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# Criminal Law

William E. Love
*University of Washington School of Law*

no public record discloses the lien. Physical examination of the property may or may not reveal the work on which the lien rests.

The development of this area of legislative sanction for long periods of secrecy for liens, and an extension as in Chapter 239, are indeed anomolous. There is direct conflict with the policy demonstrated in the recording system.

**Lien for Taxes.** For some time the state has had a lien for taxes, in the reserve fund created by retainage from earned estimates under public improvement contracts. The pertinent legislation has been a part of the excise tax chapter. Chapter 236 transfers it to the lien chapter, RCW 60.28, and repeals RCW 82.32.250.

The only substantive change made by the new statute appears in section 5. This requires the public officer charged with payment of the contract to notify the tax commission when the work is done, and to withhold all of the reserve until he has the commission's reply indicating that its claim has been paid or is collectible without recourse to the lien. The old statute did not require such notice, and directed the withholding of payment to the contractor pending his production of the commission's certificate.

Section 5 would seem to be ambiguous. It says in effect that the disbursing officer shall not pay anyone, including the state, until the state has been fully paid or waives its lien. The certification of full payment is a particularly odd pre-requisite to disbursement, in light of section 4, which gives the state priority only as to the excise taxes produced by the specific contract concerned, and of section 6, which requires the disbursing officer to pay those claimants whose liens are superior to the state's, before paying the state.

WARREN L. SHATTUCK

## CRIMINAL LAW

**Abandoned Iceboxes.** Chapter 298 is the legislative response to those grim stories in the papers during the past year chronicling the children who had chosen to lock themselves into unused iceboxes and thereby met their own appointments in Sammarra. It will probably be another example of the comparative futility of avoiding risks by making their creator criminally liable; it is now a misdemeanor to discard, abandon, or leave "in any place accessible to children" any refrigerator, icebox, or deep freeze locker with a capacity of one and one-half cubic feet or more without taking off the doors thereof or making them unlockable,

and while violation of the statute does not "in itself" render the misdemeanant guilty of "manslaughter, battery, or other crime against a person who may suffer death or injury from entrapment," the chances certainly are that few prosecutions will be undertaken until a victim has been discovered. It is a preventive statute and the benefit it is designed to achieve is much more within the talents of the Junior Chamber of Commerce, the newspapers, and the Boy Scouts than those of policemen, sheriff's deputies, or prosecutors; it provides a basis for publicity and inspection, but it is upon the innate good sense of the man whose created risks are pointed out to him that we must rely rather than on the threat of prosecution.

The civil consequences of violating the statute are not entirely clear, and here let be sounded a plea to legislators to include in any criminal statute a provision stating whether it is to carry tort liability or not. Presumably the familiar pattern of the negligence per se formula will be applied by the court, but query whether the formula should be trusted to the mythical "intent of the legislature" approach which has in the past yielded some remarkably strong fruit. If the per se formula is used, it should be noted that liability will cut considerably under the requirements of the attractive nuisance doctrine. There, the defendant must have had reason to anticipate the presence of children at his dangerous device before he is subject to the duty of guarding them against it; here, the statutory "place accessible to children" can mean nothing less than any place where children appear, and the difference is substantial.

A special escape is provided by the Act for persons who keep the refrigerating devices for sale: section 4 states that he shall not be guilty of a violation "if he takes reasonable precautions to effectively secure" their doors so as to "prevent the entrance of children small enough to fit into such articles." Aside from the nowadays minor matter of the split infinitive, it would have been better to say "to secure" rather than "to effectively secure"; the word adds nothing to context and merely provides an opportunity for shadow-boxing the statute. In any event, the key to liability is plainly negligence, and it is cause for some astonishment that the commercial keeper of the devices should be allowed to escape the strict liability meted out to the amateur keeper in section 1.

Finally there is the problem of potential municipal liability, raised in section 2: will the city, as "owner, lessee, or manager" permitting the device "to remain on the premises under his control without having the

door removed or the lock mechanism removed to prevent latching of the door" be subject to liability to parents of children suffocated in iceboxes abandoned on the city dump?

**Mandatory Sentences in Certain Traffic Violations.** Chapter 393 is the current attempt to deal with the problem from the law enforcement end of the drunken driver and the one under the influence of narcotics. The details of the Act are for the man interested in the particular case; some penalties are increased, some lightened, but the general tightening-up is indicated by the fact that forfeiture of bail is made equivalent to conviction and that no court may suspend the prescribed sentence, thereby pulling the rug out from under the municipal judge or J.P. who gives horrendous sentences, all suspended, or to be served on weekends, or only for pleasure driving, or whatever the whim indicates. This is done with, and it is a good thing, but it will not affect the other device, that of writing-down the charge from drunken to reckless to negligent driving to speeding to whatever it may be, in order to temper the wind to the lamb who has not even yet been shorn.

There is one inexorable provision: the court will be operating with full information as to former offenses. Every Monday, convictions or forfeitures must be reported to the Director of Licenses, and it provides that all prosecuting officers shall request and be provided with a record of such matters which the Director shall supply. Penalties for repeaters are stepped-up, and their lot, as it should be, is hard.

JOHN W. RICHARDS

**Criminal Procedure—Term of Sentence.** In Chapter 42, provisions found in four scattered sections of the code[1] referring to sentencing procedure, have been reenacted in the original wording of the session laws. As a result of this chapter and of rules promulgated by the supreme court which superceded several procedural statutes, the provisions of RCW 10.73 (except RCW 10.73.040, pertaining to bail) are no longer effective.

This chapter was one of several submitted by the statute law committee. While there is little material change from the repealed provisions of the code, there are two points worth noting. In reading this chapter one must be careful to distinguish between the sections which apply to *criminal actions*[2] (including misdemeanors) and those which apply to *felonies*.

[1] RCW 10.70.030, 10.73.030, 10.73.070, and 10.73.080.

[2] "Criminal actions" are those actions prosecuted in a court of justice, in the name

The second point concerns section 4 of this chapter which allows for deduction from a sentence for time spent *in prison* pending appeal when the conviction is reversed and the defendant is again convicted on retrial. The comparable section in the code[3]—now repealed—referred to time spent in *jail.* The popular and usual tendency is to use the term "prison" in contradistinction to "jail"—i.e., prison refers to a penitentiary or place of punishment for serious offenses.[4] The fact that section 2 of this chapter in another connection uses the word "jail" further substantiates the argument that the terms are complementary and do not overlap. On the other hand, a convicted defendant not out on bail is almost always retained in the county jail pending appeal and retrial; hence, if "prison" referred exclusively to penitentiary, the provision would have little practical applicability. In *Lindsey v. Superior Court*[5] the court was applying a legislative enactment[6] which contained the exact language now found in section 4, including the use of the term "prison". The court concluded that the time spent in jail was deductible from the sentence imposed after a second trial.

**Duty of Sheriff to File a Complaint.** Chapter 10 added a new section to RCW 36.28, reading as follows:

> In addition to the duties contained in RCW 36.28.010, it shall be the duty of all sheriffs to make complaint of all violations of the criminal law, which shall come to their knowledge within their respective jurisdictions.

RCW 36.28.010 read in part as follows:

> In the execution of his office, [the sheriff] and his deputies: . . . (6) Shall make complaint of all violations of the criminal law which shall come to their knowledge within their jurisdiction;

The bill was submitted by the statute law committee to fill a void created when section 2801, Code 1881 was amended so as to be applicable only to constables.[7] The duty to make complaints under the 1881 section applied to both constables and sheriffs. The compilers of RCW divided the provision, changed the language slightly, and consolidated each with other statutes relating to constables and sheriffs, respectively.

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of the government, against one or more individuals accused of crime. State *ex rel.* Calderwood v. Schomber, 23 Wash. 573, 575, 63 Pac. 221, 222 (1900).

[3] RCW 10.73.070.

[4] There are cases, however, stating that the term "prison" may also refer to a county jail. State v. Killian, 173 N. C. 792, 92 S. E. 499, 502 (1917).

[5] 33 Wn.2d 94, 204 P.2d 482 (1949).

[6] Section 34, c. 61, L. 1893.

[7] Section 10, c. 11, L. 1955.

The committee did not in this instance specifically amend or repeal RCW 36.28.010 (6).[8] Thus, unless one concludes that this chapter impliedly repeals RCW 36.28.010 (6), or that the RCW section automatically loses its "prima facie" status when the underlying statute on which it is based has been modified, we have two provisions—cursorily repetitious—presently existing side-by-side in the code. Repeal by implication is not favored; certainly it is not desirable, and in this case confusion could have been avoided had specific reference been made to RCW 36.28.010 (6).

One other point worthy of mention is the meaning to be attached to the word "knowledge"[9] found in both sections. Does it mean that a violation must come to the attention of the sheriff or a deputy by use of the physical senses? Where the sheriff's office is notified of alleged violations, must it make an investigation to gain the requisite personal knowledge, or does a sheriff have sufficient knowledge from the mere statement of a third party to require him to act? Is the complaint he is required to make only an informal one to the prosecuting attorney's office, or must a sheriff file a formal complaint before a judge which can be the basis of a hearing, and of the issuance of a warrant of arrest?[10]

There is no prohibition against a private citizen filing a complaint under RCW 10.40.010 for misdemeanors or gross misdemeanors within the jurisdiction of a justice of the peace or under RCW 10.16.010 for felonies and for other crimes not within the jurisdiction of a justice of the peace. There is, therefore, no necessity for concluding that a sheriff has "knowledge"—and thus require him to act by filing a formal complaint—when merely notified by a private party that an alleged violation has been committed.

[8] The committee expressly amended or repealed both the session law and the applicable RCW section in most of the other bills it submitted.

[9] What constitutes "knowledge" has caused courts no end of trouble for years. For example, courts have said the following: "Knowledge generally is 'a clear and certain perception of that which exists, or of truth and fact'" (quoting Webster's Dictionary). People v. Steele, 37 N.Y. Supp. 2d 199, 200 (1942); Knowledge is not limited to personal cognizance. The Cleveco, 154 F.2d 605, 613 (C.C.A. 6th Cir. 1946); Actual knowledge is not limited to be first-hand knowledge, Brown v. Brann & Stuart Co. 20 N.J. Misc. 405, 28 A.2d 420, 423 (1942); Reliable information may be knowledge. Guardian Life Insurance Co. v. Weiser, 51 N.Y. Supp. 2d 771, 773 (1941); "The word 'knowledge' has no technical meaning." "It is a word in popular use, and its import is well understood. Knowledge may be obtained from many sources and in many ways, and is furnished or obtained by a variety of facts and circumstances. But, generally speaking, when we say that a person has knowledge of an existing condition [or act], we mean that his relation to it, his association with it, his control over it, his direction of it are such as to give him personal information concerning it." Howard v. Whittaker, 250 Ky. 836, 64 S.W.2d 173 (1933). quoting from Parrish v. Commonwealth, 136 Ky. 77, 123 S.W. 339, 346 (1909).

[10] RCW 10.04.010 and 10.16.010.

An opinion by the attorney general states that the sheriff is obligated to investigate alleged violations of the law.[11] This obligation is not based on any precise statutory enactment, but on the common law duty of the sheriff. However, the attorney general concludes that the prosecuting attorney has, as a practical matter, no effective method of compelling action by the sheriff.

**Prisoners.** Several provisions affecting prisoners were enacted. Escape from custody without force was made a crime.[12] The previous law was applicable only to escapes with force or by fraud.[13]

Prisoners sentenced to one of the penal institutions may be transferred to any of the others whenever the superintendent of public institutions deems it in the best interest of the state or of the prisoner.[14] All restrictions which prevented a boy between the ages of 16 and 30 from being sent to the reformatory rather than the penitentiary have been removed.[15]

One who engages in a prison riot can be tried, convicted and sentenced up to 10 years.[16] The statute states that one who voluntarily participates by being present at a riot has committed the offense; the validity of the provision that makes *presence* without any overt act a crime is open to question.[17] Prior to the passage of this chapter, one engaged in a riot could only lose good conduct credit or be denied institutional privileges. An additional punishment up to 10 years may be added to one convicted of holding or participating in a holding of a hostage.[18]

The board of prison terms and parole may enter into a compact with other states for the return of parole violators.[19] Legislation previously existed which provided for out-of-state supervision of parolees with a compacting state, and for their return if situation so warranted.[20] The new law will cover cases where parolees leave the state without authority.

The board of prison terms and parole may now reconsider the dura-

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[11] OPINIONS OF THE ATTORNEY GENERAL, 51-53-322.
[12] Chapter 320.
[13] See State v. Hoffman, 30 Wn.2d 475, 191 P.2d 865 (1948).
[14] Chapter 245.
[15] Chapters 242 and 246.
[16] Sections 1 and 2, c. 241.
[17] The Washington court has held that one (a non-convict) merely present at the scene of a riot is not guilty of the crime of riot—at least until an order to disperse has been issued. State v. Moe, 174 Wash. 303, 24 P.2d 638 (1933).
[18] Section 3, c. 241.
[19] Chapter 183.
[20] RCW 9.95.270.

tion of confinement after one year in either penitentiary or reformatory.[21] Under the old law, the minimum duration could not be reconsidered until seven years had elapsed for penitentiary offenders and before three years for inmates of the reformatory.

**Indecent Liberties.** That portion of RCW 9.79.080 (2) which made it a felony to take indecent liberties with or on the person of any *female* under the age of 15 years has been amended by Chapter 127; the subsection now applies to anyone taking indecent liberties with either a *male* or *female* under the age of 15. Except for the substitution of the word "child" for "female," the subsection was not changed; thus, several ambiguities still remain. For example, does that portion of the statute which refers to indecent or obscene exposure apply only where children under the age of 15 are involved? The subsection does not expressly so state. However, unless it is so interpreted, the taking of indecent liberties with a female above the age of 15 *without her consent* would only be a gross misdemeanor under subsection (1), whereas taking indecent liberties with a female above the age of 15 *with her consent* would be a felony.

Also, does the phrase "whether with or without his or her consent" refer only to the word "another"—i.e., to a person, other than the accused, who is the subject of the indecent exposure—or does the phrase refer to a third party who witnesses the exposure? Is any such third party witness necessary where the actor-accused exposes another? If not, must the person exposed by the actor be under the age of 15?

Does the phrase which eliminates lack of consent as an element also apply to the first portion of the statute—the taking of indecent liberties? In 1937[22] when the original statute was amended, the legislature in all probability sought to protect females under 15 by making it irrelevent whether they did or did not in fact consent. However, the use of "his or her," when referring to consent, in the same statute which required that the victim of the indecent liberties be a female at least left room for argument that the *consent* phrase was not applicable where the charge was indecent liberties. The amendment eases the strain in this connection for anyone trying to give a logical construction to the statutory wording.

It is regrettable that the legislature did not take advantage of this opportunity to further clarify the section.

WILLIAM E. LOVE

[21] Section 6, c. 133, amending RCW 9.95.050.
[22] Section 2, c. 74, L. 1937, amending Section 190, c. 249, L. 1909.