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Practice and Procedure

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Municipal Corporations—Discharge of Seattle City Employees—Civil Service—Seattle City Service Commission. *State ex rel. West v. Seattle,* 50 Wn.2d 94, 309 P.2d 751 (1957). P, a Seattle civil service employee in the lighting department, was discharged by the department personnel supervisor. The Seattle civil service commission sustained her dismissal, and she appealed its decision. Seattle's city charter provides: Art. VII, § 8: "He [superintendent of lighting] shall appoint... all officers and employes in his department." Art. XVI, § 12: "Any officer or employee [in such civil service] may be removed by the appointing power only upon the filing with the commission of a statement in writing of the reasons therefor." Art. XVI, § 4: "The [civil service] commission shall make rules... for... removals...." Seattle civil service commission Rule 1 defines "appointing officer" as "the head of a department... or a person designated by such head of department with authority to appoint, discipline and remove subordinates."

Held, (5-0) for P. Art. VII, § 8, and Art. XVI, § 12, taken together, mean only the superintendent of lighting *in person* may remove lighting department employees. Civil service commission Rule 1 was violative of the city charter and so void. Therefore P's discharge by the department personnel supervisor was ineffective.

This surprisingly strict construction of the Seattle charter will apply to the departments of engineering, water, buildings, transportation and probably to public health, as well as to lighting. It is understood that those departments are now insuring that discharges are signed by their heads, so the precise issue of this case probably will not recur. However, the judicial approach of strictly construing city charters may be used again.

PRACTICE AND PROCEDURE

Landlord and Tenant—Unlawful Detainer—Jurisdiction Over the Person. The opinion of the supreme court of Washington in the case of *Sowers v. Lewis*[1] changes the law of Washington in the action of unlawful detainer. The court, ignoring past Washington cases, held that the notice which is to be given a tenant before an action of unlawful detainer[2] can be brought is a jurisdictional condition

[1] 49 Wn.2d 891, 307 P.2d 1064 (1957).

[2] RCW 59.12.030: A tenant of real property for a term less than life is guilty of unlawful detainer either:

(3) When he continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due.

(4) When he continues in possession inperson or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in manner in RCW 59.12.040 provided) upon him, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture."

precedent; therefore, such notice must be properly given before the court has jurisdiction over the person. Also, the decision is the first in Washington dealing directly with joinder of causes of action under the unlawful detainer statute and the result is a very technical view which is of importance to the practicing attorney. The result is that in bringing an action for unlawful detainer in which recovery is sought for more than one act, the notice or notices given should take the form of a pleading in order that all possible elements of recovery are covered. Further, if two causes of action are joined and one requires a longer period of notice than the other, the plaintiff should wait the longer period of time before he proceeds in his action.

Marie Weeks Sowers leased to Alex Lewis certain real estate in King County. Lewis agreed to pay rent in monthly instalments. Lewis became delinquent in rent. According to plaintiff's complaint, Lewis also failed to renew and pay premiums on insurance coverages, which the plaintiff was obliged to pay in order to protect the property.

The plaintiff, Sowers, brought an unlawful detainer proceeding in which two causes of action were pleaded. The first cause pleaded was the failure to pay rent. Under this cause of action the plaintiff could recover the premises and double the rental value.[3] The second cause of action pleaded was breach of covenant to pay the insurance premiums. The plaintiff also pleaded that the defendant had been served with a three-day notice to pay rent or, in the alternative, to vacate and surrender the premises. The notice also demanded performance of the covenant to pay insurance premiums.

The defendant appeared specially and moved that the proceedings be quashed upon the ground, among others, that the court had no jurisdiction over the person of the defendant or over the subject matter of the action. The plaintiff moved to strike defendant's motion to quash, upon the ground that such motion was not a proper one in an unlawful detainer action where service of summons complied with the statute. The trial court denied the motion to quash and allowed the defendant three days in which to answer. Reserving the special appearance, defendant filed a demurrer upon six of the statutory grounds.[4]

[3] There is question as to what may actually be recovered as "double the rental value." No attempt is made to resolve the question at this time.

[4] RCW 4.32.050: "The defendant may demur to the complaint when it shall appear upon the face thereof either— (1) that the court has no jurisdiction of the person of the defendant or of the subject matter of the action. (2) that the plaintiff has no legal capacity to sue; or— (3) that there is another action pending between the same parties

The trial court overruled the demurrer and ordered the defendant to answer within three days. The defendant elected to stand upon his motion to quash and his demurrer. An order of default, findings of fact, conclusions of law, and judgment were entered. By the judgment, the plaintiff upon her first cause of action was restored to possession of the premises, awarded double rental recovery, and the lease was declared forfeited. Upon the second cause of action, plaintiff was awarded the sum of $710.98, together with costs and disbursements.

On appeal the supreme court remanded the case with instructions to modify the judgment by striking the portion based on the second cause of action (breach of covenant).

The supreme court in reaching its decision reasoned as follows:

> An unlawful detainer action is a special proceeding which relates only to real estate.... Where a special statute provides a method of process, compliance therewith is jurisdictional.
>
> As a jurisdictional condition precedent, where a tenant is in default in the payment of rent, the statute requires (1) that the tenant be served with a written notice to pay rent or, in the alternative, vacate the premises within three days from the date of service... and (2) that a summons and complaint be served upon the tenant which shall fix a date certain for appearance of not less than six nor more than twelve days from the date of service.
>
> In the instant case, the three-day notice and the service of the summons and complaint complied with the jurisdictional requirements of the statute, as they related to maintaining an unlawful detainer action based upon default in the payment of rent.
>
> The second cause of action was based upon failure to perform a covenant of the lease other than the payment of rent. The jurisdictional condition precedent to the maintenance of an unlawful detainer action for breach of a covenant is a ten-day written notice. The three-day notice which was given in the instant case was not substantial compliance with the statute relating to the second cause of action. The motion to quash the process as to the second cause of action should have been granted.[5]

The reversal by the supreme court was correct. However, reversal on jurisdictional grounds is questionable. By making the statutory

for the same cause; or— (4) that there is a defect of parties, plaintiff or defendant; or— (5) that several causes of action have been improperly united. (6) That the complaint does not state facts sufficient to constitute a cause of action. (7) That the action has not been commenced within the time limited by law.

The particular six grounds on which defendant demurred are not set forth in the opinion. However, it is reasonable to assume they included grounds five and six listed above. The opinion states that the jurisdictional ground was included.

[5] 49 Wn.2d 891, 894, 307 P.2d 1064, 1067 (1957).

notice jurisdictional the court repudiated its former position as to jurisdiction in an unlawful detainer proceeding. The court rather should have reversed by sustaining appellant's demurrer to the second cause of action.

In moving to quash the defendant is usually challenging the service of summons. In the *Sowers* case the court admits that there was proper service of summons. Proper service of summons is enough to give the court jurisdiction over the person. Having jurisdiction over the person and the subject matter, the court was able to hear and determine the question of unlawful detainer. However, the supreme court went further and held that in an action for unlawful detainer, jurisdiction over the person of the defendant requires more than service of summons and includes the giving of proper notice as required by statute.

To say that giving of notice as required by the statute is necessary to the court's jurisdiction over the person of the defendant is to repudiate holdings of the past. In *State Ex Rel Robertson v. Superior Court,*[6] the supreme court held,

> Notice to quit or pay rent, served in the manner required by law is a fact to be established upon the trial, before the court may pronounce a judgment of unlawful detainer.... When the summons is properly served the court undoubtedly has jurisdiction of the person.[7]

On the basis of past decisions, then, the court should not have held that proper notice to quit or fulfill the covenant was jurisdictional, and should not have sustained the motion to quash.

The correct approach would seem to be that plaintiff, by giving the proper notice and service of summons as the first cause of action, had established in the trial court jurisdiction over the person and the subject matter to decide the question of unlawful detainer. Furthermore, the defendant, by his refusal to heed the three-day notice to quit or pay rent, had placed himself in the status of unlawful detainer. Therefore, the plaintiff should be entitled to possession plus the double rental. After unlawful detention had been established the plaintiff should not have been required, in addition, to show that he also

[6] 95 Wash. 447, 164 Pac. 93 (1917); see also Little v. Catania, 48 Wn.2d 890, 297 P.2d 255 (1956), Davis v. Palmer, 39 Wn.2d 219, 235 P.2d 151 (1951).
An excellent coverage of landlord-tenant notices prior to the *Sowers* case is made by Peck, *Landlord and Tenant Notices,* 31 WASH. L. REV. 51 (1956).
[7] 95 Wash. 447, 449, 164 Pac. 93, 94 (1917).

served the ten-day notice to perform the covenant in order to have recovery under the unlawful detainer statute.

Assuming the above approach to be correct, there would have been two questions remaining as to the breach of covenant. The first question would have been whether or not the facts as pleaded in the second cause of action (breach of covenant) actually constituted a cause of action for recovery of possession under the unlawful detainer statute. Since there was no ten-day notice given as required by the statute, the breach of covenant did not furnish a basis for recovery under the statute. The lack of the ten-day notice was evident from the face of the complaint, and the trial court should have sustained the demurrer as to the second cause of action on the ground that the complaint did not state facts sufficient to constitute a cause of action.[8] A holding on this ground would have been in complete accord with past decisions.

The second question would have been whether or not several causes of action had been improperly united.[9] Plaintiff in his second cause of action prayed for judgment against defendant in the sum of $710.98. This was the amount plaintiff had to pay to renew and pay premiums on insurance coverage. The prayer was one for general damages and not one for relief under the unlawful detainer statute.[10] This factor, combined with the failure to give ten-day notice, would have made the plaintiff's second cause of action only a general proceeding for breach of covenant.

A general proceeding cannot be joined with a special proceeding for the reasons given in *Little v. Catania*.[11] In that case the court held

[8] See note 3 *supra* (ground 6).

[9] See note 3 *supra* (ground 5).

[10] RCW 59.12.170. This statute states what may be included in a judgment of unlawful detainer. It provides in part: "If the proceedings are for unlawful detainer after neglect or failure to perform any condition or covenant or a lease under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or tenancy. The jury or the court shall also assess the damages occasioned to the plaintiff by a forcible entry or a forcible or unlawful detainer."

The damages plaintiff prays for on breach of covenant are not damages occasioned by the unlawful detainer." It is the view of the writer that the statute precludes the recovery of such damages as plaintiff prayed for in an unlawful detainer action, therefore such damages must be recovered in a general proceeding. Such a view has not been taken previously by the courts and would be confronted with the case of Munro v. Irwin, 163 Wash. 452, 1 P.2d 329 (1931), in which it was held that an unlawful detainer proceeding in which damages could have been recovered was res judicata in a later proceeding for recovery of such damages. The question of damages recoverable under unlawful detainer proceedings is one which it is anticipated will be covered thoroughly at a later date in the WASHINGTON LAW REVIEW.

[11] 48 Wn.2d 890, 297 P.2d 255 (1956).

that where a special summons is used to get jurisdiction over the person in a special proceeding (unlawful detainer), it is "wholly insufficient to give the court jurisdiction of the parties in a general proceeding . . .", and further:

> The court obtained jurisdiction of the parties for a limited statutory purpose only—namely, to determine the issue of possession in an unlawful detainer action. Having obtained that limited jurisdiction, the court could not transform the special statutory proceedings into an ordinary lawsuit, and determine the issues and grant relief therein as though the action was a general proceeding.[12]

It is evident the court could have used the *Little* decision to sustain a demurrer on the ground of misjoinder of causes of action.

From the previous discussion it can be seen that the court should not have ventured into the area of jurisdiction. Having so ventured. however, it has made jurisdiction under the unlawful detainer statute a very technical matter. The *Sowers* case, if it means anything, means that hereafter in an unlawful detainer action the plaintiff will be required to give service of notice *and* proper service of summons as required by the statute before the court will have jurisdiction over the person of the defendant. If there is a defect in giving the notice and the court does not have proper jurisdiction, the question of jurisdiction may be raised for the first time on appeal. [13]

With the technical approach of the *Sowers* case now a matter of Washington law, attorneys will be required to give greater attention to notices required by the unlawful detainer statute. First, it seems necessary that where recovery is sought on more than one ground in an unlawful detainer action the notice given should take the form of a pleading to assure that all elements have been covered. A second item is that of time of the commencement of the action. If two causes of action have been joined, and, as in the *Sowers* case, one cause requires a three-day notice and the other a ten-day notice, there can be no commencement of the action until the ten-day period has expired. If the action is brought sooner the holding of the *Sowers* case will apply and no recovery will be allowed in the cause of action requiring the ten-day notice. The practical effect is that joining a ten-day cause of action with a three-day cause of action converts the

[12] 48 Wn.2d 890,893, 297 P.2d 255, 257 (1956). This case is used only for the proposition that a special service of summons cannot be used to gain jurisdiction over the person where a general proceeding matter is involved.

[13] Rules on Appeal, 43, 34A Wn.2d 47, as amended, effective January 2, 1953.

three-day cause into a ten-day cause. In order to recover on both it is advisable to wait until the longer period has elapsed.

Dismissal and Nonsuit—Voluntary Nonsuit—Nature of Right. Rule 4 of Rules of Pleading, Practice and Procedure[1] has gained additional interpretation in the case of *McReynolds v. Thaler*.[2] In the *McReynolds* case the defendant challenged the legal sufficiency of the evidence of the plaintiff after the plaintiff had concluded his opening case. The plaintiff then moved for a voluntary nonsuit. The trial court held that the plaintiff had an absolute right to a voluntary nonsuit up to the time of a final ruling against him and that granting of the motion involved no element of discretion. This *was* the law in Washington, both statutory[3] and at common law,[4] *until* the adoption of rule 4.

On appeal the supreme court reversed, pointing out that under rule 4 a plaintiff has an absolute right to a voluntary nonsuit only up to the time he rests his opening case, unless the defendant has interposed a set-off as a defense or seeks affirmative relief growing out of the same transaction, and that after the plaintiff concludes his opening case nonsuit is discretionary with the trial judge on a showing of good cause.

In *In Re Archers Estate*[5] the court held that under rule 4 a plaintiff is entitled to a voluntary nonsuit at any time before he rests at the conclusion of his opening case, unless the defendant has interposed a set-off as a defense or seeks affirmative relief growing out of the same transaction. The *Archer* case also held that a plaintiff's right is absolute and involves no element of discretion on the part of the trial court. The *Archer* ruling was followed in *McKay v. McKay*.[6] The court in the *McKay* case, however, went further than the *Archer* case to hold that the right of voluntary nonsuit is fixed at the moment

[1] 34A Wn.2d 70. Rule 4 is as follows: "An action of the Superior Court, tried either with or without a jury, may be dismissed by the court and a judgment of nonsuit rendered upon the motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case, unless the defendant has interposed a set-off as a defense, or seeks affirmative relief growing out of the same transaction or claim, either legal or equitable, to the specific property or thing which is the subject matter of the action: PROVIDED, That the trial judge may thereafter entertain a motion for a voluntary dismissal without prejudice by the plaintiff upon good and sufficient cause in support thereof, being first shown, but in such event the granting or refusal of such motion, and the imposition of terms as a condition precedent to the granting of such motion shall rest in the sound discretion of the trial court."

[2] 49 Wn.2d 905, 307 P.2d 1060 (1957).

[3] RCW 4.56.120.

[4] Kosinski v. Hines, 110 Wash. 25, 187 Pac. 712 (1920).

[5] 36 Wn.2d 505, 219 P.2d 112 (1950).

[6] 47 Wn.2d 301, 287 P.2d 330 (1955).

it is claimed, and thereafter the defendant is not entitled to claim a set-off or seek affirmative relief in order to prevent the granting of a nonsuit.

The *Archer* and *McKay* cases were concerned only with the right of the plaintiff to a nonsuit before he rests at the conclusion of his opening case. This was the factual difference the court in the *McReynolds* case used to limit the *McKay* case. The court held that once the plaintiff has rested, the absolute right to nonsuit provided for in rule 4 is at an end and, thereafter, the proviso to rule 4 is in effect. That is to say, the trial court may entertain a motion for a voluntary "dismissal without prejudice," "upon good and sufficient cause in support thereof being first shown." This means that nonsuit may be granted at the discretion of the trial judge after the plaintiff has rested his case in chief, but only on a showing of good cause. In the *McReynolds* case the trial judge was mistaken as to the plaintiff's right under rule 4. No good cause was shown for the exercise of discretion by the judge in granting a nonsuit and no discretion was exercised; therefore the judgment of the trial court was reversed.

JAMES C. YOUNG

Trial—Dismissal and Nonsuit—Taking Case from Jury—Insufficiency of Opening Statement. In *Bartel v. Brockerman,* 49 Wn.2d 679, 306 P.2d 237 (1957), plaintiff brought an action for damages for personal injuries sustained as a passenger in defendant's car. Defendant's answer alleged contributory negligence and also that plaintiff was an invited guest or licensee without payment for such transportation, which under the host-guest statute barred his action.

At the conclusion of plaintiff's opening statement defendant moved for a dismissal on the theory that the opening statement affirmatively showed that plaintiff had no cause of action. This was evidently based on the fact that the host-guest statute would prevail. When the trial judge indicated he would grant the motion, plaintiff requested permission to amend the opening statement to show facts which terminated the host-guest relationship. The trial judge refused to permit plaintiff to amend the opening statement, granted defendant's motion for dismissal, and entered judgment accordingly.

On appeal the supreme court reversed. The court stated that a trial court may direct judgment of dismissal on the opening statement of counsel for plaintiff. The purpose of the rule is to reasonably expedite litigation when it is clear that plaintiff had no cause of action. In the instant case, however, the time necessary for counsel to amend his opening statement would have consumed no more than five minutes. Under these circumstances the amendment could have been granted without harming the underlying purpose of the procedure.

Pleading, Practice and Procedure—Pre-Trial Depositions—Effect of Pre-Trial Depositions as Substantive Evidence. In *Hurst v. Washington Canners Co-op.,* 50 W.2d 729, 314 P.2d 651 (1957), an employee brought an action against her employer to recover for personal injuries sustained when she slipped on a stairway in the

employer's cannery. The defendant cannery had taken a pre-trial deposition of the plaintiff in which she had stated that prior to the time of her injury she was aware of the slippery condition of the stairs. However, at trial, she rebutted the testimony given in the deposition and denied any previous knowledge of the dangerous condition of the stairs. The defendant then, during cross-examination, used the deposition of the plaintiff to impeach her testimony given upon direct examination. At the close of the plaintiff's evidence, the defendant moved for a non-suit, arguing that the plaintiff's admission in the deposition of prior knowledge of the dangerous condition of the stairs was binding upon her as a matter of law; that the plaintiff had "'sworn herself out of court." The trial court granted the motion for non-suit, but later, upon further consideration, granted plaintiff's motion for a new trial. From the order granting a new trial the defendant appealed.

The supreme court affirmed the order granting a new trial. After setting out Rule 26(f), Rules of Pleading, Practice and Procedure, 34A W.2d 86, the court held that where a party uses the deposition of an adverse party for purposes of impeachment only, the evidence contained therein affects only the credibility of the party as a witness, and that it was within the province of the jury to consider and weigh the plaintiff's testimony to determine therefrom whether or not her conduct constituted contributory negligence.

REAL PROPERTY

Limited-Access Highway Condemnation—Compensation for Loss of Easement of Access—Measure of Compensation. *State v. Calkins*,[1] which involved damages to be paid for condemned land used in the construction of a new limited-access highway, held that no compensation need be paid for the alleged taking of easement of access,[2] and that expert testimony relative to the value of commercial highway frontage property is not admissible. The court also defined the method of computation of the compensation which must be paid where the land taken separates the remaining property of the condemnee.[3]

The state condemned property for use as a new limited-access highway connecting Ephrata with highway 11-G, which runs between Soap

[1] 50 Wn.2d 716, 314 P.2d 449 (1957).

[2] State v. Ward, 41 Wn.2d 794, 252 P.2d 279 (1953), has dictum which is inconsistent with the holding of the instant case, but the court states that this dictum is not binding authority.

The court uses the terms "easement of access," "easement of ingress and egress," and "easements of access, air, light, and view" indiscriminately in the opinion, depending upon the authority cited. While the terms are not equally inclusive, for the purpose of new limited-access highway condemnation they should be treated the same. In a problem concerning an existing highway it may be necessary to distinguish the terms.

[3] By way of dictum the court points out that two cases involving limited-access highways have been nullified by legislation. State ex rel. Veys v. Superior Ct. 33 Wn.2d 638, 206 P.2d 1028 (1949), which held that the state does not have the power to condemn access rights when an existing highway is converted into a limited-access one, has been nullified by RCW 47.52.050, which gives the power to condemn access rights. State ex rel. Troy v. Superior Ct. 37 Wn.2d 660, 225 P.2d 890 (1950), which held that "existing highways" includes relocated portions of the old highway, has been