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RECENT CASES

BILLS AND NOTES—HOLDER IN DUE COURSE—GOOD FAITH. For the purpose of inducing defendant to buy a Diesel engine the vendor made certain representations of existing facts, which representations were untrue. Defendant executed a negotiable promissory note for the purchase price of the engine, and the vendor indorsed this note to plaintiff, who gave value therefor. At the time it took the note plaintiff had knowledge of the representations, but no knowledge that they were false. To plaintiff's suit on the note, defendant set up the defense that the note was procured by the vendor of the engine by means of fraudulent representations, of which plaintiff was chargeable with knowledge. The trial court left to the jury the question of whether or not plaintiff was chargeable with knowledge of the fraud perpetrated by the vendor, and the jury found that plaintiff was chargeable with such knowledge. On appeal it was *held* that the question was properly left to the jury and that, accordingly, plaintiff was not a holder in due course and hence could not recover. (Three of the Judges dissented.) *Peoples Bank & Trust Co. v. L. Romano Engineering Co.*, 88 Wash. Dec. 226, 62 P. (2d) 445 (1936).

The case, of necessity, involves a construction of §§ 52 and 56 of the Negotiable Instruments Law (REM. REV. STAT., §§ 3443 and 3447; P. C., §§ 4123 and 4127). Since the general adoption of this Act throughout the United States the great majority of courts have construed § 56 of the N. I. L. to mean precisely what it says: namely, that a purchaser of a negotiable instrument has no notice of an infirmity in the instrument or defect in the title of the negotiator unless he has "*actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.*" (Italics ours.) Daniel, *Negotiable Instruments* (7th ed.) p. 941; Joyce, *Defenses to Commercial Paper* (2d ed.) § 689; Rightmire, *The Doctrine of Bad Faith in Negotiable Instruments* (1920) 18 MICH. L. REV. 355. That Washington has also discarded any notion that negligence or "gross negligence" would, of itself, make a holder not a holder in due course cannot be controverted. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903 (1902); *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828 (1909); *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (1911); *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102 (1911); *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907 (1912); *German American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769 (1915); *Citizens Bank & Trust Co. v. Limpricht*, 93 Wash. 361, 160 Pac. 1046 (1916); *Fisk Rubber Co. v. Pinkey*, 100 Wash. 220, 170 Pac. 531 (1918); *Larsen v. Betcher*, 114 Wash. 247, 195 Pac. 27 (1921); *Westland v. Post Land Co.*, 115 Wash. 329, 197 Pac. 44 (1921); *Keith v. Tsue Chong*, 119 Wash. 507, 205 Pac. 834 (1922); *Banner Meat Co. v. Rieger*, 125 Wash. 142, 215 Pac. 334 (1923); *First Nat. Bank v. Gunning*, 127 Wash. 307, 220 Pac. 793 (1923); *Lovell v. Dotson*, 128 Wash. 669, 223 Pac. 1061 (1924); *Mills v. Hayden*, 128 Wash. 67, 221 Pac. 994 (1924); *Cross v. Voss*, 132 Wash. 576, 231 Pac. 929 (1925). Suspicious circumstances or the negligence of the holder may, however, be evidence from which the jury may infer bad faith. *Gray v. Boyle*, *supra*; *Scand. Am. Bk. v. Johnston*, *supra*; *Citizens Bk. v. Limpricht*, *supra*; *Keith v. Tsue Chong*, *supra*; *Banner Meat Co. v. Rieger*, *supra*; *Schultz v. Crewdson*, 95 Wash. 266, 163 Pac.

734 (1917); *Inland Mortgage & Loan Co. v. Cady*, 138 Wash. 52, 244 Pac. 123 (1926); Brannan, *Negotiable Instruments Law* (5th ed.) p. 574. Hence the question underlying the principal case is: Were there any suspicious circumstances connected with plaintiff's taking the note which would justify a jury in finding that it took the note in bad faith? It is submitted that there were none. Plaintiff knew of the representations, but there is no evidence whatever—at least, none is mentioned either in the opinion or in the briefs of counsel—that either it or its officers had any knowledge or any grounds for suspecting that the representations were not in fact true. It appears to be settled law in this jurisdiction that one is a *bona fide* purchaser of a note even though he knew when he took it that it was the consideration for an executory contract, or that there were collateral agreements between the payee and the maker, or that it was given to pay for an article which the payee-vendor had warranted. *Moyses v. Bell*, *supra*; *Citizens Bk. v. Limpricht*, *supra*; *Cross v. Voss*, *supra*. A recent collection of authorities may be found in 100 A. L. R. 1357. Hence there was no evidence on the point of plaintiff's *bona fides* which justified the trial court's action in leaving that question to the jury.

It is submitted that the decision is not in accord with the great weight of authority under the Negotiable Instruments Law, that it is not in accord with the prior decisions in this state, and that if it is followed its effect will be, to quote Judge Steinert (dissenting at p. 235), "to emasculate the negotiable instruments law and seriously to cripple the passing of negotiable instruments."

J. N. R.

CONSTITUTIONAL LAW—DUE PROCESS—POLICE POWER—SUNDAY LAWS FOR BARBER SHOPS. A state statute provided that it shall be unlawful "to operate or keep open any barber shop or college for more than six days in any one calendar week." Petitioner was convicted for violation of the statute and he applied for a writ of *habeas corpus*. *Held*: petitioner should be released. The statute violates the constitutional provisions guaranteeing the right of citizens to pursue a lawful calling, and forbidding enactment of "special law" where one general in character can be made applicable. *Ex Parte Scaranino*, 60 P. (2d) 238 (Cal. 1936).

Statutes which are general in nature and which prohibit the doing or exercising of any labor or business on Sunday (works of necessity and charity excepted) have almost universally been upheld. It is stated that the common law did not prohibit the citizen from pursuing his ordinary labor on Sunday. *Eden v. People*, 161 Ill. 296, 43 N. E. 1108 (1896). The statute of 29 CAR. II (1678) seems to have laid the foundation for the laws in England and in many of the states. In their inception, no doubt these laws were passed with a religious view, and the early cases were upheld on that ground. *Charleston v. Benjamin*, 2 Strob. L. 508, 49 Am. Dec. 608 (S. C. 1847); *State v. Barnes*, 22 N. D. 18, 132 N. W. 215 (1911); Ann. Cas. 1913E 930 and note; 37 L. R. A. (N. S.) 114 and note. This view now seems to have been abandoned, and the ground taken that it is a civil and police regulation. The modern reasoning is that periodical rest preserves health and promotes good morals. *Ex Parte Andrews*, 18 Cal. 679 (1861); *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166 (1896). The fact that Sunday is the day selected is usually explained on the ground that the legislature had to select some day, and it was only natural to pick the day which the majority of the people

assumed to be the day of rest. *Specht v. Commonwealth*, 8 Barr. 312 (Penn. 1848). In *Hennington v. Georgia, supra*, the court stated that they had no doubt but that religious views had a controlling influence, but that that would not invalidate the law if there were a valid police power underlying it.

But, when legislation singles out barber shops and prohibits them from remaining open on Sunday while allowing all other businesses to be carried on, courts split about evenly as to the validity of such laws. Those denying the validity do so on the grounds of violation of equal protection, due process, and "special legislation" clauses in the Constitutions. The reasoning in this line of cases is that barbers do not require rest any more than those in many other lines of business, and that it is unconstitutional to deny this one group the right to labor on Sunday when the others are exactly in the same relation to the law. *Ex Parte Jentzsch*, 112 Cal. 468, 44 Pac. 803 (1896); *Eden v. People*, 161 Ill. 296, 43 N. E. 1108 (1896); *Tacoma v. Krech*, 15 Wash. 296, 46 Pac. 255 (1896) (overruled by *State v. Nichols*, 28 Wash. 628, 69 Pac. 372 (1902)). Possibly these cases reflect a general dislike for Sunday laws of any kind, inasmuch as similar classifications have not been held to violate the equal protection clause in other fields. *Quong Wing v. Kirkendall*, 223 U. S. 59; 32 Sup. Ct. 192; 56 L. Ed. 350 (1912). Opposed to the reasoning of these cases are those which uphold the validity of the statutes as applied only to barber shops. The usual argument in support of these cases is that barbers work longer and later hours than those in most occupations, this being especially true on Saturdays; therefore, there is a reasonable classification under the Constitution. *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 66; 44 L. Ed. 716, and note (1900); *People v. Harnor*, 149 N. Y. 195, 43 N. E. 541 (1896); *People v. Bellet*, 99 Mich. 151, 57 N. W. 1094 (1894); *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177 (1905).

The court rejected the contention in the instant case that closing one day each week would facilitate thorough cleaning of the shops. The court said that some barber shops might take advantage of the closing to clean the shops, but there was no reason to believe that all would, or even a majority. Furthermore, the sanitary practices prescribed by the California barber laws are such as to require continual observance and could not be left until the end of the week.

Legislation which prescribes closing hours for barber shops presents somewhat different constitutional problems. See 8 WASH. L. REV. 193 (1934); 19 MINN. L. REV. 802 (1935).

R. J. M.

DISBARMENT—DISCIPLINE OF JUDGES. Plaintiff sought an original writ of prohibition to prevent the Board of Governors of the state bar of Oklahoma from proceeding against him upon a petition for disbarment alleging lack of jurisdiction for the reason that, at the time of the acts charged, he was a judge of one of the county courts of Oklahoma. Plaintiff argued that an attorney cannot be disbarred for acts committed while he held judicial office because the state bar has no authority to control or supervise acts of judges, or try accusations against them, and that while serving as judge he was expressly prohibited from practicing law and was, therefore, effectively suspended from membership in the bar. *Held*: Petition denied. The court said that, while there is no judicial decision directly in point, the state board of bar governors has

jurisdiction to hear charges against any practicing lawyer of disbarable offenses involving moral turpitude rendering him unfit for the continued practice of the law, even though the offenses evidencing such lack of character occurred theretofore while he held judicial office. The bar may "purge itself of unfit members even though they were formerly judges". *Weston v. Board of Governors of State Bar*, 61 Pac. (2d) 229 (Okla., 1936).

V. W. T.

EMINENT DOMAIN—EXERCISE FOR MINING PURPOSES—PUBLIC USE. Plaintiff sought to have 51 feet of tunnel on his neighbor's land condemned for plaintiff's exclusive use in the operation of his mine. He sought to exercise the power of eminent domain on the ground that the tunnel provided the only possible outlet to his mine, and that his mining operations were in the nature of a public benefit or "public use". *Held*: Plaintiff was not entitled to the exercise of that power in this instance for it was not conclusively shown that it was necessary to the operation of his mine, nor that the use he contemplated was more of a benefit to the public than that to which the defendant devoted it. *State ex. rel. Butte-Los Angeles Mining Co. v. District Court of Second Judicial District of Silver Bow County, et al.*, 60 P. (2d) 380 (Mont., 1936).

The term "eminent domain" was unknown to the common law, though the doctrine itself was carried out by royal prerogative, as an entry on private lands in defense of the realm. The granting of the power to private organizations on the ground that the use contemplated was in the nature of a "public use" and in the furtherance of public interests is a modern device, arising out of modern conditions. *George v. Consolidated Lighting Co., et al.*, 87 Vt. 411, 89 Atl. 635 (1914). Since it was not a part of the common law, the exercise by private organizations or individuals is by virtue of constitutional grant, and regulation thereunder is by the legislatures. The enactments of the various states are substantially the same. Nearly all provide that the right of eminent domain may be exercised for "public uses", and then enumerate the fields of private enterprise in which the public has such interest. NEV., REV. LAWS, § 5606; UTAH, REV. STAT., § 1898, 3588; IDAHO, REV. CODE, § 5210; COLO., 3 MILLS ANN. STAT. REV. SUPP. § 616; MONT., REV. CODE §§ 9934, 9936; WASH., REM. REV. STAT. §§ 921-936. (The Washington statute varies in form.)

In Washington, Colorado and Missouri, contrary to the provision of the other forty-five states, the constitution provides that the judiciary and not the legislature shall be the judge as to what constitutes a "public use". WASH. CONST., Art. 1, § 16. The Washington court holds that legislative enactments enumerating various "public uses" do not raise even a presumption that such is the nature of the use. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 918, 56 L. R. A. 820 (1903).

An examination of the cases wherein this power was exercised in the furtherance of the mining industry, in the extreme northwestern states, discloses little variance in the opinions of the various state courts upon the question of whether mining is to be construed a "public use". The courts of Idaho, Nevada, Utah and Colorado, in which states mining is important, have found little difficulty in construing its operations as a "public use". *Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 30 Ida. 1, 165 Pac. 1128 (1917); *Dayton Gold & Silver Mining Co. v. Sea-*

well, 11 Nev. 394 (1876); *Goldfield Consolidated Milling & Transportation Co. v. Old Sandstrom Annex Gold Mining Co.*, 38 Nev. 426, 150 Pac. 313 (1915); *Highland Boy Gold Mining Co. v. Strickly*, 28 Utah 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110 (1904); *Strickly v. Highland Boy Mining Co.*, 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. 310, 4 Ann. Cas. 117 (1906); *Tanner v. Treasury Tunnel Mining & Reduction Co.*, 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106 (1906). The principal case from Montana, a state in which mining is very important, indicates that Montana follows the general tendency of the state courts in allowing the exercise of eminent domain to their leading industries. The plaintiff failed here because he sought the use of the tunnel to the exclusion of its owner, who was also engaged in mining. The Montana court merely refused to hold the plaintiff's use in mining to be a more important "public use" than the use of the tunnel in mining operations by the defendant. The court also held that there were shown to be other outlets to the plaintiff's mine.

It is to be doubted whether, in the State of Washington, the denomination of the use as a "public use" would be required in a case such as the principal one. In Art. I, § 16, of the Washington Constitution, it is provided, *inter alia*, that "private property shall not be taken for private use, *except for private ways of necessity * **" (Italics ours.) In REM. REV. STAT. § 6747 "ways of necessity" are defined as rights of way " * * * through the private land of another, for ingress and egress, and construction and maintenance thereon of * * tunnels * * through which timber, stone, minerals and other valuable materials and products may be carried." This statute has been held constitutional in *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994 (1914). The court has held also that "necessity" means "reasonable necessity"; *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722 (1914). In the former case it was said, with regard to Const. Wash. Art. I, § 16, that it "excepts the right of ways of necessity from the general prohibition against the taking of private property for private use." Thus, while the said Art. I, § 16, does provide for the taking of private property for "public use" as well as its taking for "private use" under the above quoted language, it would seem that a tunnel for mining purposes would be, within the meaning of REM. REV. STAT. § 6747, a "way of necessity", for which only a reasonable necessity, rather than a "public use", need be shown. While the Washington court has not passed on the problem here involved, it is submitted that the foregoing interpretation of the constitutional and statutory provisions recognizing the right to condemn "ways of necessity" which are admittedly for private rather than public use permits the legislative authority to extend the power of eminent domain in furtherance of basic industries and relieves the court of the requirement of expanding the meaning of the term "public use" beyond its normal boundaries in sustaining such enactments; which seems a desirable result in view of the apparent unanimity of opinion in this regard.

B. C. McD.

INSURANCE—EXTERNAL, VIOLENT AND ACCIDENTAL MEANS—INDEMNITY POLICIES. The plaintiff, while patronizing the Argonaut Grill, was, without justification, assaulted and severely beaten by one Reed, who at that time was engaged in the course of his employment as head waiter and

night manager at the grill. The agreement of the Great American Indemnity Company with the Grill contained this provision: "To pay all sums which the Assured shall become liable to pay as damages imposed by law arising out of bodily injuries * * * suffered or alleged to have been suffered as a result of accidents * * * by any person or persons not in the employ of the Assured while within or upon the premises * * *." *Held*: The injuries suffered fell within the terms of the policy. *Westerland v. Argonaut Grill*, 87 Wash. Dec. 360, 60 P. (2d) 228 (1936).

In defining the term "accident" as including an assault the courts have generally relied upon cases involving ordinary life and accident policies as precedents. Courts which have held that a person covered by an accident policy could recover when assaulted without any fault of his own have also held that the same rule applies to a public liability policy where the assault was committed by an employee of the assured and not by the assured himself, and where the injured party did not provoke the assault. *Hutchcraft's Exr. v. Insurance Co.*, 87 Ky. 300, 8 S. W. 570 (1904); *U. S. Mutual Accident Assn. v. Bony*, 131 U. S. 100, 9 Sup. Ct. 755; *Utter v. Traveler's Ins. Co.*, 65 Mich. 545, 32 N. W. 812 (1856); *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723 (1892). In Washington, *McGregor v. New World Life Insurance Co.*, 163 Wash. 677, 1 P. (2d) 908 (1931), furnishes the test in the instant case. It was held that the death resulted from bodily injuries "effected solely through external, violent and accidental means", the court saying that "even though Johnson knew that Clancy and Ludwig were intoxicated, that they were armed, and that they had been in a fight, he had no reasonable ground to believe that if he entered the room, a total stranger to them, without doing anything to provoke trouble he would be immediately shot." In applying to indemnity policies the rule applied to life insurance and accident policies the court follows the majority. *Employer's Indemnity Corporation v. Grant*, 271 Fed. 136 (1921); *Rowe v. United Commercial Traveler's Assn.*, 186 Iowa 454, 172 N. W. 454 (1916); *Union Casualty & Surety Co. v. Harroll*, 98 Tenn. 591, 40 S. W. 1080 (1898); *Postlero v. Travelers' Ins. Co.*, 173 Cal. 1, 158 Pac. 1022 (1916). The position that injuries from an assault are sustained by "accidental means" naturally followed from the rule that the policy will be construed most strictly against the Insurance Co.

In most of the jurisdictions in which it is held that an assault is not an accident within the meaning of an ordinary accident policy, it is said that an insurance company is equally exempt from liability under an indemnity policy. *Sontag v. Galer*, 279 Mass. 309, 181 N. E. 182 (1932); *Commonwealth Casualty Co. v. Headers*, 118 Ohio St. 429, 161 N. E. 278 (1928); *Briggs Hotel Co. v. Zurick General Accident & Liability Co.*, 213 Ill. App. 334.

While it appears that no distinction in this respect is made by the courts between these two types of policies, the propriety of treating them on the same basis has been questioned on the ground that there is an essential difference between an accident and health policy and one of public indemnity. In the latter, both parties have in mind the common connotation of the word "accident" and consider its application to the injured person from the viewpoint of the nature of the assured's act in causing injuries to third parties. John J. Francis, Esq., "*External, Violent, and Accidental Means in Indemnity Policies*", *BEST'S INSURANCE NEWS*, November 10, 1934.

W. G. D.

STATUTES—INHERITANCE TAXES—REPEAL BY IMPLICATION. The will of decedent was filed and admitted to probate. The State objected to a deduction for the federal estate tax paid, pursuant to REM. REV. STAT., § 11201-b. The State contended that as in WASH. LAWS 1935, chap. 18, § 104, p. 768, the legislature had amended the original inheritance tax law, WASH. LAWS 1901, chap. 55, p. 67 so as not to include § 11201-b and had designated specific allowable deductions, and then added "and no other sum", the deduction was not allowable. *Held*: REM. REV. STAT. § 11201-b was not repealed by act of 1935 for the reason that repeals by implication are disfavored and as the legislature had not clearly stated the section to be repealed, it shall be held in force. *In re Colman's Estate*, 87 Wash. Dec. 254, 60 P. (2d) 113 (1936).

The original inheritance tax statute in Washington allowed certain specified deductions from the estate and then included the words "and no other sum". In 1931 by the WASH. LAWS 1931, chap. 134, § 1, p. 401, REM. REV. STAT. § 11201 was amended to allow a deduction for federal estate tax paid. This amendment was given a separate section number (§ 11201-b) apart from § 11201. By WASH. LAWS 1935, *supra*, the legislature undertook to amend the original inheritance tax law as passed in 1901, "as amended, to read as follows", and then set forth what, for present purposes, may be said to be the original section, continuing it in force as the amended section, including the use of the original words "and no other sum" following specified deductions, omitting all references to the federal estate tax and making no mention of the new section known as § 11201-b.

In this case there is a difficult problem of determining the legislative intention. In every case of statutory construction, where the language is ambiguous, the intent and not the language of the act governs. *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522 (1897).

The question is: Did the legislature intend to continue § 11201-b in force? Clearly there was no express repeal of the section in the amendatory act. If the section was repealed, it must have been by implication. Repeals by implication are never favored by the courts, and unless there is a clear showing that the legislature meant to repeal but did not say so in so many words, the courts will hold that there has been no repeal. *Batchelor v. Palmer*, 129 Wash. 150, 224 Pac. 685 (1924). On the other hand the rule is pretty well established that where a later act embraces the subject matter of an earlier act and covers it fully and completely, the earlier act is impliedly repealed, though not expressly and specifically repealed. *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862 (1899); *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085 (1908); *State v. George*, 84 Wash. 113, 146 Pac. 378 (1915); *State ex rel. McCoske v. Kinnear*, 145 Wash. 686, 261 Pac. 795 (1927). And this rule is applicable even though the two acts are not repugnant. *Bradley Engineering & Machinery Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072 (1909).

These rules are guides for the determination of the legislative intent. There are conflicting evidences of the legislative intent in the principal case. The amendatory act clearly stated that its purpose was to amend the original inheritance tax law of 1901, "as amended". There immediately arises the question: Is § 11201-b an amendment to the original act? If we conclude that it is, then the present act embraces that section and according to the rule laid down in *Bradley Engineering & Machinery*

Co. v. Muzzy, supra, it should be repealed by implication. Further, the act names specific allowable deductions and then adds the words "and no other sum". Literally speaking, these words are exclusive, and as such, § 11201-b should be of no force. In the case of *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734 (1922), the court held the amount of the federal estate tax not to be deductible. This decision was based on the 1917 statute (WASH. LAWS 1917, p. 196) which contained almost identical provisions as the 1935 amendatory act.

On the other hand the 1931 act, allowing deductions for the federal tax paid, was given a separate and distinct section number, 11201-b, and as the legislature made no mention of that section, when it could easily have done so, it is logical to presume there was no intent to repeal.

It seems from this examination the court could easily have reached an opposite conclusion as did Judge Blake in his dissenting opinion. However, the decision gives a desirable result especially in the light of the Washington court's construction of the theory of our inheritance tax law, holding that it is a tax upon the right of succession, *State v. Clark*, 30 Wash. 439, 71 Pac. 20 (1902), and logically a person doesn't receive that paid to the federal government.

H. S. M.

SURETYSHIP—SUBROGATION—RIGHT OF VOLUNTEER. *E*, engaged in construction of a state highway, bought four tires from the plaintiff company; sold the tires to four employees, and charged these against their wages. This action was to collect from the surety on the bond given by *E* in accordance with the state statute. No evidence appeared that the tires were used or consumed on the job. *Held*: That had the wages not been paid, the employees would have recourse against the bond and "for all practical purposes the plaintiff company paid the wages of the employees to the extent of the cost of the tires. While the plaintiff company holds no assignment from the employees, we think it is entitled to recourse against the surety on the theory of subrogation." *Western Steel Casting Co. v. Edland*, 87 Wash. Dec. 560 (1936).

Subrogation is an equitable doctrine. It does not owe its origin to statute or custom, but is a creature of the courts of equity, having for its basis the doing of complete and perfect justice between the parties without regard to form. *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S. 998 (1909; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. ed. 868 (1878)). There are several clearly defined groups of cases in which the right of subrogation is granted by equity.

First, there are those cases where one has discharged obligations in performance of a legal duty. Whenever a party discharges an obligation in performance of a legal duty, that is, an obligation for the performance of which he was legally bound, he is entitled to be subrogated to, and avail himself of all the securities which may at any time have been put into the creditors' hands by a party whose liability was prior to his own, or which the creditor may have obtained from such party. *Southern Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 108 Ark. 555, 158 S. W. 1082 (1913); *Pomeroy, Equity Jurisprudence* (4th ed.), (1919) § 2345.

The second class of cases in which the parties are entitled to subrogation consists of situations wherein one, not legally bound to pay, but who may nevertheless suffer loss if the obligation is not discharged, pays the debt in self-protection. *Murray v. O'Brien, supra; Davison v. Gregory,*

132 N. C. 389, 43 S. E. 916 (1903); *Pomeroy, Equity Jurisprudence, supra*, § 2346.

The final group in the classification is that in which the payment is made by a stranger to the obligation, acting neither under compulsion nor for self-protection, but at the request of some party liable for the debt. *Southern Cotton Oil Co. v. Napoleon Cotton Oil Co., supra*; *Davies v. Pugh*, 81 Ark. 253, 99 S. W. 78 (1907); *Pomeroy, Equity Jurisprudence, supra*, § 2347.

The instant case does not come within any of the above classes in which equity will relieve. The evidence indicates that the plaintiff sold the tires to the contractor, relying on the latter's credit, and with the intention of holding only the buyer. There is no showing that he knew that the tires were to be used by the employees for their personal use, nor that a charge would be made against their wages. He did not discharge an obligation in the performance of a legal duty, since there was no original obligation; it cannot be said he was a party who paid a debt in self-protection, for prior to the sale of the tires, no obligations were due to him; finally, he has not paid a debt at the request of another, as no request by the contractor appears by the facts; nor can subrogation be invoked when it appears that it was never intended by the parties. *Capen v. Garrison*, 193 Mo. 335, 92 S. W. 368 (1906). If we can say that he did pay a debt, namely the salary of the four employees to the extent of the tires, he was merely a volunteer and as such is not entitled to subrogation. *Chapman v. Ross*, 152 Wash. 262, 277 Pac. 854 (1929); *Wagner v. Alderson*, 91 Wash. 157, 157 Pac. 476 (1916); *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. 625 (1888).

Certainly under the bond which was the usual statutory one required by REM. REV. STAT. § 1159, P. C. § 9724, there should be no recovery because it applies to 'provisions and supplies for carrying on the work of the contract'. *National Surety Co. v. Bratnobar Lbr. Co.*, 67 Wash. 601, 122 Pac. 337 (1912); *U. S. Rubber Co. v. American Bonding Co.*, 86 Wash. 180, 149 Pac. 706, L. R. A. 1915F 951 (1915). And lastly if it be admitted that subrogation be founded on natural justice as stated in the case of *James Dunsmuir v. Port Angeles Gas, Water & Electric Light & Power Co.*, 30 Wash. 586, 71 Pac. 9 (1902), the instant case can hardly be said to fall within the application of such a rule.

D. M. N.

TAXATION—LEVY AND ASSESSMENT—FORTY MILL LIMIT—SEVENTH-YEAR DELINQUENCY. Plaintiff brought suit against King County to recover an amount paid in excess of the ten mill limit permitted to the county by Initiative Measure No. 94, REM. REV. STAT., 1935 SUPP. § 11238-1a, which provides that "the levy by any county shall not exceed ten mills." The amount sought in recovery is plaintiff's share of delinquent taxes for the seventh preceding year as provided by REM. REV. STAT. § 11223, requiring the state auditor to transmit to the county assessor a statement of "the amount due to each state fund and unpaid from such county for the seventh preceding year, and such delinquent state taxes shall be added to the amount levied for the current year." The amount of delinquent taxes in 1935 for the seventh preceding year due to the state from all the counties was in excess of \$400,000. The suit was dismissed and the judgment affirmed upon appeal. *Held*: There was not a levy of taxes

as contemplated by the forty mill limit law as there was no action taken by the levying authority but merely the performance of a ministerial duty by state and county authorities as required by statute. Four judges dissented. *Greb v. King County*, 87 Wash. Dec. 489, 60 P. (2d) 690 (1936).

In taxation the term "levy" has been given a variety of meanings and is "in its proper sense . . . the formal and official action of a legislative body invested with the power of taxation. . ." 61 C. J. 551, § 673. The term is used in a broader sense "indiscriminately to denote the legislative function of charging the collective body of taxpayers with the sums to be raised, and the ministerial function of extending the taxes against the individual taxpayers." (Italics supplied.) 36 C. J. 1032, § 3. The court, reluctantly admitting the possibility of plurality of meaning of "levy", limited the scope of that word to action taken by the levying authority and concluded that the amount of the seventh-year delinquency was not "a new levy in the sense that it is included within the limitations of the initiative" as only a ministerial function was involved. The delinquency provision was characterized as "an accounting process" for "the collection, in the current year, of the tax already due from the property and inhabitants of the county" and so the purpose of the initiative was not "to disturb the existing machinery" for tax collection but "to superimpose upon the existing tax structure specific limitations" regarding the levy of future taxes for current governmental purposes.

That the delinquency provision is something more than "an accounting process" is suggested by the court in recognition of the strongest argument against its position. In the words of the court, "the inclusion of the amount when spread anew becomes a specific burden on the individual properties within the county, including properties that have already paid the seventh-year tax." (Italics supplied.) The tax burden of the county was not increased and the court concluded that "since the aggregate property of the county remains burdened with the delinquency, every unit of it is subject to a contribution to liquidate the burden."

The dissenting opinion stresses and vigorously upholds the right of the people to limit the taxing power of the county through the use of the initiative. *Love v. King County*, 181 Wash. 462, 44 P. (2d) 175 (1935). This proposition, not disputed by the majority of the court, apparently influenced the dissenting judges to conclude that the intent of the people as expressed through the initiative was for a broad and non-technical use of the term "levy" which would be fully effective to reduce governmental expenses through restrictions on the power of taxation. In the words of the minority, "But, assuming that the statute simply provides a process for collecting that which belongs to the state, that process is exercised through a *levy for taxes*. . . They have said that the process for collecting taxes shall not be exercised beyond certain prescribed limitations." In view of the broad construction ordinarily given to "levy", the decision of the court construing the word so narrowly would seem to be unusual in a situation where the electorate has so clearly expressed an intention to limit taxation. The limitation of "levy" to action taken only by the levying authority might very well open the way to frustration of the tax limit law.