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The articles of this survey have been prepared for publication as a part of the nominee program for membership on the *Washington Law Review*. The actual writing was done by the second-year members of the *Law Review*, under the guidance of the third-year members of the Board. The survey, the third of its kind, does not represent an attempt to discuss every Washington case decided in 1955. Rather, its purpose is to point out those cases which, in the opinion of the Board of Editors, constitute substantial additions to the body of law in Washington.

CONSTITUTIONAL LAW

Requirement that Justices of the Peace be Attorneys. After two unsuccessful attempts to get a ruling on the constitutionality of Chapter 74, P. 210 and Chapter 156 § 2, P. 430, Laws of 1951,[1] which provide that justices of the peace in cities of over 5,000 population shall be attorneys at law, the court in *In re Bartz*[2] held that the law is not in conflict with article III, section 25 of the Washington State Constitution. The first attempt at a ruling, *Bullock v. Stone*,[3] was an appeal from a denial in a lower court of a writ of prohibition to prevent a county auditor from placing on the ballot the name of a non-lawyer candidate for the office of justice of the peace in a city of over 5,000 population, and to restrain the county canvassing board from canvassing votes cast in his behalf. To uphold the lower court would have meant denying the constitutionality of the act, and the department

[1] RCW 3.12.071.
[2] 147 Wash. Dec. 145, 287 P.2d 119 (1955).
[3] 45 Wn.2d 891, 273 P.2d 892 (1955), *cert. denied* 45 Wn.2d 892, 279 P.2d 439 (1955).

of the court which heard the case, not being in unanimous agreement, felt this should be done, if at all, *en banc*. The case was scheduled for a hearing before the whole court, but before the case came up the non-lawyer candidate was defeated at the polls, thereby making the problem moot. In the second attempt, *Kitsap County v. City of Bremerton*,[4] the problem was not passed on for want of jurisdiction. Even though the defendant did not question the standing of the complainant to sue, the court declared that in all cases involving the constitutionality of a statute, the standing of the parties to sue would be carefully scrutinized.[5] The county was standing on the ground that it was an injured party under that portion of the law which required it to pay more money to justices of the peace.[6] The court rejected the contention of the county, and held that the county was a mere political subdivision of the state, derived its power from the state, could not question the will of the state to spend money collected under the power granted by the state, and therefore did not have standing to sue.

The third attempt, *In re Bartz*,[7] was an action brought by a citizen of Chehalis to restrain a non-lawyer justice of the peace who was elected after passage of the act from performing the duties of his office. The argument for declaring the act unconstitutional was that article III, section 25 provides qualifications for state officers, impliedly prohibiting imposition of further qualifications, that justices of the peace are state officers, and that therefore the imposition of further qualifications for the office is unconstitutional. Noting that there is some question as to whether or not a general qualification in a constitution prohibits imposition of additional qualifications, but assuming the better rule to be that it does, the court held that justices of the peace are not state officers within the meaning of article III, section 25, but are judicial officers, and that since no other clause imposes qualifications, the legislature is free to impose such qualifications as it sees fit.[8]

In the *Bartz* case, the court relied on the grammatical construction

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[4] 46 Wn.2d 362, 281 P.2d 841 (1955).

[5] *But see* Nacarrato v. Sullivan, 46 Wn.2d 67, 278 P.2d 641 (1955), wherein neither the opinion of the court nor the briefs of the parties revealed the standing of the complainant to sue, although the complainant was challenging constitutionality of a statute. In any event, the Kitsap County case gives fair warning to attorneys in this state to be on firm ground as far as standing is concerned before bringing a case involving constitutional problems.

[6] Chapter 156, §4, Laws of 1951, (RCW 3.16.004).

[7] 147 Wash. Dec. 145, 287 P.2d 119 (1955).

[8] The state constitution is a limitation, not a grant, of powers. Union High School District No. 1, Skagit County v. Taxpayers of Union High School District No. 1, Skagit County, 26 Wn.2d 1, 172 P.2d 591 (1946).

of article V, section 2,[9] and article IV, section 3,[10] to provide proof of intent of the drafters of the Washington State Constitution to differentiate between state officers and judicial officers, although why this sort of reasoning would not apply to prior cases which have held members of the judiciary to be state officers is not clear. The court has held that superior court judges are,[11] and are not,[12] state officers within the meaning of article IV, section 4, which provides for original jurisdiction on writs of mandamus as to state officers. It has held that superior court judges are state officers within the meaning of article VI, section 8 providing for election of state officers not provided for elsewhere in the constitution,[13] but that justices of the peace are not county officers within the meaning of that section.[14] It would thus seem that the intent of the drafters of our state constitution to differentiate between state and judicial officers is not entirely determinative of the problem.

The court also notes that article III, section 25 provides that there shall be no salary increase for state officers for the term for which they shall have been elected, and that a similar provision pertaining to judicial officers is found in article IV, section 13. Reasoning that the latter section would have been unnecessary if judicial officers were state officers, they find that article III, section 25 could not have been intended by the drafters of the constitution to apply to judicial officers. Interestingly enough, article IV, section 13 provides only that there shall be no increase in compensation during term in office, while article III, section 25 provides that there shall be no increase or decrease; hence it could be argued that the legislature has the power to decrease compensation of supreme court and superior court judges during the term for which those officials were elected.[15] This would seem

[9] "The Governor and other state and judicial officers..." If the intent of the constitutional drafters had been to include judicial within the term "state officers" the addition of the words "and judicial officers" would have been unnecessary.

[10] "The judges of the supreme court shall be elected... at the times and places at which state officers are elected...." If the intent of the constitutional drafters had been to include supreme court judges within the term "state officers" the phrase should read "...at the times and places at which *other* state officers are elected...."

[11] State *ex rel.* Edelstein v. Foley, 6 Wn.2d 444, 107 P.2d 901 (1940).

[12] State *ex rel.* Home Tel. & Tel. Co. v. Hern, 106 Wash. 362, 180 Pac. 400 (1919).

[13] State *ex rel.* Dyer v. Twitchell, 4 Wash. 715, 31 Pac. 19 (1892).

[14] State *ex rel.* Fair v. Hamilton, 92 Wash. 347, 159 Pac. 379 (1916), wherein it was also held that justices of the peace are not county officers within the meaning of art. XI, §4 and §5, which provides for uniform organization of county government and uniform election of county officers. *But see* amendment 21, wherein the legislature prescribes for election and authority of county officers, and specifically excepts justices of the peace and superior court judges from the effects of the clause, inferentially showing that the legislature considers them to be county officers.

[15] The out for the court if such a case came up might be found in the language of art.

an unusual power to leave in the legislature, under traditional notions of separation of and independence of the judiciary from the legislative branch of the government.[16] The problem becomes even more confusing with the introduction of the decision in *City of Everett v. Johnson*,[17] which held that justices of the peace come within the provisions of article II, section 25, which provides the same restrictions on alteration of wages of public officers during the term for which they are elected that article III, section 25 does for state officers. Using the same line of reasoning as that employed in *In re Bartz*,[18] superior court and supreme court justices are not public officers within the meaning of article II, section 25 because otherwise that portion of article IV, section 13 which proscribes alteration of salaries would be a redundancy. Since the court held in the *Everett* case that justices of the peace *are* public officers within the meaning of article II, section 25, one of three conclusions must follow: (1) that justices of the peace are not judicial officers in the same sense that superior or supreme court justices are; (2) that the reasoning that the court uses in the *Bartz* case is faulty or is restricted to the peculiar facts of the case; or (3) that the decision in the *Everett* case is impliedly disapproved by the reasoning in the *Bartz* case. Since the first conclusion would destroy the effect of the whole argument in the *Bartz* case, one of the latter two conclusions must follow.

In any event perhaps the most that can be said on this subject is that aside from those sections of the constitution which have been spefically interpreted (and perhaps even in those), supreme court justices, superior court justices, and justices of the peace are judicial officers for most purposes, but that they are sometimes included within the terms "state officers" and/or "public officers" (and perhaps "county officers"). The use of those terms does not necessarily include or exclude the judiciary and it would be well for any attorney relying on an interpretation either way to have his arguments for his interpretation well marshalled.

IV, §14. Since that section provides that the legislature may *increase* salaries of supreme and superior court justices, the argument could be made that the section impliedly prohibits decrease of compensation. Such a holding would of course mean that should the state ever fall into economic hardship, the legislature would be without power under the constitution to decrease compensation to supreme and superior court justices. Such a holding would also have to be made in conflict with the well established rule that the state constitution is a limitation, not a grant, of powers. See note 8, *supra*.

[16] Compare art. III, §1 of the United States Constitution, which provides that the compensation of the judiciary shall not be *diminished* during continuance in office.

[17] 37 Wn.2d 505, 224 P.2d 617 (1951).

[18] 147 Wash. Dec. 145, 287 P.2d 119 (1955).

The Frasch Fish Case. In *Frasch v. Schoettler*[19] the court held *inter alia* that the powers delegated to the Director of Fisheries under Chapter 147, Laws of 1953[20] were not void as a delegation of legislative powers. That law provides for licensing of boats and fishermen fishing outside of the three mile limit and transporting their catch through or into the waters of this state. It also provides for the establishment of closed seasons in certain areas. The *Frasch* case involved an appeal by 132 fishermen from a lower court ruling which denied an injunction against the Director of Fisheries to restrain him from enforcing rules and regulations promulgated by him pursuant to the challenged law, and which denied a declaratory judgment that the law was unconstitutional.

The Washington State Constitution provides that the power to make laws shall be vested in the legislature, or in the people by the method of referendum or initiative.[21] Two established qualifications to this provision are that the legislature may delegate power to an agency to ascertain the existence of facts on whose existence the law will begin to operate,[22] or may delegate power to promulgate rules and regulations to carry out an express legislative purpose,[23] provided a sufficiently definite standard is set out to guide and limit the agency to which the power is delegated. The problem is, what is a sufficiently definite standard? Apparently the standard required varies considerably from case to case, and what would be a sufficient standard in one situation will not suffice in another. Among the factors which determine whether or not a standard is sufficiently definite are considerations of how easy it would be for the legislature to provide a workable standard for the agency[24] and whether the subject matter regulated by the law deals only with a privilege which the state is free to withdraw completely at any time or with an established personal or property right.[25]

The standards set out for the Director of Fisheries under the challenged law are to be found, if at all, in section 1 of that law,[26] which section sets out the purpose of the act, *i.e.*, to preserve the salmon industry. With this general purpose his only limitation, the Director

[19] 46 Wn.2d 281, 280 P.2d 1038 (1955).
[20] RCW 75.18.070-.080.
[21] Art. 2, §1 as amended.
[22] Cawsey v. Brickey, 82 Wash. 653, 144 Pac. 938 (1914). See 11 AM. JUR., *Constitutional Law* §235 (1937).
[23] Senior Citizens League v. Dept. of Social Security, 38 Wn.2d 142, 228 P.2d 478 (1951). See 11 AM. JUR., *Constitutional* Law §240 (1937).
[24] *Ibid.*
[25] *Ibid.*
[26] RCW 75.18.005.

has been delegated a somewhat more extensive power than that provided by former fisheries laws. He has the power to change opening and closing dates in accordance with his judgment[27] and to revoke licenses if it appears to him that operations under such licenses will tend to result in impairment, depletion, or destruction of the salmon resources of the state.[28] The first power mentioned is an extension from that granted to the Director under the general fisheries statute, RCW 75.12.010, since that statute states that the Director can only *shorten* the fishing season from that provided by the legislature, while under the provisions of the statute challenged in the *Frasch* case, presumably he can lengthen, shorten, or even change the general period of the year during which fishing is allowed. The power to revoke licenses is even more unusual, not only because the Director has heretofore lacked such power under other fisheries statutes,[29] but also because ordinarily a law that provides for revocation of a license by an administrative official is void unless very clear guides are provided within the statute granting that authority.[30]

In upholding the constitutionality of the questioned law as far as the delegation of authority problem was concerned, the court in the *Frasch* case relied principally on two cases: *Vail v. Seaborg*,[31] and *McMillan v. Simms*.[32] These cases dealt with statutes involving the same subject matter as that in the *Frasch* case, *i.e.*, regulation of fishing, and both of those cases cited an earlier case, *Cawsey v. Brickey*,[33] which held constitutional a delegation of authority to a Board of County Commissioners to determine the best area within the county for a game preserve. This was essentially a delegation of authority to find a fact upon which the particular game conservation law began to operate. From this simple beginning, the court in the *Vail* and *McMillan* cases held that the Board of Fisheries could be constitutionally delegated

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[27] RCW 75.18.070.
[28] RCW 75.18.080.
[29] RCW 75.28.380 provides that only upon conviction of a violation of the fishing laws set out in Title 75 may a judge or justice of the peace who hears the case revoke the license of the convicted individual. A mandatory revocation is provided for a second conviction. The Director under this section has only the power to refuse to re-issue the license after revocation.
[30] *Cf.* State *ex rel.* Makis v. Superior Court, 113 Wash. 296, 193 Pac. 845, 12 A.L.R. 1248 (1920), wherein a soft drink manufacturer's license was revoked by an agency official under a law giving that official such power if he felt that operation of the business under the license was against "preservation of public morality, peace, health or good order." The law was declared unconstitutional for lack of an adequate standard.
[31] 120 Wash. 126, 207 Pac. 15 (1922).
[32] 132 Wash. 265, 231 Pac. 943 (1925).
[33] 82 Wash. 653, 144 Pac. 938 (1914).

power to promulgate rules and regulations concerning where, when and in what manner fish could be taken from the waters of the state, and that such a delegation is adequately supported by only a statement of legislative policy of game preservation as a standard.

It is not clear whether the court now looks upon delegation of powers under fish and game laws as primarily a fact-finding power, as was the case in *Cawsey v. Brickey*,[34] or power to promulgate rules and regulations, as in *Vail v. Seaborg*.[35] It seems doubtful, however, that the court's characterization in the *Frasch* case of such powers as those granted under RCW 75.18.070 and .080 as "simply ministerial" is accurate, since a ministerial duty is usually defined as one involving little or no discretion.[36] This is certainly not the nature of the power granted to the Director of Fisheries under the challenged law.

Strong dissents in both *Vail v. Seaborg*,[37] and *McMillan v. Simms*[38] voiced disapproval of the trend that the dissenting justices felt was being taken from a republican to a bureaucratic form of government, and those dissenting complained that the standards supplied to the Fisheries Board (standards substantially the same as those furnished the Director under the law challenged in the *Frasch* case) were inadequate to support the delegation. The lack of unanimity in the earlier cases is not reflected in the unanimous decision in the *Frasch* case, however, and it would thus seem well established that in the area of fishing regulation, the legislature can delegate extensive powers to administrative agencies with a minimum statement of legislature policy as the supporting standard.

Outside of the fisheries area, the controversy as to what constitutes

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[34] *Ibid.*

[35] Note 31, *supra*. There is little effort in the cases to distinguish between delegation of power to find a fact and delegation of power to promulgate rules and regulations. The former is less open to attack than the latter on grounds of unconstitutional delegation of law-making powers since the latter involves not only fact finding, but discretionary rule making, which is more legislative in nature than is pure fact finding. Indeed most of the cases talk not in terms of power to formulate rules, but in terms of power to find facts upon which the law, as provided by the legislature, begins to operate. Under a situation such as that involved in the Frasch case, the Director must (1) find that fish are being depleted and (2) formulate rules and regulations designed to stop the depletion.

[36] City of Tacoma v. Peterson, 165 Wash. 461, 5 P.2d 1022 (1931). See WASH. WORDS AND PHRASES.

[37] 120 Wash. 126, 135, 207 Pac. 15, 18 (1922), "By reason of the supposed good to be accomplished in each particular instance, the courts have indeed more and more departed from the firm foundation upon which representative government rests, and little by little insiduously [*sic*] and imperceptibly, there has grown up a line of authorities, which with slight exaggeration seems to warrant the views of the majority; and, unless a halt be called, by the same growth continued representative government will be wholly abolished."

[38] Note 32, *supra*.

a definite enough standard still divides the court.[39] In *Senior Citizens League v. Department of Social Security*,[40] another case cited as authority for the holding in the *Frasch* case, three dissenting justices felt that despite a clear legislative attempt and intent to provide a standard, the one furnished was inadequate. This was the majority view in a case before the court a few months earlier, *State v. Gilroy*.[41] The differences between the cases, according to the majority opinion in the *Senior Citizens* case, were these: (1) that the area regulated by the law in the *Senior Citizens* case (social security) was a new and very complex one, wherein many factors involved could not easily be put before the legislature, and wherein a practical standard was extremely difficult to formulate, while the area regulated in the *Gilroy* case (operation of homes for children) was not a complex one, but one in which the legislature could easily provide a workable standard; and (2) that social security benefits are a boon from the state which can be withdrawn completely if the legislature sees fit, while the operation of children's homes, being a legitimate business and entirely legal use of private property, represents an established right which can be regulated by governmental agency control only when clear and definite standards are provided for the agency exercising such control.[42] Inasmuch as the court cites the *Senior Citizens* case as authority for its holding in the *Frasch* case, and does not mention the *Gilroy* decision, although that decision was called to its attention,[43] it seems a fair inference that the court feels that the right to engage in fishing is a privilege granted by the state,[44] and that the area of regulation of fishing is so complex that a workable standard is difficult to formulate.

It should be noted that the argument of improper delegation of

[39] In a case decided shortly after the Frasch case, State *ex rel.* Oregon State Highway Commission v. Yelle, 147 Wash. Dec. 725, 289 P.2d 1027 (1955), two dissenting judges felt that power delegated to the Washington State Toll Bridge Authority to set minimum toll rates on a bridge over the Columbia River based on cost of maintenance, operation, and bond interest was void as a delegation of legislative powers without an adequate standard, although the standards in questions there were much more definite than those involved in the Frasch case. Perhaps there is a distinction between state owned roads and state owned fish. See note 44, *infra*.

[40] 38 Wn.2d 142, 228 P.2d 478 (1951).

[41] 37 Wn.2d 41, 221 P.2d 549 (1950).

[42] *Cf.* State *ex rel.* Makis v. Superior Court, 113 Wash. 296, 193 Pac. 845, 12 A.L.R. 1248 (1920). The Makis case could be rationalized on similar grounds.

[43] Brief for Appellant, p. 75.

[44] State v. Tice, 69 Wash. 403, 125 Pac. 168 (1912), held that there is no private right in a citizen to take fish or game except as such right is given by the state. This was repeated in Vail v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922), wherein the court said that the fish in the waters of the state are the property of the state. In the Frasch case the court also upheld a property in fish caught outside the three mile limit.

legislative powers formed only a small part of the attack on the constitutionality of Chapter 147, Laws of 1953 in *Frasch v. Schoettler*[45] and that the main arguments of the complainants revolved around considerations of due process, violation of the commerce clause of the Federal Constitution, and violation of restrictions in the Federal Constitution against states laying imposts. Therefore, it is not inconceivable that the court might declare similar delegations void, given a case which raised only the issue of improper delegation of powers, and thus given an opportunity to engage in a more complete analysis of the problem.

EUGENE C. ANDERSON

"Daily Newspaper" Means Weekly Newspaper Putting Out a Daily Edition. In *State ex rel. Swan v. Jones*, 147 Wash. Dec. 645, 298 P.2d 982 (1955), a citizen of Vancouver challenged the validity of an election held by that city under the terms of art. XI, § 10 of the Washington State Constitution, which section provides for adoption of a "home-rule" charter by cities in which the population exceeds 20,000. The section requires that notice of the election of adoption be published for thirty days preceding the election in two daily newspapers published within the city adopting home rule. Since Vancouver has only one such newspaper, the city contracted with a weekly newspaper published in Vancouver to put out a daily edition for thirty days preceding the election. The relator challenged that the weekly newspaper, with its daily editions, was not a "daily newspaper" within the meaning of the constitutional provision. The supreme court held that the term "daily newspaper" can and does include a weekly newspaper published daily for a period necessary to comply with the terms of the provision requiring notice to be published in a daily newspaper. Four dissenting justices argued that the term "daily newspaper" meant just that, and if the requirement was offensive, it should be removed by amendment, not by judicial legislation.

Survival of Statutory Right of Action After Statute is Repealed. Under RCW 4.24.100, persons injured by an intoxicated person were granted a right of action against the person who gave or sold liquor resulting in the intoxication. The plaintiff in *Hanson v. West Coast Wholesale Drug Co.*, 147 Wash. Dec. 744, 289 P.2d 718 (1955) sued in superior court to recover damages incurred as a result of collision between her car and a car driven by a person who was intoxicated by liquor furnished by the defendant at an annual Christmas party. Defendants demurred, claiming that the statute applied only to sales, not gifts of liquor. The superior court sustained the demurrer. Plaintiff appealed, but before the case could be heard, the statute granting her a right of action was repealed. (Chapter 372, Laws of 1955). The supreme court held that the case was moot. When the jurisdiction of a court to determine a case or class of cases depends on a statute, jurisdiction ceases completely when the statute is repealed. Prior to final judgment, there is no vested right. *Ex Parte McArdle*, 74 U.S. (7 Wall.) 506 (1869).

Constitutional Debt Limit. Chapter 12, Laws of 1955 set up the Washington State Building Finance Authority, which was to have the power to buy or lease lands, build buildings thereon, and lease those buildings to state agencies. The program

[45] 46 Wn.2d 281, 280 P.2d 1038 (1955).

was to be financed by thirty year bonds, and the bonds were to be paid for by building rents. In *State ex rel. Washington State Building Finance Authority v. Yelle*, 147 Wash. Dec. 632, 289 P.2d 355 (1955), the court held that the law was unconstitutional because it exceeded the debt limit on state obligations placed by art. VIII, § 1 of the Washington State Constitution. The court distinguished *State ex rel. Washington Toll Bridge Authority v. Yelle*, 195 Wash. 636, 82 P.2d 120 (1938), and *Gruen v. State Tax Commission*, 35 Wn.2d 1, 211 P.2d 651 (1949) on grounds that the laws in those cases did not call for the debts to be paid from the general fund, but from independent sources (bridge tolls, and cigarette excise taxes). The Building Finance Authority law called for the bonds to be paid off by rentals from the buildings, but the rent money was to come in large measure from the general funds, and thus, said the court, the law is unconstitutional. Recognizing the law as an obvious attempt to circumvent the constitutional debt limit, the court has indicated that the monies which go to pay off bonds financing similar programs must not in any sense come from the general funds, but must come from sources entirely independent, unless the debt limit is increased by the method provided in the Constitution.

CONTRACTS

Offer and Acceptance—Waiver of Condition. In *Simms v. Ervin*[1] the court held that an offeree could waive the mode of acceptance specified in an offer and accept in a different manner. The offer was in the form of a purchase order submitted to a Buick dealer by a prospective buyer. It requested delivery of a new Buick, specified the price, terms for cash and time payment, and provided, "This order is not binding upon you [seller] until accepted and signed by an executive of your [seller's] company." The seller did not sign the purchase order, but delivered a new Buick to the buyer and got him to sign a conditional sales contract. A few hours after delivery, the buyer called the seller and informed him, "the deal was off." It was held that the buyer did not withdraw in time because the conditional sales contract had superseded the purchase order, or alternatively, because the seller had waived the condition in the offer requiring written acceptance and had accepted by making delivery. To support the rule that the offeree could waive a condition in an offer the court relied on an earlier Washington case, *Pillsbury Flour Mills v. Independent Bakery*.[2] There the same rationale was applied where a buyer submitted a purchase order on the seller's printed form providing for delivery by installments and written acceptance of the order to be sent to the buyer. The buyer

[1] 46 Wn.2d 417, 282 P.2d 291 (1955).

[2] 165 Wash. 360, 5 P.2d (1931). See also Lowenthal v. McCormack Bros., 144 Wash. 229, 257 Pac. 632 (1927), where the order required confirmation by the buyer and delivery was made in full performance without prior confirmation by the buyer. The court, rather oddly, held shipment by the seller constituted acceptance by him and the subsequent receipt of delivery by the buyer, confirmation.