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Criminal Law—Statutory Interpretation—Imminently Dangerous; Unfair Trade Practices—"Loss Leaders"—The Washington Fair Trade Act; Ejectment—Demand for Rent—Forfeiture; Carriers—Instructions—Degree of Care—Passengers Under Disabilities; Constitutional Law—Fourteenth Amendment; Effect on Washington Law; Divorce—Custody of Children—Enforcement Pending Appeal; Taxpayer's Action to Restrain Illegal Acts of State Officers or Committees; Unemployment Compensation—Parties Within Purview of Act; New Trials—Statutory Grounds—Effect on the Inherent Power of Trial Court; Corporations—Purchase by a Corporation of Its Own Stock

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RECENT CASES

Criminal Law—Statutory Interpretation—Imminently Dangerous. *D* was charged with first-degree murder for intentionally shooting deceased. Defense was insanity in that *D* did not know what he was doing. The trial court instructed the jury that *D* would be guilty if the killing was by an act imminently dangerous to deceased and evincing a depraved mind, heedless of human life, even with no premeditated design to effect death. This instruction was challenged on appeal. *Held*: Conviction reversed. Where the act causing a person's death is specifically aimed at and inflicted upon deceased alone, the perpetrator of the act cannot be convicted under subdivision 2 of the murder statute. *State v. Mitchell*, 129 Wash. Dec. 437, 188 P.(2d) 88 (1947).

REM. REV. STAT. § 2392 [P P C. § 117-5] provides that

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

1. With a premeditated design to effect the death of the person killed, or,
2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual, or,
3. Without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree.

The *Mitchell* case represents the first time in which subdivision 2 has been passed on by the Washington court. In limiting its applicability to cases in which more than one person is endangered by the defendant's act, the court followed *Darry v. People*, 10 N. Y. 120 (1854), in which it was reasoned that a contrary rule would allow conviction for first-degree murder in *any* homicide where, in the "loose and uncertain opinion of the jury," the act evinces a depraved mind regardless of human life. When considered in the light of subdivision 2 alone, the *Mitchell* limitation seems to be a salutary one.

However, it may be that the holding reveals a loophole in the murder statute. If *A* were to beat *B* intentionally "to within an inch of his life" resulting in *B*'s death, *A* could not be convicted of first-degree murder under the Washington statute though he would clearly be liable to the death penalty under the common law which only required intent to inflict great bodily harm or knowledge that the act would probably result in great injury. STEPHEN, DIGEST OF CRIMINAL LAW, art. 264(b) (8th ed. 1947). *A* could not be convicted under subdivision 1 because there was no premeditated design to effect *B*'s death, the homicide would not be a felony murder because subdivision 3 does not provide for assault or battery; and, under the *Mitchell* holding, *A* would not be guilty because his imminently dangerous act was directed only at deceased. Further, if *A* should kill *C* while escaping and there is no premeditated design in commission of the second homicide, then *A* would still be guilty of only second-degree murder since subdivision 3 does not list murder, either in the first or second degree. Again, if a newly born child is laid naked out of doors, it is murder at common law even though the guilty party would have been very glad to have a stranger find the child and save it. HOLMES, THE COMMON LAW 53 (1945). Under the Washington statute, however, the guilty party could not be convicted of first-degree murder. There was no premeditated design to effect death since the defendant hoped the child would be saved, there is no commission of any of the felomes enumerated in

subdivision 3, and, the dangerous act was directed at only one person thereby making subdivision 2 inapplicable by the *Mitchell* limitation.

The decision also presents the question of what the result will be where defendant knows his imminently dangerous act will imperil at least one person (shooting into the dark knowing at least one person is there). Arguably, the language of the *Mitchell* case, though not explicit on this point, indicates subdivision 2 would not apply since it refers only to cases where more than one person is endangered. This interpretation, placing the emphasis on the circumstances surrounding the act rather than on the defendant's state of mind, would lead to the anomalous result that a person would escape the first-degree murder penalty by the mere chance that his victim was alone at the time.

The *Mitchell* case presented the court with the dilemma of either allowing the statute to say too much or requiring it to say too little. Limiting the statute as was done precludes convictions of first-degree murder where they should be available. Lack of such limitation would permit subdivisions 1 and 3 to be by-passed by a too-general application of subdivision 2.

It is submitted that this dilemma may be resolved by a legislative reworking of the statute. Subdivision 1 could be reworded so as to allow convictions where homicide, unjustifiable and inexcusable, is committed with intent to do grievous bodily injury to deceased. It has been suggested that "malice aforethought" or "premeditated design" be replaced by merely requiring that the homicide be committed by defendant with a "man-endangering-state-of-mind." Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L. J. 537 (1934). Further, the felony murder section should be revised to include murder, both first and second degree, among those felonies necessary for conviction under subdivision 3.

J. D. B.

Unfair Trade Practices—"Loss Leaders"—The Washington Fair Trade Act. *D*, a gasoline station operator, advertised two gallons of gasoline free (except for tax) with every seven gallons purchased. In a prosecution for violation of the UNFAIR SALES ACT, WIS. STAT. § 100.30, *held*, the sale must be treated as a sale of nine gallons of gasoline, and if not below cost in the aggregate, there has been no "loss leader" and no violation of the statute. *State v. Tanker Gas, Inc.*, 250 Wis. 218, 26 N.W.(2nd) 647 (1947).

Despite the fact that the legislative declaration of policy included certain "deceptive practices" within its stigma, the enacting clauses make it sufficiently clear that deceptiveness is not the gist of the offense, but rather the injury resulting to competitors and manufacturers of trademark articles through sales below cost. Since the pretended detriment to the vendor of the "gift" offer (whereas in reality a sale in quantity with an over-all profit resulted) could not be regarded as having induced the sale, the "deception" referred to would not appear tortious in character.

Since the Wisconsin Act stipulates, in subsection 2(j), that each *item* must be regarded as offered for sale in determining at what price it was sold, the court seems justified in the distinction it draws between offers of a premium *in specie* and offers of different goods as inducement to the sale. Thus *D*, above, could not have offered a quart of *oil* free or below cost in conjunction with a sale of gasoline. The decision has clarified the definition of "loss leader" and has limited it to sales and offers of any individual article below cost (including "gifts") to promote the sale of *another* article or to divert trade from competitors.

The Washington Unfair Practices Act, REM. REV. STAT. § 5854-21 to 36 [P P C. § 989-1 to 31], does not restrict the element of deceptiveness to its statement of legisla-

tive purpose but has embodied it in the definition of "loss leader" in subsection (21) as a "misleading practice." None of the enacting clauses, however would appear to support a contention that the act seeks to protect against anything other than unfair competition and derogation of trademark goods.

The Washington Act seems overly definitive in attempting to outline the practices it seeks to prohibit, and difficulties of judicial construction may be expected. To the factual situation presented by the principal case, no less than three overlapping portions might be deemed applicable: (1) "Loss leader" as defined in subsection (21) is the sale of "any article at less than cost to induce the purchase of other merchandise" (Italics ours) Under the reasoning of the Wisconsin Court, this would not apply to homogenous "free" offers and sales. (2) Subsection (24) besides prohibiting "loss leaders" makes it unlawful to "give away any article for the purpose of injuring competitors or destroying competition" This would seem to be an express prohibition of any "free" offer, but at the expense of losing the attractive advertising advantage, the same pecuniary result could be achieved by a reduction of the unit price. (3) The same subsection makes it unlawful "to sell any article at less than the cost thereof to such vendor" *Query*: If this latter be deemed not applicable to the *in specie* sale and gift, what is the status of the "one-cent sale" where, to all appearances, the premium is "sold" below cost? It would seem difficult under the statute to regard the transaction as a whole in determining at what price the *in specie* premium was sold.

It is suggested that if the legislative intent was to prohibit the *in specie* gift offer, the "one-cent sale," and other similar retail advertising and selling practices, it is inconsistent with existing ethical standards of competitive merchandising. If, on the other hand, it is directed toward the maintenance of trademark article prices at an "above cost" level, to protect the rights of the manufacturer and retail competitors (as is manifestly proper), it has done so in a laborious and overly comprehensive manner.

C. L. S.

Ejectment—Demand for Rent—Forfeiture. *P* leased certain realty to *D* for five years, rent payable monthly, with a forfeiture provision for nonpayment. *D* failed to pay on the stipulated day. *P* demanded payment the next succeeding day and, when refused, elected to declare a forfeiture. Written notice of this was served on *D*, no alternate notice to pay or remove being given as prescribed by the unlawful detainer statute, REM. REV. STAT. § 812 [P P C. § 55-5]. Instead *P* commenced his action under REM. REV. STAT. § 785 [P P C. § 24-1], the quiet title and ejectment statute, claiming that under this section no alternate notice need be given, and further that the common law rule requiring a demand for rent on the date due had been changed by REM. REV. STAT. § 785, *supra*. Trial court sustained *D*'s demurrer on the ground that no alternate notice was given. *Held*: Reversed. No alternate notice need be given by one proceeding under REM. REV. STAT. § 785. The common law rule regarding notice of forfeiture, although not changed by § 785, has been modified by § 548, CODE of 1881, thus bringing this suit was sufficient demand to sustain the cause of action. *Petch v. Willman*, 129 Wash. Dec. 130, 185 P.(2d) 992 (1947).

Unlawful detainer is a purely statutory and summary procedure, requiring that a landlord need give only three days notice to a delinquent tenant, and giving the landlord immediate possession subject to certain conditions if the tenant fails to pay within that time. Ejectment is the common law method of removing a tenant and except as modified by statute works a complete forfeiture. In the instant case, to sustain *P*'s

action the court found that the common law rule in regard to forfeiture, *i. e.*, demand on date due before forfeiture can be declared, has been modified in at least two instances. To support this, two apparently forgotten statutes were unearthed and declared to have been neither superseded nor repealed. The statutes, §§ 2056 and 548, CODE of 1881, have both been considered by compilers as repealed and have been omitted from the codes since 1891.

Section 2056, providing that a landlord may give a delinquent tenant ten days to pay or remove, at the expiration of which time the tenancy shall be forfeited if the tenant has failed to pay, was inapplicable here because *P* gave no such notice. However, § 548 was found applicable. It provides in substance that where a tenant has failed to pay rent and the landlord has a subsisting right to re-enter, he may bring an action to recover the property, "and such action is equivalent to demand of rent and re-entry on the property." It also provides for redemption of the lease by the lessee if he pays what is due plus costs, etc. In finding that this statute was still law, the court pointed out that § 548, CODE of 1881 was in a chapter entitled, "Actions to Recover and Affecting Real Estate." It apparently was the belief of the compiler of the 1891 Code that § 22 of "An Act relating to summary proceedings for obtaining possession of real property in certain cases, and declaring an emergency," approved in 1890, or its successor, WASH. LAWS 1891, C. 96, § 21, entitled "An act defining forcible entry, forcible detainer and unlawful detainer of real property, and providing remedies therefor by summary proceedings," had superseded § 548, or else that the repealer clause, WASH. LAWS 1891, C. 96, § 25, had repealed it. In this the compiler was probably in error. Section 548 deals with the situation where (a) tenant has failed to pay rent and (b) landlord has a subsisting right to re-enter. Then, under § 548, the landlord can bring an action to recover his property, such action to be equivalent to a demand for rent. At this time the tenant has the right of redemption. It is evident that this suit by the landlord is not an action in unlawful detainer, since there is no provision for shortened notice or summary procedure. Moreover WASH. LAWS 1891, C. 96, § 21, above mentioned, now REM. REV. STAT. § 830 [P P C. § 55-41] which was believed to have superseded § 548, although giving somewhat similar relief to a tenant, gives it *only* in cases where the tenancy has been forfeited under unlawful detainer. *State ex rel. Waterman v. Superior Court*, 127 Wash. 37, 220 Pac. 5 (1923). It is thus plain that § 548 was for an entirely different purpose, *i. e.*, to give relief to tenants who could not claim under REM. REV. STAT. § 830, *supra*. The repealer clause afore-mentioned could have no effect on § 548 because it referred only to code provisions of the subject matter of that act, namely, forcible entry and unlawful detainer. Logically, code provisions referring to ejectment and quiet title could not be repealed, because they pertained to different subject matter. Unless there is some further statute on the subject, which careful search has failed to reveal, the court is undoubtedly correct in its analysis. It is interesting to note that the whereabouts of these two long omitted statutes has apparently not been questioned in over half a century. Further, neither counsel in the principal case even considered it, the exhumation being left to the initiative of the state Supreme Court.

M. D. A.

Carriers—Instructions—Degree of Care—Passengers Under Disabilities. *P*, an ambulatory cripple, was injured while a passenger on *D*'s trolley. *P* was thrown to the floor by a sudden start of the bus before he was seated. The operator had carried *P* on previous occasions and had noticed *P* getting on the bus by grasping the rail and dragging himself up one step at a time. In an action for personal injuries the trial

court gave the normal instruction as to degree of care and also instructed that *P* was entitled to recover even in the absence of a sudden start if the operator knew or in the exercise of the highest degree of care could have known that *P*'s injury was such that he should have been allowed to be seated before the bus started. Judgment for *P* Appeal. *Held*: Reversed. The latter instruction might cause the jury to feel that the operator should have exercised a medical diagnostician's skill. The jury should have been told that the operator need exercise only ordinary care in ascertaining the infirmities of his passengers. *Gray v. Seattle*, 129 Wash. Dec. 399, 187 P.(2d) 310 (1947).

It has long been the law in Washington that a common carrier is bound to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its vehicle. *Denham v. Wash. Water Power Co.*, 38 Wash. 354, 80 Pac. 546 (1905), *Anderson v. Harrison*, 4 Wn.(2d) 265, 130 P.(2d) 320 (1940). Although similar factual situations have arisen, the specific problem presented by this case has not been discussed before. Ordinarily it is not negligence to start a trolley before the passenger is seated, but when the passenger is aged, infirm, or crippled, the operator may be under a duty to wait until he is seated. *Plattor v. Seattle Electric Co.*, 44 Wash. 408, 87 Pac. 489 (1906), *Rice v. Puget Sound L. & P Co.*, 80 Wash. 47, 141 Pac. 191, 53 L. R. A. (ns) 797 (1914).

Most modern courts and text writers deplore the use of *degrees* of care and negligence because the potential confusion of such an approach outweighs its utility. Salmond, *LAW OF TORTS* (8th ed. 1934), 462 note; PROSSER ON TORTS (1941) 258. They suggest as a universal standard the conduct of a reasonably prudent man under the circumstances of each case. See Thayer, *Liability Without Fault* in SELECTED ESSAYS ON THE LAW OF TORTS, 603, RESTATEMENT OF TORTS (1934), 283. In the instant case the substance of the court's holding is: (1) the requirement of the highest degree of care applies only to the operation of the vehicle, and (2) the observation of the condition of the passengers, not being a part of that operation, will require only ordinary care. This holding appears open to objection. Because of the public nature of such an undertaking, the established policy of the law has been to require the carrier to provide the utmost safety for its passengers, and presumably this applies to the disabled as well as the physically sound. It then seems inconsistent to say that the carrier is discharging its high duty to *all* passengers if it exercises only ordinary care in determining the measures necessary to effect this safety—which precaution would not call for the specialized skill of a medical observer. Logically the present case will require the court to define the scope of the term "operation of the vehicle." The tenor of the holding suggests that this scope will be narrowly confined. Seemingly the application of the reasonable man standard of the text writers would obviate the present problem, but even a strict adherence to the established requirement of highest practical care in all situations would furnish a more sound and workable solution.

Regardless of the view taken, since it adequately appears here that the operator had *actual* knowledge that *P* was crippled, the instruction of the trial court on this point would seem to be mere surplusage not amounting to reversible error.

D. W. L.

Constitutional Law—Fourteenth Amendment—Effect on Washington Law. *A* was convicted of murder in the first degree in California. The conviction was affirmed. *People v. Adamson*, 27 Cal.(2d) 478, 165 P.(2d) 3 (1946). Both the California constitution, Art. I, § 3, and Penal Code, § 1323, permit court and counsel to comment on the accused's failure to testify. In appealing to the Supreme Court of the United States, *A* charged that he was in effect forced to testify. This, he urged, is self-incrimin-

nation, which is either a national privilege, or immunity contained in the Fifth Amendment of the Constitution and protected from the state abridgment by the Fourteenth Amendment, or was contrary to the due process clause of the Fourteenth Amendment. *Held*, in a five to four decision. neither the privileges and immunities clause nor the due process clause of the Fourteenth Amendment makes the Fifth Amendment effective against the states. The dissent contended that the specific guarantees of the Bill of Rights were incorporated into the Fourteenth Amendment. *Adamson v. California*, 67 S. Ct. 1672 (1947).

Four years after the ratification of the Fourteenth Amendment by the states, the *Slaughter-House Cases*, 16 Wall 36 (U. S. 1872), held that it did not secure federal protection for state privileges and immunities. *Maxwell v. Dow*, 176 U. S. 581 (1900), *Twining v. New Jersey*, 211 U. S. 78 (1908). Only "fundamental" principles of liberty and justice are now protected by due process from state abridgment. These have been held to be fundamental freedom of religion, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), freedoms of speech, press, assembly, and petition, *De Jong v. Oregon*, 299 U. S. 353 (1937), just compensation for property taken for public use, *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 266 (1897), right to counsel in certain cases, *Powell v. Alabama*, 287 U. S. 45 (1932). Several other provisions of the federal Bill of Rights have been decreed not to be fundamental rights and, therefore, not limitations on state action. These include right to bear arms, *Presser v. Illinois*, 116 U. S. 252 (1886), right of indictment by grand jury, *Hurtado v. California*, 110 U. S. 516 (1884), privilege against self-incrimination, *Twining v. New Jersey*, 211 U. S. 76 (1908), right to jury trial in criminal cases, *Maxwell v. Dow*, 176 U. S. 581 (1900), in civil cases, *Walker v. Sauvestre*, 92 U. S. 90 (1875).

What effect would the dissenting view have on Washington law? The Washington constitution contains provisions approximating practically all of those contained in the first eight amendments of the federal Constitution. These provisions, although similar in wording, have not always been interpreted to be the same. The interpretation placed upon double jeopardy in *Kepler v. U. S.*, 195 U. S. 100 (1904), would lead one to believe that the Fifth Amendment would prohibit appeals being allowed the federal government after the defendant has been put in jeopardy. By statute, REM. REV. STAT. § 2183-1 [P P C. § 5-3], in Washington the state has the right of appeal in at least two situations after verdict has been given for the accused. Yet the double jeopardy clause as contained in the Fifth Amendment to the federal Constitution is very similar in wording to Art. I, § 9, of the Washington constitution. In at least two cases the Washington constitution itself is at variance with the federal Constitution. (1) The right of grand jury is guaranteed in the federal Constitution, Fifth Amendment, but not in the state constitution, Art. I, § 25, (2) Jury trial in the federal Constitution, as interpreted in the *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899), consists of a jury of twelve men, but by Art I, § 21 of the Washington constitution a jury of less than twelve men may be used in courts not of record, and a verdict of less than twelve men may be given in civil cases.

The result of the minority view would be to bind the state to the interpretation placed on the rights and privileges contained in the first eight amendments of the federal Constitution, a deep inroad on the autonomy of the state. Those provisions in our State constitution and those statutes which are directly at variance with the Bill of Rights of the federal Constitution as it is now interpreted would probably be held unconstitutional. Many other state laws would be cast into doubtful position. An indictment by grand jury would be required. With it, probably, would come a deluge of petitions for writs of habeas corpus from criminals serving time in our state penal in-

stitutions. The interpretation placed by the Supreme Court on the privileges and immunities would be the minimum standard. Our state courts would have independence only in broadening this interpretation. Any change in reducing the scope of the privilege and immunities would have to come by amendment to the Constitution of the United States or by a change in the interpretation placed upon them by the Supreme Court. Even if the view of the minority is theoretically correct, could such a drastic change be justified?

S. R. B.

Divorce—Custody of Children—Enforcement Pending Appeal. An interlocutory decree of divorce granted *H* directed that he should deliver his minor child to *W*. Pending *H*'s appeal from custody award, *W* brought an original proceeding in the Supreme Court for an order to show cause why *H* should not be ordered to deliver the child or to be held in contempt and have his appeal dismissed. *Held*. An order awarding custody of children cannot be superseded on appeal, but since remedies are available to *W* in the trial court the Supreme Court is not the proper forum and the petition must be dismissed. *Sewell v. Sewell*, 128 Wash. Dec. 272, 184 P.(2d) 761 (1947).

A method for the suspension of remedies pending appeal provided by REM. REV. STAT. § 1722 [P P C. § 5-17] is a stay of proceedings when a sufficient *supersedeas* bond is filed. However, an interlocutory decree with respect to the custody of minor children cannot be superseded, *State ex rel. Davenport v. Poudexter*, 45 Wash. 37, 87 Pac. 1069 (1906), upon the theory that the welfare of children, always paramount, cannot be protected by a bond. Heretofore the Washington court has nevertheless given an appeal the effect of a stay of proceedings by refusing to enforce, or to allow the trial court to enforce, the custody order in the absence of a showing that the welfare of the child requires immediate compliance. *State ex rel. Clark v. Superior Court*, 90 Wash. 80, 155 Pac. 398 (1916), *State ex rel. Wilkerson v. Superior Court*, 108 Wash. 15, 183 Pac. 63 (1919). Without discussion of the welfare of the child, the court in the instant case departs from this rule.

The departure may have serious consequences in view of the further holding that the trial court is the proper forum in which to secure enforcement of the order, and leaving unchanged the rule that that court is impotent to change or modify the order in any way pending appeal, *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123 (1901), *Pike v. Pike*, 24 Wn.(2d) 735, 167 P.(2d) 401, 163 A. L. R. 1314, (1946). See also REM. REV. STAT. § 996 [P P C. § 23-41]. Since the trial court must enforce the order which it cannot change, the right of review might be impaired in some situations, e.g., when the decree allows the party awarded custody to take the children out of the state and the jurisdiction of the court.

In dismissing the petition, the court stated that it will order production of the child and dismiss appeals in divorce actions where it appears that the appellant has surreptitiously taken the children out of the jurisdiction or will not otherwise abide the appeal. It would seem that this is inconsistent with the holding that the proper forum for enforcement is the trial court. Although the show cause order was issued for the express purpose of enabling the court to indicate the proper procedure to be followed in this situation, it is submitted that the decision does not accomplish the desired clarification. The position of the three dissenting justices, that once an appeal is taken the entire jurisdiction concerning the case vests in the Supreme Court, would appear to be the more sound.

Quaere: If the welfare of the child becomes jeopardized pending appeal, will the instant decision be followed?

D. E. R.

Taxpayer's Action to Restrain Illegal Acts of State Officers or Committees. In a suit by a taxpayer to restrain the state capitol committee from consummating a sale of state capitol timber, the court deemed it necessary to determine "when, if ever, can a taxpayer who has no direct, special, or pecuniary interest in a transaction complained of, restrain or set aside the action of state officers or committees such as the state capitol committee if they are acting in excess of their authority or in violation of law, or if the acts complained of constitute malfeasance in office?" *Held.* In absence of statute a demand on the proper public officer to take appropriate action is a condition precedent to maintenance of taxpayer's action challenging the validity of what public officers intend to do or have done, unless facts showing that such demand would have been useless are alleged. Since *T* had not alleged a demand on the attorney general, a demurrer to the complaint was sustained. *Reiter v. Wallgren*, 128 Wash. Dec. 693, 184 P.(2d) 571 (1947).

As a general rule, when the taxpayer has a sufficient interest to maintain the suit, a demand upon the proper public officer to bring suit in the name of the taxpayer is a condition precedent to the taxpayer's action. *Milwaukee Horse & Cow Commission Co. v. Hill*, 207 Wis. 420, 241 N. W. 364 (1932), *Jones v. Centralia*, 157 Wash. 194, 289 Pac. 3 (municipal funds) (1930). The taxpayer, suing in his private capacity, has no standing to maintain a suit to enjoin a state officer from committing a breach of public duty, without showing that he will suffer a special injury differing in kind from that suffered by the general public. *Lawson v. Baker* (Tex. Civ. App.), 220 S. W. 260 (1920), *Goodland v. Zimmerman*, 243 Wis. 459, 10 N. W.(2d) 180 (1943), *Crews v. Beattie*, 197 S. C. 32, 14 S. E.(2d) 351 (1941). However, in cases involving a misapplication of funds or property, the majority rule is that the taxpayer has a sufficient interest to maintain the action. *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102 (1920), *Johnson v. Gibson*, 240 Mich. 515, 215 N. W. 333 (1927), *Peck v. Tugwell*, 199 La. 125, 5 So.(2d) 145 (1941), *Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S. W.(2d) 145 (1941). The Washington court holds with the minority that it is safer to relegate suits involving the disposition of the revenue of the state, where no special interests are involved, to the judgment and discretion of the attorney general. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067 (1891). It has been held that the attorney general has the sole right to maintain an action in the interests of the public to coerce or restrain a particular course of action by a state officer or board unless the taxpayer shows a direct pecuniary injury. *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1930). The minority, however, hold that the taxpayer has a sufficient interest to restrain unlawful expenditures or waste of municipal or county funds through his increased tax burden. *Jones v. Centralia, supra*, *Sasse v. King County*, 196 Wash. 242, 82 P.(2d) 536 (1938).

The principal case implies that the taxpayer could have maintained the action if a demand on the attorney general had been alleged. If this is true, it is clear that the court has established a new rule of law governing taxpayers' actions in those cases not involving a misapplication of funds or property. This view is strengthened since the court could have held that the *Jones v. Reed* doctrine, *supra*, applied. If the interest required for the taxpayer to maintain an action is his increased tax burden, it seems clear that a case involving a misapplication of funds or property involves a greater need for protection than one which only involves malfeasance or acts in violation of law. Therefore, it is believed that a direct overruling of *Jones v. Reed, supra*, would be more desirable than the result of the instant case.

E. M. N.

Unemployment Compensation—Parties Within Purview of Act—Determination of Status “In Employment.” Upon being held liable for contributions to the unemployment compensation fund by the commissioner of unemployment compensation, the owners of certain purse seine fishing vessels appealed to the superior court where the decision was affirmed. The vessels were operating under the customary “share” or “lay” plan. The sole issue to be decided on appeal was whether the crew members were persons “in the employment” of the owners within the purview of REM. REV. STAT. (1945 Supp.) § 9998-140 *et seq.* *Held:* Affirmed. In finding “employment” the court established. (1) that the crew members were performing “personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law for wages or under any contract calling for the performance of personal services,” REM. REV. STAT. (1945 Supp.) § 9998-150 [P P C. § 923t-77], and (2) that the exception tests as provided in REM. REV. STAT. (1945 Supp.) § 9998-154 [P P C. § 923t-85] were not met. *Skrwanich et al. v. Davis*, 129 Wash. Dec. 143, 186 P.(2d) 364 (1947).

Since the passage of the Unemployment Compensation Act of 1937 the court has vacillated between strict and liberal interpretations of “employment.” The early cases were in doubt as to whether the meaning of “employment” under the Act was limited to concepts attending the common law relationship of master and servant. *McDermott v. State*, 196 Wash. 261, 82 P.(2d) 568 (1938), held that it was not so limited, but see to the contrary *Washington Recorder Pub. Co. v. Ernst*, 199 Wash. 176, 91 P.(2d) 718 (1939). *Mulhausen v. Bates*, 9 Wn.(2d) 264, 114 P.(2d) 995 (1941), then swung back to the more liberal rule as laid down in the *McDermott* case, which view was followed by *In re Foy*, 10 Wn.(2d) 317, 116 P.(2d) 545 (1941), “If the common law relationship of master and servant was to obtain, the legislature would have so stated.” *Sound Cities Gas & Oil v. Ryan*, 13 Wn.(2d) 457, 465, 125 P.(2d) 246, 249 (1942), *Unemployment Comp. Dept. v. Hunt*, 17 Wn.(2d) 228, 135 P.(2d) 89 (1943).

The more recent cases seem to show that the common law test is no longer valid. The Washington legislature appears to have settled the question by adding to the definition of employment, “unlimited by the relationship of master and servant as known to the common law,” in the 1942 amendment. However, the case of *Broderick, Inc. v. Riley*, 22 Wn.(2d) 760, 157 P.(2d) 954 (1945), again applied, at least temporarily, a narrow construction to the act. Real estate brokers working for commission were declared without the statute. The court held that no relationship of employment existed within the meaning of the act since the remuneration for the brokers’ services was not paid out of funds belonging to the realty company. See also *In re Coppage*, 22 Wn.(2d) 802, 157 P.(2d) 977 (1945).

The instant case found that fishermen working under the “share” plan were performing services for the employer and wages were paid from the employer’s funds but noted parenthetically that the statute does not require wages or remuneration to be paid out of funds belonging to the employer. Rather the statute was held to embrace any relationship wherein an individual has in his employ a person engaged in performing personal services.

The court attempts to distinguish the *Broderick* case by contending that it arose under the 1943 amendment to the Unemployment Compensation Act which suggested a narrower construction of “employment” than does the 1945 amendment. The 1943 statute defined employment:

Employment, subject to the other provisions in this subsection means service performed for wages or under any contract of hire, written or oral, express or implied. REM. REV. STAT. (1943 Supp.) § 9998-119g(1) [P P C. § 928-37g(1)].

The words "contract of hire" have been changed to "contract calling for the performance of personal services" in the 1945 statute, but this difference seems negligible. Rather it appears that the *Skrivamuch* case represents a swing once more from a narrow to a broad construction of the act. However, it is arguable that the court is not actually varying its interpretation but is rather seeking to apply the statute in a manner most consistent with legislative policy. Fishermen would seem much more clearly than real estate brokers to be within the class of persons the act was designed to benefit, i.e., those whose livelihood depends upon the willingness of other persons to create jobs by putting capital at risk.

W A. R.

New Trials—Statutory Grounds—Effect on the Inherent Power of Trial Court. *D* was convicted of second-degree murder. The trial court, after saying, "The court being further of opinion that on the facts the case was very close, and a jury composed of conscientious and reasonable people might well conclude that the homicide was justified," granted a new trial on the grounds that "the verdict is contrary to the law and evidence." *Held*: Order for new trial reversed. The amendment of 1933, REM. REV. STAT. § 399 [P P C. § 78-3], specifying as a ground for new trial "that there is no evidence or *reasonable inference* from the evidence to justify the verdict or the decision, or that it is contrary to law," (italics ours) is the only basis for granting new trials on the ground of insufficiency of the evidence. *State v. Brent*, 128 Wash. Dec. 371, 183 P.(2d) 495 (1947).

The grounds for granting a new trial in *criminal* actions are contained in REM. REV. STAT. § 2181 [P P C. § 136-1], the sixth being identical to ground 2 contained in the trial court's order. The court, therefore, erred in applying REM. REV. STAT. § 399 [P P C. § 78-3], which contains the grounds for a new trial in *civil* actions. Hence the interpretation of the 1933 amendment which limits the trial court's discretion in granting new trials on the basis of insufficiency of evidence appears inapplicable.

The court recognizes that numerous decisions hold that the statutory language gives the trial court a very broad discretion in the matter of granting new trials for insufficiency of the evidence but dismisses them as being abrogated by the 1933 amendment. However, in so deciding, the court apparently failed to recognize that it is overruling settled law in Washington. In the leading case on the exact ground in question, the court held that subdivision 7 of sec. 1, Chapter 138, Laws of 1933, p. 482, did not take away from the court the right to exercise its discretion with reference to the granting of a new trial when the court should believe that substantial justice had not been done in the case. *Branmer v. Lappenbusch*, 176 Wash. 625, 30 P.(2d) 947 (1934). Cited with approval in *Lowther v. Tollefson*, 184 Wash. 55, 49 P.(2d) 908 (1935), *Starr v. Bard*, 25 Wn.(2d) 381, 170 P.(2d) 655 (1946), *Wood v. Hallenbarter*, 12 Wn.(2d) 576, 122 P.(2d) 798 (1942), *Bond v. Owens*, 20 Wn.(2d) 354, 147 P.(2d) 514 (1944). In *Huntington v. Clallam Gram Co.*, 175 Wash. 310, 27 P (2d) 583 (1933), it was held that the granting of a new trial because the verdict is against the weight of evidence is discretionary with the trial court, which ruling will not be disturbed unless the discretion is manifestly abused. *Leer v. Cohen*, 10 Wn.(2d) 239, 116 P.(2d) 535 (1941), *Dyal v. Fire Companies Etc., Inc.*, 23 Wn.(2d) 515, 161 P.(2d) 321 (1945). *Myers v. Weyerhaeuser*, 197 Wash. 407, 85 P.(2d) 1091 (1938) said that whether a verdict should be set aside as against the evidence is a question which is peculiarly within the discretion of the trial judge, and an appellate court will not interfere except under "most extraordinary circumstances."

The effect of this decision would be to greatly limit the trial court's discretionary power to grant a new trial. However, in view of the application of the wrong statute and, in effect, the overruling of the *Brammer* case, *supra*, and all subsequent decisions without mentioning them or discussing the prior Washington rule, the authority of the instant case is weak and might not be followed when the question is properly presented and considered.*

R. L. O.

Corporations—Purchase by a Corporation of Its Own Stock. Prior to 1947 a corporation in Washington could not ordinarily purchase or traffic in its own stock unless it did so in the process of reducing its capital stock and had met the requirements of REM. REV. STAT. § 3803-40 [P P C. § 443-9], (two-thirds vote of shareholders, etc.). *State ex rel. Howland v. Olympia Veneer Co.*, 138 Wash. 144, 244 Pac. 261 (1926), *Whittaker v. Weller*, 8 Wn.(2d) 18, 111 P.(2d) 218 (1941). This prohibition was an adherence to the so-called English rule, *Trevor v. Whitworth*, L. R. 12 App. Cas. 409 (1887), which is regarded as the minority rule in the United States. *Barrett v. Lumber Co.*, 275 Mass. 302, 175 N. E. 765 (1931), *Keith v. Kilmer*, 261 Fed. 733, 9 A. L. R. 1287 (1920). The 1947 legislature amended the UNIFORM BUSINESS CORPORATION ACT, REM. REV. STAT. § 3803-12 [P P C. § 441-21] by the addition of the following clause.

(2) Every corporation organized hereunder shall have the power to purchase, hold, sell and transfer shares of its own capital stock: *Provided*, That no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital stock of the corporation. (WASH. LAWS 1947, c. 195, § 1)

A question which immediately arises is the meaning of "impairment of the capital stock." Must the purchase of such stock only be made when the corporation has a surplus of assets over liabilities including capital stock, or may it make the purchase if the position of the capital stock outstanding after the purchase is not impaired? The holdings in other jurisdictions are not uniform. While some jurisdictions hold a corporation can purchase its stock only out of surplus, *Cross v. Beguelin*, 252 N. Y. 262, 169 N. E. 378 (1929), *Iback v. Elevator Supplies Co.*, 118 N. J. Eq. 90, 177 Atl. 458 (1935), others hold that such purchases may be made even in the absence of surplus if the position of the creditors is not jeopardized. *Scriggins v. Thomas Dalby Co.*, 290 Mass. 414, 195 N. E. 749 (1935), *Rasmussen v. Roberge*, 194 Wis. 362, 216 N. W. 481 (1928).

The text of the instant amendment seems to have been lifted word for word from the Delaware CORPORATION ACT (REV. CODE DEL. 1935, § 2051) with the exception that in the Washington statute the phrase "capital stock" has been substituted for the word "capital." This substitution seems unimportant in the determination of the problem under consideration. The Delaware court in *In Re International Radiator Co.*, 10 Del. Ch. 358, 92 Atl. 255 (1914) and later the Circuit Court of Appeals in *Ashman v. Miller*, 101 F.(2d) 85, 90 (C. C. A. 6th 1939), held that under the Delaware statute:

Capital does not in this connection mean the assets of the company for of course the assets are reduced when any of it is used by a corporation to purchase shares of its capital stock. It means that the funds and property of the company shall not be used for the purchase of shares of its capital stock when the value of its assets is less than *the aggregate amount of all the shares of its capital stock outstanding.* (Italics supplied)

The italicized portion is essentially the definition of "capital stock" under the Washington BUSINESS CORPORATION ACT, REM. STAT. § 3803-1(10) [P P C. § 444-1(X)].

*EDITOR'S NOTE: On rehearing *en banc*, the court reversed the departmental decision and held substantially in accordance with this analysis, *State v. Brent*, 130 W.D. 265, 191 P.(2d) 682 (1948).

In both cases the court held that under the Delaware statute a corporation may use only its surplus for the purchase of its stock.

In view of this interpretation of the almost identical Delaware statute and the conservative position of the Washington court regarding the purchase by a corporation of its own shares previous to the 1947 amendment, it would seem that when the problem is presented the court will require that a purchase of a corporation of its own stock be made only out of surplus. This prediction would seem further fortified by the fact that to hold otherwise would allow a corporation to deplete the security margin of its creditors as represented by the capital stock without compliance with *REM. STAT. § 3803-40, supra*. It is hardly possible that the legislature intended this result.

D. E. R.