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Equity

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

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it was the appellant's contention that whatever jurisdiction the court formerly had to annul voidable marriages was withdrawn by the divorce act of 1949, and that only void marriages could now be annulled.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

EQUITY

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

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

that officer answered and declined in writing to initiate any such proceeding. The Superior Court issued an alternative writ of mandate, in response to which the respondents demurred on the ground, among others, that the relators had no capacity to sue. The demurrer was overruled and respondents appealed. The Supreme Court held: "Since prior to instituting the present mandamus proceeding they had demanded that the Attorney General take legal steps to cure the alleged illegal actions on the part of respondents and since the Attorney General had refused to act, relators are entitled to bring this action and thus they have capacity to sue."[2]

The Washington court in an unbroken line of decisions from 1891 to 1938, a period of forty-seven years, has consistently enunciated and followed the general rule that volunteer private citizens and taxpayers have no capacity to maintain an action against state officers in matters of public concern except upon a showing of a direct, substantial and pecuniary injury separate and distinct from that suffered by the general public.[3]

The reasoning behind the rule was set forth in the first Washington case on the problem[4] in language which has been quoted with approval many times as follows:

> As the fallacy of a proposition can best be shown by distorting it, we may presume that if one of the departments of the state government can be suspended at the instance of a private citizen who has nothing more than a community interest in a matter which concerns the general public, that every department in the state can be suspended at the same time, and the whole machinery of the government stopped, and the very existence of the state, so far as the exercise of its functions are concerned, destroyed. Surely such a theory of practice is not in harmony with the genius of our government, nor will authority sanction, or public policy permit, the adoption of a rule which will authorize any number of volunteers who may rightfully or wrongfully, interpret the laws different from the interpretation put upon them by the officers of the state, to paralyze for a time every or any branch of the state government.[5]

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[2] *Id.* at 80, 273 P.2d at 469.

[3] Jones v. Reed, State Auditor, 3 Wash. 57, 27 Pac. 1067 (1891); Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37 (1898); Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186 (1901); Bilger v. State, 63 Wash. 457, 116 Pac. 19 (1911); State *ex rel.* Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108 (1915); State *ex rel.* Hartley v. Clausen, 146 Wash. 588, 264 Pac. 403 (1928); State *ex rel.* Jueneman v. Superior Curt, 157 Wash. 429, 289 Pac. 28 (1930); State *ex rel.* Clithero v. Schowalter, State Superintendent of Public Instruction, 159 Wash. 519, 293 Pac. 1000 (1930); State v. Gattavara, 182 Wash. 325, 47 P.2d 18 (1935); Sasse v. King County, 196 Wash. 242, 82 P.2d 536 (1938).

[4] Jones v. Reed, *supra* note 3.

[5] *Id.* at 65, 27 Pac. at 1069.

In the instant case the court, rejecting the broad rule stated above, relied wholly upon the more recent Washington case of *Reiter v. Wallgren*[6] where the court, after considering all of the previous cases on the subject, said: "We never have held that, in a proper case *where the Attorney General refused to act to protect the public interest*, a taxpayer could not do so,"[7] and laid down this rule:

> In the absence of a statute governing suits by taxpayers, a demand upon the proper public officer to take appropriate action is a condition precedent to the maintenance of a taxpayer's action challenging the validity and legality of what public officers are intending to do or have done, unless facts are alleged which sufficiently show that the demand to bring the suit would have been useless.[8]

It was held that Reiter was precluded from maintaining the action because he had not made a demand.

It would seem that the *Reiter* case decided only that a taxpayer does not have capacity to sue where he has not made a demand on the Attorney General and that any discussion about a taxpayer's capacity to sue where he has made a demand on the Attorney General (quoted above) was dicta. Thus the *Reiter* case which determined the rights of a taxpayer who *has not* made a demand would not seem to be authority for the instant case which determined the rights of a taxpayer who *has* made a demand.

However, the court reasoned that for the court in the *Reiter* case to determine whether a taxpayer could maintain an action against officials involving a public matter without a direct interest it was first necessary to determine whether any taxpayer, under any circumstances, had the capacity to sue.

Thus, the *Reiter* rule, as interpreted by the instant case, would seem to be that a taxpayer has capacity to sue subject to the limitation that he must first make a demand on the Attorney General.

However, the language in the *Reiter* case does not say that in every case where the Attorney General refuses to act a taxpayer may do so. The conditions, if any, to which this new doctrine is subject must be left to the determination of future cases.

Declaratory Judgment — Jurisdiction. In *Manus v. Snohomish County Justice Court District Committee*[9] an action for a declaratory

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[6] 28 Wn.2d 872, 184 P.2d 571 (1947).
[7] *Id.* at 876, 184 P.2d at 573.
[8] *Ibid.*
[9] 44 Wn.2d 893, 271 P.2d 707 (1954).

judgment was brought against the Justice Court District Committee to determine the constitutionality of a statute providing that a Justice Court District Committee shall group precincts outside cities of more than 5,000 population into justice court districts, that boards of county commissioners shall establish such districts accordingly, and that the justice of the peace for a district, which includes a city under 5,000 population, may be appointed as police judge of the city. The action was brought by justices of the peace whose terms expired before the effective date of the questioned statute. The opinion assumes without discussion that, under the declaratory judgment acts, RCW 7.24, the courts of this state have jurisdiction to decide this case.

The Washington court has many times held that under the declaratory judgments act there must be an actual, existing controversy between the parties having opposing interests, which interests must be direct and substantial, and involve an actual, as distinguished from a a possible, potential, or contingent dispute, to meet the requirements of justiciability.[10]

An example of the application of this rule may be found in *Adams v. City of Walla Walla*[11] where a labor union instituted an action under the Uniform Declaratory Judgments Act to secure a judgment determining the constitutionality of an ordinance restraining patrolling or loitering in front of any business establishment in Walla Walla, and alleged that the ordinance would interfere with strikes which might be called to settle labor disputes. However, no strike or restraint by the city of patrolling or loitering, pursuant to the ordinance in question, was alleged, nor was any actual enforcement thereof, with respect to the union, shown. The court, in holding that there was nothing alleged but a remote, contingent peril to the union, stated, "We are compelled to conclude that no justiciable issue has been presented to entitle appellants to invoke the declaratory judgments act."[12]

Thus, in the *Adams* case, since the application of the questioned law was contingent upon the restraint of the union's patrolling or loitering, there was no justiciable issue.

Similarly, in the instant case, since the application of the questioned law was contingent upon the reelection of the incumbent justices, there would also seem to be no justiciable issue.

In the *Adams* case, the court also held, "although the parties have

[10] Conaway v. Time Oil Company, 34 Wn.2d 884, 210 P.2d 1012 (1949).
[11] 196 Wash. 268, 82 P.2d 584 (1938).
[12] *Id.* at 271, 82 P.2d 586.

stipulated that appellants have a sufficient interest in the present litigation to enable them to maintain this action, parties cannot stipulate that a justiciable controversy exists so as to clothe this court with jurisdiction, when it does not, in fact, exist under the pleadings and the record as made."[13]

The question then arises, if the justices presented no justiciable issue and the parties cannot by stipulation give the court authority to entertain jurisdiction, how, then, was jurisdiction invoked under the declaratory judgments act?

When the case was brought up on appeal the Justice Court District Committee (appellants) assigned error upon a portion of the trial court's Finding of Fact which states: ". . . that the unconstitutional acts of the legislature cited herein renders (sic) the plaintiffs [justices] uncertain and insecure with respect to their rights, status and legal relations."[14]

This assignment of error apparently goes to the jurisdiction of the court since it would seem that since the justices are no more than potential candidates their interests are too remote for the justices to be insecure with respect to them and, therefore, they should not be able to invoke the declaratory judgment.

However, this assignment of error was not argued and though the parties cannot stipulate jurisdiction, it would appear that the court is permitting them to accomplish the same result by failure to argue an assignment of error.[15]

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Interpleader—To Try Title to Corporate Offices. *State Bank of Wilbur v. Wilbur Mission,* 44 Wn.2d 80, 265 P.2d 821 (1954), was an interpleader action by a bank to determine title to church funds deposited with the clerk of the court. The appellant contended that the only way to try title to a corporate office is an action in quo warranto. The court held: (1) Equitable relief (interpleader) may be allowed because quo warranto is not an adequate remedy at law because the plaintiff (Bank) does not claim an interest in the corporate office to invoke quo warranto and can only invoke it at the discretion of the Prosecuting Attorney or of the court. (2) Quo warranto is not under all circumstances an exclusive remedy and the title to such office may be tried in any action where necessary to the determination of other matters in controversy. See also *Corporations* at page 111.

Equity—Declaratory Judgment—Demurrer to the Pleadings. *Richardson v. Danson,* 44 Wn.2d 760, 270 P.2d 802 (1954), was a complaint brought by the decedent's heirs at law which prayed for a judgment declaring the rights of the parties under the

[13] *Ibid.*
[14] Note 9 *supra,* at 899, 271 P.2d at 711.
[15] See the dissent in the principal case by Mr. Justice Olson.

will and for the determination of the validity of the provisions therein with respect to real estate. The trial court sustained a demurrer to the complaint, plaintiffs refused to plead further, judgment of dismissal was entered, and plaintiffs appealed. The court held, as a matter of first impression in this state, that when a complaint is filed for a declaratory judgment and the plaintiffs set forth facts showing the existence of an actual controversy relating to the matter covered by the declaratory judgment act (RCW 7.24.020), although not showing that the plaintiffs are entitled to a declaration of rights in accordance with their theory, a demurrer to the pleadings should be overruled. See also *Property* at page 178.

EVIDENCE

Hearsay—An Exception to the Rule. The importance in a civil action of the criminal record of a party or the deceased in a wrongful death action was further enhanced by the decision in *Fleming v. Seattle*.[1] Last year the court in *Minch v. Local Union No. 370, I.U.O.E.*[2] went beyond the general rule that the record of conviction could be used to impeach the witness.[3] There it held that the *fact* of conviction, when material without regard to the facts upon which the conviction was based, was admissible as to the amount of damages a plaintiff could recover for lost wages. In order to obtain employment, which was essentially limited to federal projects in that area, the plaintiff would have probably needed a security clearance from the F.B.I.

In the *Fleming* case, the defendant sought to show habitual drunkenness as affecting the earning power and life expectancy of the decedent in a wrongful death action. An offer of the record of a justice court showing eleven convictions for drunkenness, mainly on pleas of guilty, was not accepted by the trial court which sustained an objection that this was hearsay evidence. The defendant took exception. The jury rendered a verdict for $55,580 which the trial judge reduced, with the consent of the plaintiff, to $37,580. The decedent was 62 years old, had been advised by his physician to "take it easy" because of poor health, and had not been gainfully employed for several years. The decedent's wife had been supporting him and their three minor sons. While the majority opinion did not so state, Justice Olson in his dissent indicates that the judgment was considered excessive. This excessiveness would induce the court to find an error, as to the damage question, to be prejudicial.

Thus, a dilemma faced the court. It could follow what it conceded

[1] 145 Wash. Dec. 447, 275 P.2d 904 (1954).
[2] 44 Wn.2d 15, 265 P.2d 286 (1953); noted, 29 WASH. L. REV. 123 (1954).
[3] 1 WIGMORE, EVIDENCE 980 (3d ed. 1940).