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WASHINGTON CASE LAW — 1957

Presented below is the fifth annual Survey of Washington Case Law. The articles in this survey issue have been written by second-year students as a part of their program to attain status as nominees to the *Law Review*. The second-year students were guided in their work by third-year students on the staff of the *Law Review* and by various members of the law school faculty.

The case survey issue does not represent an attempt to discuss every Washington case decided in 1957. Rather, its purpose is to point out those cases which, in the opinion of the Editorial Board, constitute substantial additions to the body of law in Washington.

ADMINISTRATIVE LAW

Presumption as to Acts of Public Officials—Zoning Boards. In *State ex rel. Jehovah's Witnesses v. Wenatchee*¹ the court held that the presumption that official acts of public officers have been regularly and legally performed is inapplicable to zoning boards. A zoning board, according to the court, has the ultimate burden of proving that its actions are not arbitrary and capricious. Such a decision is opposed to the vast weight of established law outside Washington. As recently as 1955 the Washington court held that the exact opposite was true.²

Jehovah's Witnesses purchased property in a zoned residential area of the city of Wenatchee and then sought a permit to erect a church thereon. A city ordinance, which was held constitutional by the court, allowed such a permit if approved by the zoning board. Pursuant to the ordinance the zoning board held two public hearings, entertained petitions from landowners in the area, inspected the site, studied maps

¹ 50 Wn.2d 378, 312 P.2d 195 (1957).

² Lillions v. Gibbs, 47 Wn.2d 629, 289 P.2d 203 (1955).

and engineer's reports, and concluded that the permit should be denied on the grounds that a traffic hazard would be created. It was the policy of the board to allow churches in that area only if they were located on an arterial street. The superior court denied mandamus after a trial *de novo*. The supreme court reversed and ordered the mandamus to issue.

The court reasoned that the usual presumption as to the regularity of acts of public agencies does not apply to acts "... involving the forfeiture of an individual's rights or the depriving him of the free use of his property."

The court relied heavily on an Ohio³ and a Maryland⁴ decision which are undeniably in accord. The court also cited a Minnesota case⁵ where the presumption was held not to apply to a tax sale. The rule is limited in Minnesota to public sales. It appears inconsistent that the Washington court should rely upon this Minnesota decision when their own decisions are contra to it. Past Washington cases have held the presumption applicable to execution sales.⁶ The court also cited an Oklahoma decision⁷ where it was stated that the presumption of regularity was inapplicable in cases of forfeiture of land. While there is no doubt that Oklahoma shifts the burden of proof to the zoning board in cases of actual forfeiture,⁸ the rule is inapplicable to a board ruling on an application for a variance from the zoning, which is what the Jehovah's Witnesses sought in the instant case.

To culminate this impressive list of authority, the court cited 22 *Corpus Juris* 141. It is interesting to note that the authors of that work eliminated the cited statement from the text of *Corpus Juris Secundum* and, indeed, imply that just the opposite is true.

In *Lillions v. Gibbs*¹¹ the action of a zoning board was before the Washington court and the decision as to who had the burden of proof was exactly contra to the instant case. The majority in the present case distinguish the *Lillions* case by ignoring it. In *In re Local Im-*

³ State ex rel. Synod of Ohio v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515, 138 A.L.R. 1274 (1942).

⁴ Applestein v. Osborne, 156 Md. 40, 143 A. 666 (1928).

⁵ Deaver v. Napier, 139 Minn. 219, 166 N.W. 187 (1918).

⁶ Williams v. Continental Securities, 22 Wn.2d 1, 153 P.2d 847 (1944).

⁷ Christ v. Fent, 16 Okla. 375, 84 P. 1074 (1906).

⁸ Tonini & Bramblett v. Board of County Commissioners, 100 Okla. 246, 229 Pac. 263 (1924) (and cases cited).

⁹ Thompson v. Phillips Petroleum Co., 194 Okla. 77, 147 P.2d 451 (1944); Torrance v. Bladell, 195 Okla. 68, 155 P.2d 546 (1945).

¹⁰ 31 C.J.S. §146.

¹¹ 47 Wn.2d 629, 289 P.2d 203 (1955).

*provement District No. 1*¹² the court held: "Arbitrary action by public officials is *never to be presumed.*" (Emphasis supplied)

If the court was correct in holding zoning boards an exception to the presumption of regularity on the grounds that they interfere with the free use of property, they were apparently wrong when they held that the presumption was applicable to condemnation authorities.¹³ Certainly condemnation is a forfeiture of greater magnitude than restrictions on user. The Washington court has also held the presumption applicable to a sheriff accused of failing to protect a prisoner from bodily injury by other inmates,¹⁴ to the withholding of the right to engage in a lawful occupation or business,¹⁵ to execution proceedings,¹⁶ to a sheriff accused of allowing an unauthorized person to redeem land,¹⁷ and to a tax assessor accused of excessive overvaluation of land.¹⁸ Invasion of the preceding rights appears to be of greater consequence than restrictions on user of land.

The great majority of courts faced with the question of whether the burden of proof was on the zoning board or the person attacking its decision have ruled *contra* to the Washington court.¹⁹ In addition, the writers are unanimous in stating that the presumption extends to zoning boards.²⁰

¹² 195 Wash. 439, 445, 81 P.2d 289 (1938) (special assessment of land owners).

¹³ State ex rel. McPherson Brothers Co. v. Superior Court, 108 Wash. 58, 182 Pac. 962 (1919).

¹⁴ Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415 (1920).

¹⁵ Standard Fire Ins. Co. v. Fishback, 86 Wash. 225, 149 Pac. 945 (1915); Chief Petroleum v. Walla Walla, 10 Wn.2d 297, 116 P.2d 560 (1941) (Where power has been granted to a city council to withhold a permit, the matter is to be left to their discretion. The court noted that many cases dealing with following a trade or occupation were in accord.)

¹⁶ Atwood v. McGrath, 137 Wash. 400, 249 Pac. 996 (1926) (there is a presumption that the sheriff followed his statutory duty in levying on real estate); Hill v. Calkins-Rice, 102 Wash. 118, 172 Pac. 829 (1918) (personal property); Williams v. Continental Securities, *supra* note 6.

¹⁷ State ex rel. Stickel v. Shattuck, 95 Wash. 119, 163 Pac. 414 (1917).

¹⁸ Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553 (1901).

¹⁹ California: Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419 (1933). Connecticut: St. Patrick's Church Corp. v. Daniels, 113 Conn. 132, 154 A. 343 (1931) (The court stated: "It is essential to their [the zoning board's] functions that they be invested with liberal discretion."); Levine v. Zoning Board, 124 Conn. 53, 198 Atl. 173 (1938). Kentucky: Hennessey v. Bischoff, Ky., 240 S.W.2d 71 (1951). New Jersey: Grant v. Board of Adjustment, 133 N.J.L. 518, 45 A.2d 184 (1946); Manning v. Paramus, 37 N.J.Super. 574, 118 A.2d 60 (1955). New York: Ulmer Park Realty v. City of New York, 57 N.Y.S.2d 713 (1945), *reversed on other grounds*, 63 N.Y.S.2d 143, *affirmed* 297 N.Y. 788, 77 N.E.2d 797 (1948); Crone v. Brighton, 119 N.Y.S.2d 877 (1952); Shepard v. Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949). Pennsylvania: Perelman v. Board of Adjustment, 144 Pa. Super. 5, 18 A.2d 438 (1941). Rhode Island: Roberts v. Zoning Bd. of Review, 60 R.I. 202, 197 Atl. 461 (1938); Jenney Mfg. Co. v. Zoning Board, 63 R.I. 477, 9 A.2d 705 (1939). Wisconsin: Smith v. Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956) (and cases cited). Iowa: Anderson v. Jester, 206 Iowa 452, 221 N.W. 354 (1928).

²⁰ 2 METZENBAUM, LAW OF ZONING 931 (2d ed. 1955); 1 YOKELY, ZONING LAW

Restrictions upon users of land are normally considered to be neither a forfeiture nor an unreasonable interference with the free utilization of land. The numerous nuisance cases decided by the court attest to the fact that restrictions as to users of land are common in furthering the rights and enjoyment of the greater number of land occupiers.

There is no apparent reason why zoning boards should be an exception to the presumption that public officials act reasonably and honestly. Decisions such as the instant one tend to fragmentize basic principles of law into inconsistent and uncertain segments. The court could have reached the same result, and still remained consistent with its past decisions, by holding that the presumption in favor of the zoning board was rebutted.

As the New York court stated: "... zoning boards and not the courts are empowered to zone and their work is presumed to be reasonable and lawful."²¹

Removal of Public Officer—What Constitutes Cause—Rule of Necessity. In *Kennett v. Levine*¹ the court held that an incompatibility of positions, sufficient for removal from office, existed where a city transit commissioner was also a member of a law firm representing tort claimants injured in consequence of transit system operations.

Petitioner sought a writ of prohibition to prevent the city council from proceeding to hear whether the petitioner's removal from office by the mayor should be confirmed. The petitioner argued that the facts did not constitute "cause" within the meaning of the city charter and that the council was prejudiced against him. The supreme court affirmed the trial court's dismissal of the petition and held that cause implies a reasonable ground for removal; what is reasonable is a question for the city council to decide, subject to review as a matter of law by the courts.

The city charter contained only the bare words "for cause" to define the grounds for removal. In elaborating on what is cause the court held that the question turns on whether the nature and duties of the office are such that it would be against public policy and detrimental to the public interest for one person to retain both positions.

AND PRACTICE §37 (2d ed. 1953); RATHKOPF, LAW OF ZONING AND PLANNING §51 (2d ed. 1949).

²¹ Ulmer Park Realty v. City of New York, *supra*, note 19.

¹ 50 Wn.2d 212, 310 P.2d 244 (1957).

The court concluded that the mayor might "...honestly, fairly and reasonably, and not through caprice or prejudice, conclude that there was an incompatibility..." between petitioner's public office and private employment. The mayor having so decided, a prima facie case was established and the courts would not prohibit the city council from hearing the matter. While the court held that the facts alleged constituted cause, the general tenor of the opinion is that it is within the city council's discretion as to whether or not to utilize the cause to remove from office.

While the bare phrase "for cause" is widely used in the United States as grounds for removal, there are singularly few cases anywhere defining the phrase. Such cases as there are on the subject are in general accord with the Washington court.² While the question of cause has been before the Washington court on numerous occasions, in most instances either the statute or ordinance was worded in terms of specific acts of misconduct,³ specific limitations were placed upon the removal procedure,⁴ or civil service employees and not elective or appointive officials were involved.⁵ In *State ex rel. Ennis v. Superior Court*⁶ it was held that the power of removal for cause was a common law incident of municipal corporations. In *State ex rel. Heilbron v. Van Brocklin*⁷ the court held that want of attention to duty was ground for removal of an appointive member of the board of public works under the same city charter under which the petitioner in the instant case was removed. With regard to civil service employees the rule is firmly entrenched in Washington that the civil service commission decides what is cause and that, unless the cause assigned is utterly frivolous, their decision is final.⁸

² 17 WORDS AND PHRASES 236; 6 WORDS AND PHRASES 328.

³ *State ex rel. Winsor v. Mayor and Council*, 10 Wash. 4, 38 Pac. 761 (1894). The statute authorized removal of a city councilman for willfully being interested in any contract with the city. The court held that the councilman's actions were not proven to be willful.

⁴ *State ex rel. Evans v. Superior Court*, 92 Wash. 375, 159 Pac. 84 (1916). A police judge appointed by the mayor is a constitutional officer within Art. 5, §3, of the Washington constitution and can be removed only by impeachment.

⁵ *Bridges v. Patterson*, 135 Wash. 436, 237 Pac. 998 (1925) (and cases cited). A policeman was removed for "the good of the service." The court held it could not review in the absence of arbitrary action on the part of the commission in receiving evidence.

⁶ 153 Wash. 139, 279 Pac. 601 (1929). Appointive civil service commissioner. The cause was not related in the opinion.

⁷ 8 Wash. 557, 36 Pac. 495 (1894).

⁸ *State ex rel. Wolcott v. Boyington*, 110 Wash. 622, 188 Pac. 777 (1920) (city fireman dismissed for circulating a petition calling for removal of the fire chief); 189 Wash. 64, 63 P.2d 515 (1937) (policeman removed for taking indecent liberties with a female).

Of more precedent value than what constitutes cause is the court's statement that this is an area that is *primarily administrative* and that therefore the court's jurisdiction should be *extremely limited*. Such a judicial attitude is not new to this state. In *State ex rel. Ennis v. Superior Court*⁹ there was no specific provision in the city charter as to how, by whom, or for what an appointive civil service commissioner was removable. The court held that the city council had *jurisdiction in the first instance* to determine the question of continuance in office. In *State ex rel. Heilbron v. Van Brocklin*¹⁰ the mayor removed an appointive member of the board of public works on the ground of inattention to duty in that he failed to inspect the public works and was unaware of extravagant expenditures in the department. The court would not undertake to say what was the proper range of duties but held that the mayor was within his bounds in determining that the attention to duty paid by the commissioner did not fulfill the demands of the office.¹¹

Petitioner also alleged that since the city council was prejudiced against him he would not be accorded a fair hearing and that for that reason the council should be prohibited from holding the hearing. In answer to this the court relied upon the rule of necessity: that if the agency is the only body given jurisdiction to hold the hearing its members will not be disqualified because of bias or prejudice. This marks the first time that the Washington court has invoked the rule of necessity. While such a rule hardly accords with the ideal of a fair trial and can at times be an almost sacrificial doctrine, there is little authority to the contrary. Only two jurisdictions appear to have questioned the doctrine.¹² The reasoning behind the rule is that if the agency's jurisdiction is exclusive and there is no legal means for calling in a substitute, a refusal to allow the agency to act will result in preventing absolutely a determination of the proceeding. The opponents of the rule argue that the rule of disqualification should be the paramount policy and that it is better that the question be delayed until the omission is remedied by legislative enactment.

In referring to the rule of necessity the court distinguished *State ex*

⁹ *Supra* note 6.

¹⁰ *Supra* note 7

¹¹ To the same effect regarding the mayor's discretion see *State ex rel. Niggle v. Kirkwood*, 15 Wash. 298, 46 Pac. 331 (1896), where a city police commissioner was part owner of a house of prostitution and attempted to use his position to influence the police from closing it up.

¹² Annot., 39 A.L.R. 1476 (1925).

rel. Barnard v. Board of Education,¹³ wherein the court disqualified one member of a school board from sitting on a removal hearing, on the ground that in the *Barnard* case there was still a majority of the board remaining to hear the question. In the instant case the petitioner asked that all of the council members be disqualified. While the instant case limits the right to an impartial hearing, the *Barnard* case affirms it to a degree. The consequent result may be that one can obtain at least a reasonably impartial hearing by singling out those members of the agency, less than a majority, that are most prejudiced and seek only their removal.

STEPHEN C. WATSON

Unconstitutional Delegation of Legislative Authority. In *State ex rel. Kirschmer v. Urquhart*, 50 Wn.2d 131, 310 P.2d 261 (1957), relator brought an original mandamus proceeding in the Supreme Court to compel the state director of licenses to issue a license to practice medicine. Relator had received a degree of Doctor of Medicine from the University of Vienna in 1937. At the time relator received her degree the Washington statute (Wash. Sess. Laws, 1909, c.192, § 6, as amended by Wash. Sess. Laws, 1919, c. 134, § 3) provided that an applicant for a license to practice medicine must file a diploma issued by a medical school "the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year..." Subsequent to relator's receipt of her diploma but prior to her application to practice, the statute was amended to provide that an applicant must present a diploma "...issued by a medical school *was has been accredited and approved by the American Medical Colleges and... (the American Medical Association) ...at the time a diploma shall have been issued...*" (emphasis supplied).

Wash. Sess. Laws, 1947, c. 168, §6; cf. RCW 18.71.050. At the time relator received her diploma the designated agencies had no accredited list of foreign medical schools; such a list was not promulgated until three years after enactment of the statute and thirteen years after relator received her diploma. Based upon the fact that the University of Vienna was not on any accredited list of the designated associations at the time the diploma was issued, the respondent director of licenses refused to issue the license. HELD: for relator, all judges concurring. Legislative power is non-delegable. The legislature can adopt existing lists but not ones to be issued in the future. When the legislature declared that accredited schools shall be those on a list which was not then in being, it was an unconstitutional delegation of legislative authority to a private agency and therefore void.

No lists were promulgated by the agencies prior to 1950 and yet the statute required that the school be on a list in being in 1937 when the relator received her degree. The court would not presume that the legislature intended to prohibit all who graduated from foreign medical schools prior to 1950 from practicing medicine in this state. This being so, the 1919 amendment, which set up a valid standard and which was in effect when the relator received her diploma, controlled the matter. The director of licenses was ordered to determine relator's application.

¹³ 19 Wash. 8, 52 Pac. 317 (1898). The board of education was by law a tribunal from which there was no appeal. A board member who filed charges against a school superintendent was disqualified by reason of personal enmity and a publicly announced intention to find the superintendent guilty. The court discussed the rule of necessity.