185 Pac. 810 (1919), citing Beers v. Arkansas, 61 U.S. 527 (1858).

[42] 154 Wash. Dec. 940, 344 P.2d 1028 (1959).

[43] RCW 46.08.080.

[44] Wash. Sess. Laws 1933, c. 18 § 1.

[45] Trunk v. Wilkes, 162 Wash. 114, 297 Pac. 1091 (1931); Craig v. McAtee, 160 Wash. 337, 295 Pac. 146 (1931); Eastman v. Silva, 156 Wash. 613, 287 Pac. 656 (1930); Blood v. Austin, 149 Wash. 41, 270 Pac. 103 (1928).

[46] Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936). The language of the statute makes this clear: "No person . . . shall have a cause of action . . . unless . . . intentional. . . ."

[47] International & G.N. R.R. v. Edmundson, 222 S.W. 181 (Texas 1920).

fenses retroactively could be said to affect vested rights.[48] The *Nogosek* case can also be rationalized on this theory. The purpose of the 1933 host-guest statute was "not only to do away with collusive suits,[49] but also to make it possible for an owner or driver of an automobile to invite others to ride with him without fear that, by so doing, he might subject himself to potential liability in the event that they should be injured without any intent on his part."[50] Statutes of this type are passed for the express purpose of creating a defense in order to induce full freedom of action.

If the court was using this theory to decide *Hammack*, the distinction made in *Hand*[51] between that case and the *Grasse* case is repudiated, and those cases are squarely in conflict. If the *Hand* case is correct (in that the immunity afforded by the Washington act was only incidental) it is difficult to see why this fortuitous defense should be treated any differently than the fortuitous defense afforded by the statute of limitations. Just as "no man promises to pay money with any view to being released from that obligation by lapse of time,"[52] no one negligently injures another with a view of being freed from liability because he comes under the Workmen's Compensation Act. If the defense created cannot be relied upon in the commission of the tort, it is difficult to see how the repeal of that defense can affect any vested rights.

The *Hammack* case leaves many questions unanswered and it is impossible to predict what course of action the court will take in the future. Within the field of workmen's compensation alone, the issue is likely to recur. The present act allows the injured workman an election of remedies: he can either claim compensation under the act or sue the third party tort-feasor.[53] Should the legislature abolish the election and allow both remedies, it is questionable whether the court would follow the Michigan court, which held such a statute to be remedial and, hence, retroactive.[54] The same issue would arise were the legislature to abolish the immunity now afforded third party tort-feasors *in the same employ*[55] as the injured workman. Because of the fact that

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[48] *Ibid.*

[49] Upchurch v. Hubbard, 29 Wn.2d 559, 188 P.2d 82 (1947); Taylor v. Taug, 17 Wn.2d 533, 136 P.2d 176 (1943).

[50] Parker v. Taylor, 196 Wash. 22, 25, 81 P.2d 806, 807 (1938).

[51] See note 40 *supra* and accompanying text.

[52] Herr v. Schwager, 145 Wash. 101, 104, 258 Pac. 1039, 1040 (1927) (quoting from Campbell v. Holt, 115 U.S. 620 (1885)).

[53] RCW 51.24.010.

[54] Rookledge v. Garwood, 340 Mich. 444, 65 N.W.2d 785 (1954).

[55] RCW 51.24.010.

compensation under the act is not afforded for all types of injury,[56] there has been considerable dissatisfaction with the "exclusive remedy" principle of workmen's compensation acts.[57] If the legislature responds to the agitation thus created by allowing suits against persons who are now immune, the same problems presented by the *Hammack* case will recur.

Perhaps the *Hammack* decision can be rationalized as a policy decision in keeping with the exclusive remedy principle of workmen's compensation acts by strictly construing those causes of action that are allowed. This theory is greately weakened by the *Nogosek* case which implies that this reasoning will be extended to other statutory causes of action and defenses as well.

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TORTS

Torts—Violation of Civil Rights—Damages. In *Browning v. Slenderella Systems*[1] the Washington Supreme Court allowed nominal damages for embarrassment and humiliation caused by a discriminatory refusal of service. The action was brought under the public accommodations law,[2] which is criminal in form.

Mrs. Browning, a Negro, went to the defendant's salon for a courtesy demonstration of Slenderella reducing treatments. Although an appointment had been arranged in advance by telephone, she was asked to wait a few minutes before being served. Nearly two hours later she was still waiting for her treatment. During this time other ladies came and were served without undue delay. Mrs. Browning asked a receptionist if she would ever be served and received an evasive reply. The manager was summoned and Mrs. Browning was informed that the salon had never served one who was not Caucasian and that she would not be happy there. This conversation was private and no public scene was created. No physical violence was threatened. Mrs. Browning left without being served; shortly thereafter this action was commenced

[56] The case of Hand v. Greyhound Corp., *supra* note 17, furnishes a good example. Plaintiff was injured in a traffic collision and suffered severe facial disfigurement. This type of injury is not covered by the act, and the plaintiff was denied his suit against the third party tort-feasor because of the immunity proviso. It was partly as a result of the *Hand* case that the legislature abolished the immunity proviso.

[57] See SOMMERS & SOMMERS, WORKMEN'S COMPENSATION 191 (1954).

[1] 154 Wash. Dec. 556, 341 P.2d 859 (1959).

[2] RCW 9.91.010: "(2) Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor."