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## Criminal Law

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tion which is disassociated from transactions with the customer, and the private home.

The second major addition to the coverage is the extension of the board's power to the sale, use and financing of "publicly-assisted housing." This phrase too enjoys a very elaborate and sweeping definition. It includes any building used or to be used for the residence or sleeping quarters of one or more persons the acquisition, construction, rehabilitation, repair or maintenance of which is either (a) financed by a loan guaranteed or insured by the federal or state governments or any agency thereof, so long as such loan remains so guaranteed or insured, or (b) subject to an outstanding commitment for such loan.

It should be pointed out that the 1957 legislation is in addition to, and not in substitution of, other enforcement measures in the civil rights area. There yet remain, for example, the criminal sanctions applicable to places of "public resort" as discussed above. Also, the person aggrieved by discriminatory practices in violation of the criminal statute has still a right to civil damages from the offender, as illustrated by the case cited earlier.<sup>6</sup> One qualification must here be observed: The 1957 legislation providing for administrative enforcement does require the aggrieved person to make an election of his remedies—of civil recovery or of administrative assistance. The details of the election are not specified, but it is to be presumed that either the commencement of the civil action or the filing of the complaint for administrative relief would constitute such an election.

The implications and scope of application of the administrative power as thus created in this 1957 legislation are, of course, awesome. The ideals of equality of treatment are thus brought much closer to the lives of all than most persons may have realized or, for that matter, than many may wish to realize. For example, every home upon which there is an FHA loan, nay, even an FHA commitment for a loan, is now subject to the board's power. And this power apparently includes the specific enforcement of real estate transactions which would have been entered into but for the race, creed, color or national origin of the prospective purchaser.

## CRIMINAL LAW

**Perjury by Deposition—An Abortive Re-Definition.** Chapter 46, Session Laws of 1957, re-defining perjury, is the child of an unfortunate 1938 supreme court decision and the belated labor of a confused 1957

<sup>6</sup> See footnote 3, *supra*.

legislature. The statute attempts, apparently, to make the person who lies in oral testimony given in deposition guilty of perjury, whether or not he may later sign the written version prepared by the reporter. In this, the legislation fails; not only does it fail to overcome the supreme court decision which made the liar immune from prosecution, but it also introduces new problems.

In the aspects which are here material, the perjury statute was, until the supreme court decision, clear and unambiguous. It provided as follows:<sup>1</sup>

Every person

a) who . . . shall swear

- 1) that he will testify, declare, depose or certify truly, or
  - 2) that any testimony, declaration, deposition, certificate, affidavit or other writing subscribed by him is true,
- and

b) who . . . shall state or subscribed as true any material matter which he knows to be false,

shall be guilty of perjury in the first degree . . . (outline form supplied.)

(RCW 9.72.060 then defined the completion of a deposition, certificate or affidavit as being the time when it was subscribed and sworn to with intent that it be uttered or published as true.) Thus, it seemed clear enough that perjury committed *during the course of taking an oral deposition* was distinct and separate from perjury committed by subscribing to the truthfulness of a written version submitted to a witness *after the reporter had transcribed the testimony*. In the one case the oral statement was the basis for perjury; in the other, the written version.

The confusion started with the supreme court's decision in *State v. Ledford*<sup>2</sup> in 1938. There, the appellate court affirmed the dismissal of an information charging perjury upon the ground that the witness who allegedly made a false statement during the taking of a deposition had not signed the written version prepared by the reporter. By so doing, the court ignored the first part of the statute which made the oral utterance also the subject of perjury. The source of the confusion was, of course, the statutory use of the word, "deposition," as being a "writing" along with "testimony, declaration . . . certificate, affidavit or other writing." The attention of the majority, being drawn only to

<sup>1</sup> RCW 9.72.010.

<sup>2</sup> 195 Wash. 581, 81 P.2d 830 (1938).

that use of "deposition," apparently overlooked the presence of the word, "depose," in the section of the statute pertaining to oral testimony.

Since 1938 prevaricators by deposition have avoided perjury charges by conveniently waiving signature, with no legislative attempt at remedy until this 1957 statute. Logically, the legislature should have made it clear that the supreme court misinterpreted the legislative intent, by simply spelling out the two different bases for perjury: (1) the oral utterance of the witness in deposition (the testimony as written by the reporter, though not signed by the witness, would be evidence of what the oral sworn statement had been); and (2) the written version of the deposition signed by the witness.

Unfortunately, the legislature did not see the problem in those simple terms. The present act unrealistically proceeds on the basis that a person who lies during the taking of a deposition does not commit perjury until he "completes" the deposition, and it provides that he completes it either when he swears to and signs the written version with intent that it be published as true or when, after waiver of the requirement that he sign the written version, he swears to its truthfulness.

The legislation accomplishes nothing, if the language of the statute is given its plain meaning. The witness who lies in his oral deposition still cannot be convicted of perjury unless either of two things happens:

- a) he swears to and signs the written version as later prepared by the reporter, or
- b) *after* he has waived the requirement that he sign the written version, he swears to the truthfulness of that written version, and it is *still* the written document that is the basis for his conviction, not his oral testimony.

It must be apparent, therefore, that the statute does not accomplish what we assume the legislature really had in mind, namely, the conviction for perjury of the witness who lies in his oral deposition and who, for the convenience of all concerned at the time of the taking of oral testimony and before the reporter writes up that testimony, waives the requirement of his signature thereto.

At this point we must acknowledge the contribution of one John N. Rupp to this ill-conceived and ineffectual remedy (though we attribute the error of his ways to his then youth). Mr. Rupp, in a comment in 13 *Washington Law Review* 319, published in 1938, conceded the *Leaford* decision to be correct, as it was not, and proposed a deceptively

simple remedy—merely that a deposition be deemed complete when signed *or* sworn to.

However, tampering with the “completion” definition in the statute does not reach the real problem created by the court’s decision. What constituted a completed written deposition under the old statute was reasonably clear: if the written version of the deposition were to be used as a basis for perjury, the statute required that it be subscribed *and* sworn to with intent that it be uttered and published as true. Judge Steinert, dissenting in the *Ledford* case, pointed out that the swearing referred to in the statute was the oath administered to the witness before the oral testimony was given. Indeed, in the case of a deposition, the statute then in force provided, as Rule 30 now provides,<sup>3</sup> for the witness to be sworn only once, at the beginning. He is not sworn again when he signs the written version. Recognizing this, Judge Steinert considered the swearing at the start of the proceeding as applicable also to the written version but only when the written version was later signed by the witness. How else could a witness be held to the truthfulness of a written version?

If Mr. Rupp thought his change would make the oral testimony the basis for a perjury conviction, his proposal strikes at the wrong place, *i.e.*, at the section dealing with writings, not that dealing with oral testimony. And, as we have pointed out, there is no need for either signature or swearing to a written document if the object is to reach oral testimony. Of course the oral testimony is sworn to, and if it be the basis for perjury there is no need for reference to the writing or to its signing at all.

Possibly Mr. Rupp meant that after the written version of the deposition is presented to the witness, he may be held to its truthfulness if he then does either of the two things, *i.e.*, swears to its truthfulness *or* signs it. This alternative seems ridiculous, for it would still require the witness to see the document, and if he is willing to sign it he presumably would be willing to swear to it, or *vice versa*. And yet the legislature seems to have incorporated this interpretation. The legislature, however, tries to express the idea of swearing to *or* signing in two places, not just one (as suggested by Mr. Rupp).

The first place is in the section of the statute dealing with the various writings which are the subject of possible perjury, by adding the words “sworn to . . . or,” and changing the word, “is,” to “as” where indicated, as follows:

<sup>3</sup> Rule 30, Rules of Pleading, Practise and Procedure, 34A Wn.2d.

Every person

a) who . . . shall swear

. . .

2) that any testimony, declaration, deposition, certificate, affidavit, or other writing by him *sworn to* . . . or subscribed as true,

and

b) who . . . shall state or subscribe as true any material matter which he knows to be false,

shall be guilty of perjury in the first degree (emphasis and outline form supplied).

The change of "is" to "as" was, obviously, gross grammatical error, for the clause starting with "that any . . ." has no verb and is meaningless. Presumably an indulgent court may read "as" as "is" in order to make sense, but there is no excuse for such carelessness.

Even if this statute be read as it must be meant, *i.e.*, with the word, "is," the statute does raise a new idea: writings which the witness swears to as true may be of two different types—those which are signed and those which are sworn to. This concept is a bit difficult to appreciate. How can you swear to a document as true which, though not signed, is already sworn to? Presumably, the only sense to it at all is that the document be sworn to at two different times; in the case of a deposition, the first swearing takes place at the commencement of the proceedings, and the second takes place when the written version is inspected.

The second legislative change occurs in the definition of the "completion" of a deposition. The earlier version of the statute had provided that a deposition was completed when subscribed and sworn to. From this, the words "subscribed and," have been deleted, with the result that the deposition is now completed when sworn to. There is a qualification, however, that the swearing must take place *after* the waiver of signature. Since the witness rarely, if ever, waives the requirement of signature prior to the commencement of proceedings, this qualification of swearing *after* waiver must also contemplate a second swearing.

This requirement of a double swearing is, of course, quite unrealistic and ineffectual as a practical matter. Not only does it not reach the oral lying, but it also confuses and complicates the procedure with a second swearing when a signature following the swearing at the commencement of the proceedings is all that should be necessary to hold the witness to the truthfulness of the written version.

The only other possible interpretation of this new statute is one

which would require only one swearing. Though it seems unlikely, the court conceivably could say that a person "who . . . shall swear . . . that (a) writing by him sworn to . . . (is) true" swears only once. And though it would not conform to usual practice, one can imagine a witness waiving signature even before he is sworn at the commencement of the proceedings. Under these circumstances the written version of the deposition would be the basis for the perjury conviction even though the only formality was the swearing at commencement of proceedings, with neither signature nor swearing to the written version.

If by any chance the court should so interpret this statute, a host of other problems will thus intrude:

In the first place, the witness would be held to the truthfulness of a document he has never seen. At the time of the only certification which he makes, the document does not even exist, at least not in the form in which it will be used against him. The hazards thus created were largely obviated by the former requirement of signature to the written version, but now there is no such protection of the witness. If the court should go behind the version written in the English language to that expressed in the reporter's hieroglyphics or in the impressions on the reporter's recording mechanism, how can a witness be held to the accuracy of another's symbolism or to the faithfulness of a recording machine operated by another, the record of which he has not even heard?

In the second place, if the court does get over the hurdle of the non-existence of the written English language version of the testimony at the time the witness purports to swear to its truthfulness, the witness hazards thereby a perjury charge not on what he actually said in his oral testimony but upon the error of the reporter or of his machine. By this interpretation, the writing of the reporter becomes in itself the utterance laid to the responsibility of the witness. How, within the limits of due process of law, could conviction for perjury be based on this conception of vicarious criminal responsibility?

Out of all this unnecessary complication emerges one clear conclusion: the legislature has not accomplished what it must have had in mind. The lying which occurs when the oral testimony is given still cannot be the basis for a perjury conviction. The remedy was simple; yet how ineffectual was the attempt, how awkward is the language, and how pregnant the result with new problems of its own.

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