Washington Law Review

Volume 10 | Number 4

11-1-1935

Action Against Receiver—Equitable Defenses; Bank-Depositor Relationship—Three Doctrines Relating to Endorsements; Constitutional Law—State Taxation—Interstate Commerce; Evidence—Spontaneous Declarations of Present Pain; Corporations—Watered Stock; Workmen's Compensation—Compensable Employment—Emergency Relief Work; Landlord and Tenant—Crop Share Rental—Interest of Landlord in Tenant's Conflict with Seed Company

C. A. C.

RECENT CASES

ACTION AGAINST RECEIVER—EQUITABLE DEFENSES. Receivership proceedings were instituted against D, a corporation. P a finance company intervened and asked payment strictly according to a loan contract which it had entered into with D· strict compliance meant a charge of 28 per cent on the loan. A statute making the defense of usury unavailable to the corporation, D and the receiver defended on the ground of hardship. *Held*: The equitable defense of hardship cannot be set up against the P company, which is not asking for extraordinary equitable relief, which is asserting only its contractual rights, and which sues in equity by necessity because of the receivership and injunction. *Manufacturers' Finance Company v. McKey*, 55 Sup. Ct. 444, 79 L. Ed. 513 (1935), reversing 72 Fed. (2d) 471 (1934).

That equity at its discretion will withhold the relief of specific performance (or other purely equitable relief) where unconscionable hardship will result is a well established principle. *Marks v. Gates*, 154 Fed. 481, 14 L. R. A. (N. S.) 317, 12 Ann Cas. 120 (1907) *Koch v. Streuter* 232 Ill. 594, 83 N. E. 1072 (1908) Walsh on Equity, sec. 104. The statement is usually made that the plaintiff will be left to such damage as he may recover at law. The principle does not apply in the instant case because P sues only for his legal, contractual rights. These rights the equity court cannot deny although by the reason of the receivership it has exclusive jurisdiction and would seem to be able to condition its relief on such terms as it might see fit to impose. Pomeroy's Equity Jurisprudence (Students' Ed.) sec. 386. For a case illustrating to what extent equity will "follow the law" and regard it as definitive of rights which the equity court must observe and enforce, see *Missouri, Kansas & Texas Trust Co. v. V Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474 (1899) (relief of cancellation being given by statute, it is not subject to the equitable defense of hardship). Cf. Pomeroy's Equity Jurisprudence (Students' Ed.) sec. 391. See also *Columbus Mercantile Trust & D. Co.*, 218 U. S. 645, 31 Sup. Ct. 105, 54 L. Ed. 1193 (1910).

The result in the principal case is well supported by authority. *In re Lutz & Schramm Co., Inc.*, 235 Fed. 970 (1916) *Ramsey et al. v. Marlin Firearms Corporation*, 14 Fed. (2d) 314 (1925) *In re International Raw Material Corporation*, 22 Fed (2d) 920 (1927) *Estes v. E. B. Estes & Sons*, 24 Fed. (2d) 756 (1927) *In re Bernard & Katz, Inc.*, 38 Fed. 40 (1930) *In re Gotham Can Co.*, 48 Fed. (2d) 540, 17 Am. Bankr. Rep. (N. S.) 729 (1931) *Merchants' & M. Securities Co. v. Johnson*, 69 Fed. (2d) 940 (1934). But the defense of hardships is not specifically raised in any of the foregoing cases. A case on all fours with the instant case and overruled by it is *In re Chicago Reed & Furniture Co.* 7 Fed. (2d) 985, 6 Am. Bankr. Rep. (N.S.) 785 (1925). The decision in the latter case in effect permitted the judge in equity to alter the obligations of the debtor in receivership on its contracts. Hence it may be said that the principal case determines against a doctrine which might have proved dangerous to contractual rights where one of the parties to the contract goes into receivership.

L. V L.

BANK-DEPOSITOR RELATIONSHIP—THREE DOCTRINES RELATING TO ENDORSEMENTS. Plaintiff lumber corporation operated a saw mill in which a large number of men were employed. A time clock and card system was used, of which system Foster, the day foreman, had charge. He also was authorized to employ and discharge the mill workers. Over a three-year period Foster inserted in the card rack time cards, bearing the names of four non-existent persons, punched the time clock for them twice daily. Extracted pay checks made to them from the rack where checks were customarily placed, endorsed the name of the payee thereon and cashed them at various banks. Foster did not himself make out the checks; this was done in the bookkeeping department of the corporation on the basis of the time cards. The fraud was discovered in December, 1929, at which time plaintiff notified defendant, the drawee of the checks. In this suit to recover the money paid on such checks and charged by defendant bank to plaintiff's account, *held*: for defendant.

The majority opinion rests on two bases: 1. The drawer of a check cannot recover from the bank paying on a forged endorsement, where the payment was proximately caused by the drawer's own conduct, unless the bank by its own negligence has rendered itself liable despite the drawer's negligence; the rule that a bank paying a check on a forged endorsement must stand the loss being limited to instances in which the acts of the depositor have not increased the risk lawfully resting upon the bank. 2. Where an impersonator indorses a check in the name which he has assumed for the purpose of the fraud, the endorsement is not forgery, and a drawee bank which pays the check is protected in so paying.

The minority opinion contends that plaintiff was not negligent in reposing confidence in Foster, but even conceding such negligence, it was not the proximate cause of the loss; that the negligence of the drawer must be the proximate cause of the forgery, and not merely the circumstances under or the means by which the check comes into the possession of the forger. It was not the negligence of plaintiff in the issuance of its checks that was the direct cause of this loss—it was the negligence of defendant in failing to ascertain the genuineness of the endorsements. And these rules apply with equal force to a case in which the check is payable to a fictitious payee and the drawer in good faith believes that the payee is a real person. *Defiance Lumber Company v. Bank of California*, 80 Wash. Dec. 474 (1935).

There is an indication in both majority and minority opinions that the case comes within, or is analagous to the doctrine of "fictitious payee" The N.I.L. provides that the instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." Sec. 9, Subsec. 3. If the facts here presented meet the requirements of the subsection, the drawee bank paid rightfully and hence of course can charge the drawer's account. *Snyder v. Corn Exchange National Bank*, 221 Pa. 599, 70 Atl. 876 (1908) *Mueller and Martin v. Liberty Ins. Bank*, 187 Ky. 44, 218 S. W 465 (1920) *Norton v. City Bank and Trust Company*, 294 Fed. 839 (C. C. A., Va. 1923).

Concededly there is no difficulty with the first part of the subsection. The payees here if not non-existent persons were clearly intended to have no interest in the instruments. But the case cannot meet the second requirement for the drawer of these checks was not aware that the payees were fictitious. Here it was the bookkeeper of the plaintiff corporation who drew the instruments on the basis of the faked time card records furnished by Foster. The knowledge must be that of the actual *signer* of the instrument, not that of the person at whose instance it is drawn. *Seaboard National Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829 (1908) *City National Bank of Mexia v. First National Bank of Wortham*, 20 S. W (2d) 212 (Tex. Civ. App. 1929). Accordingly the decision cannot be rested on the doctrine of fictitious payee.

However, there is another group—the fraudulent impersonation cases—within which might be placed the instant case. Typically A., fraudulently representing himself to be B., obtains a check payable to the order of B., indorses B.'s name and negotiates it. Does A.'s endorsement pass title to the instrument? The answer apparently depends on the intention of the drawer. Thus, in *McHenry v. Old Citizens' National Bank*, 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111 (1911), where plaintiff gave a check to a stranger who was introduced to him as X., the owner of certain land, in exchange for a note and mortgage executed by the stranger who was an imposter, in the name of X., it was held that the plaintiff intended X. the person with whom he dealt to be the payee and that he cannot recover of the bank which charged the amount to his account. Accord: *Boatsman v. Stockmen's National Bank*, 56 Colo. 495, 138 Pac. 764, 50 L. R. A. (N.S.) 107 (1914) *Montgomery Garage Co. v. Mfgrs. Liability Ins. Co.*, 94 N.J.L. 152, 109 Atl. 296, 22 A. L. R. 1228 (1920). But where plaintiff received a letter written by an imposter signed with the name of an army officer whose name was on the army list, in which letter plaintiff was asked to discount pay vouchers; and where in exchange for forged vouchers which were sent him plaintiff mailed a check made payable to the supposed officer, which check was indorsed by the imposter in the payee's name and finally paid by defendant drawee bank, it was held that the drawee bank was not entitled to charge the drawer's account. Plaintiff did not intend to deal with the person who received the check either in his own or in an assumed name, but with the particular army officer. The endorsement was therefore a forgery which passed no title in the absence of estoppel. *Mercantile National Bank v. Silverman*, 148 App. Div 1, 132 N. Y.S. 1017, Aff'd 210 N. Y. 567, 104 N. E. 1134 (1914) Accord: *Simpson v. Denver and Rio Grande Ry. Co.* 43 Utah 105, 134 Pac. 883, 46 L. R. A. (N. S.) 1164 (1913) *Strang v. Westchester City National Bank*, 235 N. Y. 68, 138 N. E. 739 (1923) Brannan, 5th Ed., sec. 9.

Brannan makes the statement that in these fraudulent impersonation cases, the maker of the instrument may be said to have a double intent; he intends first to make the instrument payable to the person before him or to the person writing in case the negotiation is by correspondence, and second, he intends to make it payable to the person whom he believes the stranger to be; and that the courts have almost unanimously held that the first is the controlling intent except where the named payee was already known to the maker or was more particularly identified in some manner, by description or title—as in the *Silverman* case *supra*. Brannan, 5th Ed. p. 310.

In the instant case, there was no impersonation in the strict sense since the drawer had no dealings with the imposter Foster. The facts more nearly coincide with those cases where the transaction takes place by correspondence, Foster's insertion of the bogus cards in the rack being analagous to the imposter's writing of the letter. Applying the *Brannan* analysis, *supra*, it would seem that the drawee should not be liable, the first intent governing since the named payees were non-existent so could not have been previously known to the drawer, and there was no evidence to show they were identified by description or title. This would accord with the result reached by the majority. It is submitted, however, that on the facts the second intent was the dominant one here—for surely the bookkeeper in drawing the checks intended to pay not John Doe, Richard Roe, or any *named* person, but to pay persons in the plaintiff corporation's employ. *Strang v. Westchester City National Bank*, *supra.*

But the principal ground of reliance of both majority and minority is that the endorsement is a forgery, and the point of difference between them is whether the drawer is estopped to set up the forgery. It is to be noted parenthetically that inasmuch as the cases which deny recovery to the drawer under the fraudulent impersonation theory do so on the ground that since the maker intends primarily to deal with the person before him the endorsement by that person is not a forgery, the majority opinion in the instant case cannot consistently rest on the alternative grounds that the endorsement is a forgery, and that the case falls within the first division of the impersonation cases.

The general rule is that the drawer may recover from the drawee for an instrument paid on a forged endorsement. *Goodfellow v. First National Bank*, 70 Wash. 554, 129 Pac. 90, 44 L. R. A. (N.S.) 580 (1913) *Schwartz v. Bank of Pittsburgh National Association*, 283 Pa. 200, 129 Atl. 52 (1925) *Labor Bank and Trust Co. v. Adams*, 23 S. W (2d) 814 (Tex. Civ. App. 1930) N. I. L. sec. 23. The depositor is not bound to examine the endorsement on returned checks to ascertain their genuineness. *Prudential Ins. Co. v. National Bank of Commerce*, 227 N. Y. 510, 125 N. E. 824, 15 A. L. R. 146 (1920). The drawer can recover even if negligent in examining endorsements if no injury results to the drawee. *Atwell v. Mercantile Trust Co.*, 95 Cal. App. 338, 272 Pac. 799 (1928) *National Surety Co. v. Pres. and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929). But the drawer may be precluded from setting up the forgery. N. I. L. Sec. 23. His failure to notify the drawee bank promptly after discovery of the forgery will bar recovery. *McNeeley Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891 (1908).

Nor may the depositor recover from the drawee where it was negligent in making possible forged endorsements by its swindling clerk, and not discovering or reporting them promptly. *Osborn v. Corn Exchange National Bank*, 218 Ill. App. 28 (1920) *Fletcher American National Bank v. Crescent Paper Co.*, 193 Ind. 329, 139 N. E. 664 (1923). But there are many cases *contra*, and in some of them the degree of fault in the drawer was much greater than in the instant case. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909) *City of St. Paul v. Merchant's National Bank*, 184 App. Div. 771, 172 N. Y. S. 413 (1918) *Caledonian Ins. Co. v. National City Bank*, 208 App. Div. 83, 203 N. Y. S. 32 (1924) *American Sash and Door Co. v. Commerce Trust Co.*, 25 S. W. (2d) 545 (Mo. App. 1930). A number of these cases rest on the finding that the drawer's conduct was not the proximate cause of the loss, the very contention of the minority in the principal case. Indeed it would seem that the numerical weight of authority under facts similar to those of the *Defiance Lumber Co.* case supports the minority view. Cases collected in Brannan, under N. I. L. Sec. 9.

Nevertheless it is submitted that the result here reached is correct, at least so far as all but the first few checks are concerned, and for the reason stated so concisely in the majority opinion— that "plaintiff by its own careless and negligent conduct of its own business, permitted its own employee to perpetrate upon it a gross fraud, and it cannot now recoup its losses by passing the burden thereof to defendant."

M. W

CONSTITUTIONAL LAW—STATE TAXATION—INTERSTATE COMMERCE. Pennsylvania levied a tax "upon all liquid fuels used or sold and delivered." D, a Pennsylvania corporation, having its principal place of business in Pittsburgh, sold oil to purchasers in Pennsylvania "f. o. b. Wilmington, Del." and added to the price the tax. The fuel was obtained from a company in Delaware, and on order of D, was shipped directly to the purchasers in Pennsylvania, D being named consignor and the purchaser consignee. Upon suit by the state to recover the tax it was *Held*, that the tax was not repugnant to the commerce clause, *Wiloil Corp. v. Penn.*, 79 L. Ed. Adv. 382, 55 Sup. Ct. 358 (1935).

The question to be answered, in the words of the court, was "Whether the mere fact that defendant caused the fuels to be shipped from Delaware for delivery in tank cars—deemed original packages—on purchaser's sidings as agreed makes imposition of the tax repugnant to the commerce clause."

The court found that according to the contracts between D and the purchasers interstate transportation was not required, and that the contracts could have been fulfilled by fuel already resting in Pennsylvania. And, that the interstate commerce was merely incidental.

It was pointed out that when goods have reached their destination in a state, that state has the power without discrimination to tax as it does other property within its jurisdiction, citing cases where the question involved a tax levied after the goods had come to rest in a state, including *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. 643 (1923), wherein the court was chiefly concerned with the sale of oil shipped into Texas and afterwards sold from storerooms in unbroken original packages. It will be noted that there the oil had already reached Texas before it was sold, whereas here the interstate movement was subsequent to the sale, and made in order to fulfill the contract.

Thus it is interesting to note that in *Sonneborn Bros. v. Cureton, supra*, 515, it was stated that "Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state and authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it." The court, for this proposition, cited cases involving chiefly "drummers." While the "drummer" cases may be distinguished from the principal case in that in the former, the manufacturer or producer whose "drummer" secured the order are located in different states and the parties clearly contemplate interstate transportation in order to fulfill the contract, whereas here both parties were located in Pennsylvania and the oil could have been shipped from oil resting already in Pennsylvania rather than Delaware, it is difficult to distinguish the wording of the *Sonneborn* case, which again may be distinguished on the ground that it does not appear whether the sales contemplated interstate movement. But it is not stated that those contracts could not have been fulfilled from oil already resting in Texas. Therefore, it may be said that in the *Sonneborn* case the court did not go behind the actual shipment in interstate commerce of the oil to fulfill the contracts and find out if such shipment was contemplated or required.

The court stated that "upon the principle applied here recently in *Minn. v. Blasius*, 290 U. S. 1, 78 L. Ed. 131, 54 Sup. Ct 34 (1933), the liquid fuels were taxable in Penn." However, it may be noted that that case involved an ad valorem tax upon personal property assessed upon cattle that were on the assessment day resting in the state.

Where the goods have reached their destination and held for sale it is stated that the rule allowing the state to tax applies whether the burden falls directly or indirectly, citing *Banker Bros. v. Penn.* 262 U. S. 506, 56 L. Ed. 168, 32 Sup. Ct. 38 (1911), a case involving the question whether the auto dealer was an agent of the manufacturer or not. Upon finding that he was not, the sale between himself and the purchaser was held to be local, altho the dealer did not put in his order to the manufacturer until he had found a purchaser after which the manufacturer sent to the dealer who in turn delivered to his purchaser. In the principal case the goods were shipped directly to the purchaser, D being named consignor, from Delaware.

But the interstate movement is here said to be merely incidental, citing *Moore v. N. Y. Cotton Exchange*, 270 U. S. 593, 70 L. Ed. 750, 46 Sup. Ct. 367 (1926), which involved no question of taxation, but monopoly, and is pure dicta as far as this case is concerned, and *Ware & Leland v. Mobile County*, 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. 526 (1908), which involved a license tax upon stock exchanges, a purely local activity. Thus both cases may be distinguished from the principal case.

As was said in *Western Oil Co. v. Lipscomb*, 244 U. S. 346, 349, 61 L. Ed. 1181, 37 Sup. Ct. 623, (1916) "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done—it is the essential character of the commerce not the accident of local or through bill of lading, that is decisive."

It may be said that prior to the principal case the determinative question was whether or not in fact the goods did move in interstate commerce pursuant to the contract between the parties where the shipment was subsequent to the sale, *Sonneborn Bros. v. Cureton, supra*, and not whether or not the contract could have been fulfilled by goods moving only in intrastate commerce.

It will be interesting to note whether in the future in the cases involving mail order companies, e. g., Sears, Roebuck & Co., and the "drummer" the court will look behind the actual movement in interstate commerce and see if whether according to the terms of the contract it could have been fulfilled from goods resting already within the state. Could the State of Washington levy a sales tax upon goods purchased by a Washington purchaser from Sears, Roebuck & Co., altho sent from Chicago, if the contract could have been fulfilled if the goods were shipped from their store here?

For an interesting side problem see Lowndes, State Taxation of Interstates Sales, 7 Miss. Law Quart. 223 (1935) for a discussion of the constitutionality of the proposed federal statute which would permit a tax upon interstate sales, and stop residents of a state having a sales tax from securing a benefit by sending into another state that has no sales tax for their purchases, and thus remove a discrimination against intrastate commerce.

Altho a tax prior to this case upon interstate commerce, as such, whether discriminatory, or non-discriminatory may be said under the doctrine of the *Case of the State Freight Tax*, 15 Wall, 232, 21 L. Ed. 146 (1873) to be bad, and, altho the court in the principal case relies upon cases which may be distinguished, chiefly cases where the sale was made after the goods had already come to rest in the taxing state, and *Minn. v. Blasius, supra*, an ad valorem tax, the decision here in effect places interstate and intrastate commerce on an equality. While this is the first case involving the precise point it may be said to be a step toward an ultimate just result of deciding each case upon its facts as to whether or not there is a discrimination against interstate commerce, and whether it burdens it, in fact. C. P Z.

EVIDENCE—SPONTANEOUS DECLARATIONS OF PRESENT PAIN. The plaintiff, a young child seven years of age, was struck by a car driven by the defendant. At the trial the mother of the plaintiff was permitted to testify concerning expressions of pain and suffering made to her by the plaintiff, some of them occurring long after the time of the accident. *Held*: That while hearsay, such usual and natural expressions and exclamations which are the spontaneous manifestations of pain, and naturally flow from the pain being suffered at the time, are competent and original evidence, which may be testified to by any party in whose presence they are uttered. *DeWitt v. Johnson*, 41 Pac. (2d) 476 (Okla. 1935).

It appears that the Oklahoma court, in deciding the first case presented to it on this question, has followed the weight of authority and what it considered to be the proper rule. These spontaneous exclamations are not a part of the *res gestae*, but come under a separate exception to the hearsay rule. They are considered as having been made under such stress of nervous excitement and under such a natural response to actual sensations that self-interest could not have been brought to bear by reasoned reflection, therefore giving a guarantee of trustworthiness. This guarantee is especially strong in the case under consideration, where the statements were made by a young child to her mother. In addition, the statements made at the time of the pain are superior to circumstantial evidence by way of conduct, as being more direct; and better than the injured person's own testimony on the stand as he would have had time to deliberate and fabricate, 3 Wigmore on Evidence (2d Ed.) sec. 1714.

The two elements which justify an exception to the hearsay rule, a guarantee of trustworthiness and a fair necessity in that there is no other equally satisfactory source of evidence either from the same person or elsewhere, are seldom distinctly separated, the courts emphasizing one or the other. Thus in *Fishburn v. Burlington & N. W R. Co.*, 127 Iowa, 483, 103 N. W 481 (1905), the court emphasized the fact that it is impossible to describe in apt terms all the manifestations upon which conclusions as to pain and suffering are based; and in *Western Steel Car & Foundry Co. v. Bean*, 163 Ala. 255, 50 So. 1012 (1909), stated that sometimes it is the only mode of determining whether pain and suffering was endured.

The rule, however, does not extend to rehearsals or narrations of past conditions or sufferings, nor to declarations as to the cause of the pain or suffering, *Birmingham R. Light & P Co. v. Gray*, 196 Ala. 42, 71 So. 689 (1916) thus a statement made several hours after the accident to the effect that his back was wrenched, does not fall within this exception to the hearsay rule, *Ensign v. Southern Pac. Co.*, 193 Cal. 311, 233 Pac. 953 (1924).

A few jurisdictions, following what is known as the New York limitation, restrict the admissible declarations to those made to an attending physician for the purpose of treatment, *Jones v. Niagara Junction R. Co.*, 63 App. Div. 617, 71 N. Y. S. 647 (1901) *Smith v. Chicago City R. Co.*, 165 Ill. App. 190 (1911) *Raymond & W Co. v. Ebsary*, 9 Fed. (2d) 889 (1925) but whenever the injured person is prevented from testifying in his own behalf, as by his death, then the court will revert to a rule of necessity and allow third persons to testify, *Tromblee v. North American Accident Ins. Co.*, 173 App. Div. 174, 158 N. Y. S. 1014 (1916). Apparently the physician limitation has as its foundation the early case of *Barber v. Merriam*, 11 Allen 322 (Mass. 1865), which factually was concerned with only statements of past condition, but which used broad language pertaining to statements of present pain. 3 Wigmore on Evidence (2d Ed.) sec. 1719. It is to be noted that in addition to the element of trustworthiness previously pointed out, there is an added safeguard in that what a patient said to the doctor as to the pain the injury then caused, and the effect it then caused upon the senses, was necessary for the doctor to know in order that he might properly treat the injury. Under these circumstances it is presumed that the injured person will state truly how he is affected, as otherwise the doctor might be at a loss as to the remedies needed. The incentive for a fair statement is so great that the presumption is that the patient will not hazard an untruth to better his financial condition, as by fabricating a basis of claim against the person charged with the injury at the expense of permanent health or life. In all probability the patient's dominant thoughts relate to a recovery from the injury.

Most courts admit such statements of present pain even though made while suit is contemplated or even after suit is started; *Bagley v. Mason*, 69 Vt. 175, 37 Atl, 287 (1896) *Indianapolis Southern R. Co. v. Tucker*, 51 Ind. App. 480, 98 N. E. 431 (1912) but a few refuse to admit the statements if made after the action is brought or after the litigation is in view, *Schock v. Cooling*, 175 Mich. 313, 141 N. W 675 (1913).

With respect to statements of present pain made to a person not a doctor, the Washington court has followed the weight of authority and in *Bothell v. City of Seattle*, 17 Wash. 263, 49 Pac. 491 (1897), said that statements of present pain were admissible as being the ordinary accompaniment of pain and suffering; and in *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 53 L. R. A. 586 (1900), that such statements were admissible because of necessity. The later decisions follow this rule, *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76 (1903) and in *Buell v. Park Auto Transportation Co.*, 132 Wash. 92, 231 Pac. 161 (1924), statement was made to the effect that testimony of complaints made by an injured person to another, not a physician, a few days after the injury relating to the nature and extent of the injuries was admissible. But as to statement made by a patient to a doctor regarding his condition and pain suffered, our court has held that they were inadmissible if introduced to show the patient's actual condition and could be used only to afford the jury some means of determining the weight to be given to the opinion of the doctor, *Estes v. Babcock*, 119 Wash. 270, 205 Pac. 12 (1922) *Poropat v. Olympic Peninsula Motor Coach Co.*, 163 Wash. 78, 299 Pac. 979 (1931). In its last decision on this subject the court said that in no case, where a doctor has been called to effect a cure, has it been held that the doctor could testify as to the patient's statements of past pain and suffering; but then the court proceeded to make the same limitation as to the use of the statements, that is, that they could be used only to determine the weight of the doctor's opinion, *Kraetti v. North Coast Transportation Co.*, 166 Wash. 186, 6 Pac. (2d) 609 (1931).

Just why statements made to a third person should be admissible to prove an injured person's actual condition, and not be admissible if made to a doctor, is difficult to determine; for if made to a doctor there is present a double guarantee of trustworthiness, that of spontaneity and that of a necessity to state the truth to secure proper remedy. However, as the statements can come in to determine the weight to be given the doctor's opinion when called as an expert, as a practical matter the testimony would be related to the jury and no doubt would have some effect upon the jury even though they are instructed as to the use to be made of the testimony.

F T. R.

CORPORATIONS—WATERED STOCK. Plaintiff, a creditor of a corporation, was unable to satisfy its claim out of the proceeds derived from a sale of the corporation's assets sold under a receivership proceedings. Thereafter, the creditor instituted the present suit to obtain a satisfaction from the defendants by seeking to recover the value of "watered stock" received by them from the corporation. Defendants demurred on the ground that the statute of limitation commenced to operate in their favor from the date when the stock was issued to them; and since the statutory period has elapsed from that date, the action is barred. *Held*: that plaintiff had no cause of action against the defendants at the time when the stock was issued, therefore the statute did not commence to operate at that time, *Townley & Hardware Co. v. Cramer* 37 Pac. (2d) 915 (Okla. 1934).

The present case, it may be noted, does not decide the exact time when the limitation would begin to run. This depends, of course, on the time when the cause of action accrues. In determining this point care should be taken to distinguish between an action by a creditor of a corporation against a stockholder to recover the amount due on an unpaid subscription for stock, and an action by a creditor to compel a stockholder to pay the difference between the value of the property for which the stock was issued and the "fixed" value of the stock which is purported to be fully paid but is not in fact—which is commonly known as "watered stock."

In both cases if such assets are to be reached, a creditor's bill, or another equitable process, is required. *Spencer v. Anderson*, 193 Cal. 1, 222 Pac. 355, 35 A. L. R. 822 (1924) *Burch v. Taylor*, 1 Wash. 250, 24 Pac. 439 (1890) *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810 (1895) *Adamant Mfgr Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415 (1897) *Lantz v. Moeller* 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (n.s.) 68 (1913). The suits are, however, fundamentally different. In the former, the suit is essentially one sounding in contract, and the creditor is ordinarily subrogated merely to the contractual right that the corporation has against its subscriber. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 194 Pac. 11, 12 A. L. R. 437 (1920), *Spencer v. Anderson, supra, Townley & Hardware Co. v. Cramer supra, Guaranty Trust Co. v. Scoon*, 144 Wash. 33, 256 Pac. 74 (1927) see, 13 Fletcher Cyclopedia Corporations, Revised and Permanent Edition (1932) 6179. Whereas in the latter, the stockholder is deemed to have participated with the corporation in working a fraud upon the creditor by representing that certain values have been paid in as capital upon the faith of which the creditor has advanced credit to his detriment. *Harrison v. Armour* 169 Cal. 787, 147 Pac. 1166 (1915) *Adamant Mfgr Co. v. Wallace, supra; Tait v. Pigott*, 38 Wash. 344, 73 Pac. 364 (1903) same 38 Wash. 59, 80 Pac. 172 (1905) *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539 (1912) see, Balantine Private Corporations (1927), sec 205. In order to maintain the suit against the stockholder, it would seem that in both cases the creditor should be required to allege and prove either that the corporation is insolvent or that he has obtained a judgment and an execution returned *nulla bona*. First, because the suit is in equity and no grounds for this type of relief exists until the creditor has exhausted his legal remedies, and, second, speaking of the suit sounding in tort, no actual injury can be shown until the creditor is prevented from fully recovering his debt from the corporation. The statute of limitations may run independently of the creditor's suit in the case of unpaid subscriptions, depending on whether payment is due; *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598 (1906), but in the case of "watered stock" the statute would seem to commence to operate only at the time when the creditor is actually injured, proof of which depends on a showing that his claim could not be satisfied out of the corporation's assets. *Spencer v. Anderson, supra, Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W 1117 (1892) *Pitman v. Ball*, 140 Mo. App. 389, 124 S. W 1082 (1910), see, *Powell v. Oregonian R. Co.*, 13 Sawy, 543, 38 Fed. 187, 3 L. R. A. 201 (1889).

There is, however, apparently no agreement among the courts as to when the statute commences to run in either event. To be sure this frequently depends on the exact statute in question. In the cases of unpaid stock subscriptions the courts divide along the lines in which they answer the following questions: (1) Does the creditor have a right to sue the stockholders upon their secondary liability, or must a representative suit be maintained? (2) If the stock subscription does not state the time of payment, does this create an obligation to pay at once, or only upon demand? (3)If the creditor has a right to sue, does this right accrue immediately upon the insolvency of the corporation or must he first exhaust his legal remedies against the corporation? See 35 A. L. R. 832n. 13 Fletcher Cyclopedia Corporations (1932) 6180 et seq. In the cases of "watered stock" the courts are divided as follows: (1) The statute commences to run from the date that the indebtedness is incurred by the corporation, (2) from the time when the right of action accrues against the corporation. (3) from the time when the corporation becomes insolvent; (4) from the time when a judgment is obtained against the corporation and an execution is returned *nulla bona*, and (5) from the time when the corporation is dissolved or ceases to do business. See note 10 L. R. A. (n. s.) 897 13 Fletcher Cyclopedia Corporations (1932) 6180 et seq.

The Washington Court has held that the right of action in favor of creditors of an insolvent corporation against its stockholders to enforce stock subscription liability accrues at least as soon as the corporation disposes of all of its property ceases to be a going concern and then becomes notoriously insolvent, and that the necessity of recovering a judgment against the corporation and having it returned *nulla bona* will not be required. *Chilberg v. Siebenbaum, supra.* But it is a condition precedent to a suit by the receiver of an insolvent corporation to collect stock subscriptions that the stockholders be heard upon the validity of claims against the corporation, after which an order is made to collect *pro tanto* the amount due from each, and therefore no cause of action accrues against the stockholders until the order is made, so that the limitation can not begin to run before that time. *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (n. s.) 177 (1911) *Reas v. Eslich*, 87 Wash. 125, 151 Pac. 256 (1915) *Guaranty Trust Co. v. Scoon, supra.* And that unpaid stock subscriptions are a trust fund for the benefit of all the creditors, and to enforce a right to participate therein requires a proceeding in equity for the benefit of all. *Burch v. Taylor supra, Dunlap. v. Rauch*, 24 Wash. 620, 64 Pac. 807 (1901). Where a call is necessary to start the statute running against the corporation, the limitation, however, will commence to run against the creditor at least as soon as the corporation disposes of all of its property and assets, ceases to be a going concern, and becomes notoriously insolvent because on the insolvency of the corporation the liability of the stockholder becomes fixed, and the stock subscription becomes a debt immediately due. *Chilberg v. Siebenbaum, supra.* A call made by the court is sufficient, *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919 (1895). Apparently the statute commences to run in the case of "watered stock" only on insolvency and at the same time, then, as it would ordinarily run against an action on a stock subscription. See *Adamant Mfgr Co. v. Wallace, supra*; *Barnard Mfgr Co. v. Ralston*, 71 Wash. 659, 129 Pac. 389 (1913) *Lantz v. Moeller supra.*

O. K. A.

WORKMEN'S COMPENSATION — COMPENSABLE EMPLOYMENT — EMERGENCY RELIEF WORK. The plaintiff was injured while engaged in extrahazardous employment on the public roads in Skagit county being hired by the commissioner in charge of the road work in that district, and working under the immediate direction of a foreman employed by the county. He was paid from money in the indigent relief fund. The department of labor and industries denied him relief under the workmen's compensation act. *Held*: The plaintiff comes within the purview of the act and is entitled to relief thereunder. *Garney v. The Department of Labor and Industries*, 80 Wash. Dec. 576 (1935).

The only question involved in the appeal was whether the plaintiff was an employee in contemplation of the act, since it was conceded by the parties that the work was extrahazardous and that the county was an employer. The court recognized that the weight of authority in the United States supports the view that where the work being done is "charity or emergency relief work" the relationship of employer and employee contemplated by the compensation acts does not exist, *McBurney v. Industrial Accident Commission*, 220 Cal. 124, 30 Pac. (2d) 414 (1934) *In re Moore*, 97 Ind. App. 492, 187 N. E. 219 (1933) *West Milwaukee v. Industrial Commission*, 255 N. W 728, (Wis. 1934) *Davenport v. Detroit*, 268 Mich. 374, 256 N. W 354 (1934) *Bell v. Raleigh*, 206 N. C. 274, 173 S. E. 580 (1934) *State ex rel State Board of Charities v. Nevada Industrial Commission*, 34 Pac. (2d) 408 (Nev. 1934). *Reavey v. Guild of St. Agness*, 284 Mass. 300, 187 N. E. 557 (1933). The reasoning behind this rule is that the county is simply performing its governmental function of giving relief to the pauper or indigent, and the worker, therefore, falls without the protection of the act notwithstanding that he is hired and paid by the municipality. On the other hand, the view adopted by the Washington court is comparatively new in this country, being drafted from England where it was formulated early in the history of workmen's compensation legislation, *Porton v. Central (Unemployed) Body for London*, 2 B. W C. C. 296 (1908) *MacGillivray v. The Northern Counties Institute For the Blind*, 4 B. W C. C. 429 (1911). In support of the conclusion reached the court said that it is not within the authority of the department under our act to inquire into how the workman is to be paid—whether it be by cash, warrant, scrip or supplies. But it is sufficient to create the relationship of employer and employee if the county be engaged in extrahazardous work and the worker be employed by proper authority for compensation in the performance of such work.

Since the question before the court was an open one in this state, the decision can well be based on policy, for under our present economic condition the relation here created between the plaintiff and the county is not unusual, and, hence the holding of the principal case makes many eligible for relief under the act who would not otherwise be so protected.

Affirmed in the cases of *Polk v. Department of Labor and Industries*, 80 Wash. Dec. 584 (1935) and *Benson v. Department of Labor and Industries*, 80 Wash. Dec. 585 (1935). R. P.

LANDLORD AND TENANT—CROP SHARE RENTAL—INTEREST OF LANDLORD IN TENANT'S CONTRACT WITH SEED COMPANY. L and T entered into a lease contract, the rent to be by crop share rental. Subsequently, T entered into a contract with C (Seed Company) to grow seeds for C at a stipulated price which contract provided that the crops and seeds should at all times remain the property of C. After T threshed the crop, L seized his share as rent. C sued L in claim and delivery. *Held*: L was entitled to the crop seized as rental on the theory that one tenant in common may not dispose of the share of another cotenant without his consent. *Washburn-Wilson Seed Co. v. Alexie*, 35 Pac. (2d) 990 (Idaho 1934).

There were several problems raised by this case. First, as between L and T, when did L acquire an interest in the crop grown? Applying the doctrine of potential existence (which holds that at the time the contract is made there is a completed sale and when the crop comes into existence, it is instantaneously appropriated to the contract, the title relating back to the time the contract was made), as soon as the seeds germinated L had full legal and equitable title as tenant in common with T to the extent of the rental share. Even if the doctrine of potential existence is not applicable (especially since the Uniform Sales Act was intended to abolish the old common law doctrine), the great weight of authority agrees that when the crops were grown L and T would be tenants in common as to the proportion due under the crop rental. 8 R. C. L., p. 374, sec. 21.

A more substantial difficulty was the determination of the legal relations between T and C, as a consequence of their contract. If it was a sale of the seeds to T, then L was entitled to the crop since title would vest in L and T as tenants in common when the crops came into existence. The wording of the contract imported a bailment to T of the seeds and the crops when they came into existence. If a bailment of the crops, then L would win, his interest should attach before the bailor's, C, since the crop was grown on L's land. 36 C. J. 710; *McLellan v. Roberson*, 171 Ala. 120, 55 S. 99 (1911) *Copeland v. Gilbert*, 24 Ga. A. 387, 100 S. E. 775 (1919). If a bailment of the seeds for T to transform into crops, drawing an analogy to bailments of cloth to be manufactured into garments, T would acquire no title, legal or equitable, and consequently there would be no subject matter on which the tenancy in common could operate. Accord in principle, *Nielsen v. Woodruff*, 133 Wash. 174, 233 Pac. 1 (1925) *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493 (1893) *Sattler v. Halloch*, 44 N. Y. S. 543, 46 L. R. A. 679 (1897). *Stewart v. Sculthorp*, 24 Ont. 544.

To find a tenancy in common interest in the crop, the court must have proceeded on one or more of the following theories: (1) a bailment of the crops by C to T· (2) a sale of the seeds and crops by C to T· or (3) constructive or actual fraud of C on L. The court did not expressly state on what theory it found the subject matter of the tenancy in common but it seemed they considered that a decision in favor of C would have been a fraud on L. In other fields of the law when the parties have hid the substance of their transaction behind the form, the courts have thrown off the form and have treated the agreement as the substance required. Especially in the field of sales, when to avoid the recording statutes, the parties put a sale in the form of a consignment, the courts have treated the agreement as a sale. *D. M. Ferry & Co. v. Hall*, 188 Ala. 178, 66 S. 104 (1914). So, in this case, the court could construe this transaction as a sale of seeds in the form of a bailment. The courts have decided in the crop rental cases that what the lessor contracts for is the crop and not its money equivalent. *Devereaux Mortgage Co. v. Walker* 46 Idaho 431, 268 Pac. 37 (1928). So treating this agreement as a sale and protecting the lessor's right to get the crops is more in accord with the parties' intention and also sounder policy. Otherwise a lessee could entirely defeat the lessor's right to any crops by contracting with seed companies to hold all the seeds and crops grown on the land as bailee for the seed companies. Also, since it is the landlord's land that contributes to the crop, it is only fair that he be permitted to protect his interest in the crops produced under his contract with the tenant.

C. A. C.