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# Automobile Guest Statute—Intentional Impact; Banks and Banking—Stockholders—Superadded Liability—Persons Liable—Beneficial Owners; Criminal Law—Habitual Criminal Charge—Evidence—Records of Conviction in Sister States; Injury to Business—Falling Walls—Damages—Allowance for Advertising; Kidnapping—Reward—Construction of Statute; Public Sales—Substantial Compliance with Statute; Taxation—Inheritance Tax—Doctrine of Retainer—Distributive Shares; Workmen's Compensation—Occupational Diseases

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# RECENT CASES

AUTOMOBILE GUEST STATUTE—INTENTIONAL IMPACT. Defendant, returning with his family from a drive in the country, at the request of his children that he "give them a thrill", drove into a hump in the highway at high speed over the protest of his sister in the back seat, who had been jounced by the hump on the outgoing trip. As a result her back was broken. *Held*, that the guest statute applied, and since it was not shown that defendant intended to injure the plaintiff, the trial court properly dismissed the case at the close of the plaintiff's evidence. *Parker v. Taylor*, 95 Wash. Dec. 611, 81 P. (2d) 806 (1938).

The interpretation of the statute (Wash. Laws 1933, c. 18, § 1, modified by Wash. Laws 1937, c. 189, § 121) applied in *Shea v. Olsen*, 185 Wash. 143, 53 P. (2d) 615, 11 A. L. R. 998 (1936); *Carufel v. Davis*, 188 Wash. 156, 61 P. (2d) 1005 (1936) and *Lassiter v. Shell Oil Co.*, 188 Wash. 371, 62 P. (2d) 1096 (1936), removed injuries to an automobile guest from the operation of the law of negligence, and placed such injuries within the field of intentional injury. It has been pointed out that, "the statute as interpreted by our court means three things: (1) only intentional injury is actionable, (2) plaintiff must prove this intent specifically, in the sense, but not to the degree required in cases of suicide, homicide, or mayhem, and (3) this burden is not sustained merely by showing recklessness, heedlessness, or gross negligence, since the jury cannot reasonably infer the necessary intent to injure from these alone." Comment (1937) 12 WASH. L. REV. 138. The principal case adds a further restriction to the above, *i. e.*, the burden of showing intent is not sustained by showing that the impact causing the injury was intentional.

The restriction indicated above requires qualification of its own, however, since it must be clear that where the intentional impact is of such a nature as to make it substantially certain that it will produce injury, the inference that the injury was intentional is irresistible, as in the case of battery, where the same requirement is met in similar fashion. "In order that an act may be done with the intention of bringing about a harmful or offensive contact, the act must be done for the purpose of causing the contact or with knowledge on the part of the actor that such contact is substantially certain to be produced." RESTATEMENT, TORTS (1934) § 13, comment *a*. Drawing an analogy from the rule quoted above, it would seem to follow that a person could come within the scope of liability under the Washington guest statute merely by the plaintiff's showing that the impact itself was intentional if the factual situation were such that there was reasonable certainty that the impact would result in injury to the guest. In other words, the court could not have meant that one who playfully drives his car into a ditch would be relieved from liability, in the absence of proof of the actor's having done the act for the purpose of injuring those in the car. In such circumstances, the court would undoubtedly permit recovery under the above rule, due to the fact that there was a reasonable certainty that injuries would result from the impact caused, indicating an intent to injure, by inference. In such cases, where the inference of an intent to kill, maim, or injure is reasonably to be drawn from showing the intent to create the impact, it is a question for the jury whether the actor did so intend.

It is submitted that the principal case was correctly decided, in view

of the fact that it was a case in which no such inference of intent to injure those in the car could arise, the mere act of "taking a bump" at a high speed not being one which might be said to carry with it a reasonable certainty of injury to those in the car. The court, however, when stating that proof of an intent to create the impact is not enough to create liability under the statute, might properly have added, "unless the facts and circumstances are such that the injury was substantially certain to result from the intended impact". Such qualification in no way contradicts the rulings in the previous cases, since they merely required that the injury be intentional, the suggested addition merely being a test whereby the required intent may be established.

J. H. J.

BANKS AND BANKING—STOCKHOLDERS—SUPERADDED LIABILITY—PERSONS LIABLE—BENEFICIAL OWNERS. The directors of three Washington banks merged into one bank for the ostensible purpose of eliminating duplication of service and to weld three struggling banks into one strong unit. Simultaneously, and as part of the reorganization plan, a corporation was formed to hold the shares of stock of the new bank. When the state supervisor of banks took over the merged bank for liquidation, the holding company held 900 shares and each of the ten directors had ten shares of bank stock. The stockholders of the old banks held all of the stock of the holding company, whose only other assets besides the bank stock, were the two unused bank buildings. After failure of the holding company to pay its statutory liability, action was brought to collect from the stockholders of the holding company. *Held:* The stockholders of the holding company are liable additionally in proportion to the amount of stock that they owned. *Hansen v. Agnew*, 95 Wash. Dec. 294, 180 P. (2d) 845 (1938).

The defense was that the holding company plan was adopted in good faith and for good reason, and that it is only when the plan is devised to escape liability that the stockholders should remain liable as owners of bank stock. But the court said: "The question of motive is entirely immaterial; nor is it necessary, in order to permit a recovery in this case, to disregard the corporate entity of the holding company, or to invoke the comparatively modern concept of *alter ego*, or even to fall back upon considerations of public policy; for the statute contemplates that the superadded liability shall be that of the real and beneficial owner of the stock."

Double liability is imposed by statute to provide additional security to depositors and creditors because it is the peculiar function of banks to undertake to care for the money of others. Also, it is imposed to hold the owners of bank stock to a higher degree of business accountability because they utilize these funds and derive a profit from them. ZOLLMAN, BANKS & BANKING, §§ 1611, 1612. The solicitude of the courts in giving a liberal interpretation to these statutes arises because of the great ease by which their purpose could otherwise be evaded by use of the holding company or other devices. *Harris Investment Co. v. Hood*, 123 Fla. 598, 167 So. 25 (1936). If an owner of stock transfers it in bad faith to an irresponsible person, it is void as to bank creditors. *Ohio Valley National Bank v. Hulitt*, 204 U. S. 162. A trust arrangement will not be allowed to defeat statutory liability. *Maddison v. Bryan*, 31 N. M. 404, 247 Pac. 275 (1926). A holding company organized for the sole purpose of escaping

liability will not be countenanced. *Corker v. Soper*, 53 F. (2d) 190 (1931).

The principal case disregarded motive and applied the idea of beneficial ownership, differing perhaps in verbiage from others, but reaching a result in accord with the unbroken line of authority. *Metropolitan Holding Co. v. Snyder*, 79 F. (2d) 263, 103 A. L. R. 912 (1935); *Barbour v. Thomas*, 86 F. (2d) 510 (1936); *Nettles v. Rhett*, 94 F. (2d) 42 (1938); *Fors v. Farrel*, 271 Mich. 358, 260 N. W. 886 (1935).

Who is the beneficial owner? In the instant case the emphasis is upon a determination of who really furnished the consideration. In all cases the ultimate consideration flows from the stockholders through the holding company to the bank. If the holding company has assets, the law will look no further; if not, the courts find the stockholders liable. In disregarding motive, it seems to be plainly a matter of whether the holding company has assets enough to meet the liability. See Comment (1938) 36 MICH. L. REV. 1336; Note (1938) 33 ILL. L. REV. 104. The notion of legal entity as it pertains to a corporation will not be allowed to defeat the purpose of the statute. *Metropolitan Holding Co. v. Snyder, supra; Fors v. Farrel, supra.*

E. K. N.

CRIMINAL LAW—HABITUAL CRIMINAL CHARGE—EVIDENCE—RECORDS OF CONVICTION IN SISTER STATES. Defendant was convicted of burglary in the second degree and of being an habitual criminal in that he had suffered three prior convictions for felonies, two of which were in sister states. The prior convictions in Oregon and California were proved by certified copies of judgment and sentence from the records of those courts supplemented by certified photostatic copies of fingerprint records kept in the respective penitentiaries where the sentences were served. Conviction affirmed. *State v. Harry Johnson*, 94 Wash. Dec. 359, 78 P. (2d) 561 (1938).

Although it is now well settled that identity may be proved by fingerprints, *State v. Bolen*, 142 Wash. 653, 254 Pac. 445 (1927); WIGMORE, EVIDENCE, § 414 (Supp. 1934), the form and method of making such proof is of vital significance in protecting the rights of the accused and in assuring conformity with the rules of evidence. *People v. Reese*, 258 N. Y. 89, 179 N. E. 305, 79 A. L. R. 1329 (1932). State statutes generally provide for admission and effect of certified copies of non-judicial records kept under authority of the state or federal laws, REM. REV. STAT. § 1257, § 1260; *State v. Bolen, supra*, and of certified copies of judicial records of sister states, REM. REV. STAT. § 1254; but as to admission and effect of certified copies of non-judicial records kept in sister states, state statutes are generally silent. *Reed v. Stevens*, 120 Me. 290, 113 Atl. 712 (1921); 3 WIGMORE, EVIDENCE, (2d Ed.) § 1652 n. 4.

Missouri, California and West Virginia, however, have such statutes; but they are strictly construed and made to conform to such rules of evidence as require preliminary proof that they are public records, that they are kept in accordance with the law of the state, and that the certifying officer is the legal custodian. *State v. Hendrix*, 331 Mo. 658, 56 S. W. (2d) 76 (1932); *People v. Darling*, 120 Cal. App. 453, 7 P. (2d) 1094 (1932); *Central Trust Co. of Illinois v. Hearne*, 78 W. Va. 6, 88 S. E. 450 (1916). Congress has provided a certain procedural method for certifying copies of non-judicial records of a sister state, REV. STAT.

§ 906 (1875), 28 U. S. C. 688 (1934); and that when so certified, such records shall have the same effect in sister states as they have in their home state. At first glance such a provision seems to be an interference with state judicial procedure, but the fact that it is simply a non-exclusive, alternative means of proof, (3 WIGMORE, EVIDENCE (2d ed. 1923) § 1680a; *Reed v. Stevens, supra*) minimizes any supposed interference; also it should be noticed that this federal statute was enacted by Congress in pursuance of the power delegated by the full faith and credit clause of the United States Constitution. U. S. Constitution, Art. IV, Sec. 1. The state in the instant case had carefully followed this method of authentication laid out in the federal statute; and the court, relying on dicta in two prior Washington cases, *James v. James*, 35 Wash. 650, 77 Pac. 1080 (1904); *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837, 190 Am. St. Rep. 1009 (1906), approved the procedure.

Since 1804, when this statute was passed, many states have accepted the procedure as sufficient authentication for copies of non-judicial records from sister states, *Strode v. Churchill*, 12 Ky. (2 Litt.) 75 (1822); *Reid v. State*, 168 Ala. 118, 53 So. 254 (1910); *Garigues v. Harris*, 17 Pa. 344 (1851); *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024 (1895); but for proving prior convictions in sister states by copies of prison records, this method has not been used and approved in any court of this country prior to the instant decision. In *People v. Reese, supra*, Cardozo, J., though holding inadmissible certified copies of fingerprint records from Oregon and Washington offered under the provisions of a New York statute, indicated that such records would be admissible if properly certified and correctly used by the prosecution. It seems that a photostatic copy of a fingerprint record authenticated in accordance with the federal statute should be sufficient; and, in fact, such authentication, though not exclusive, might be considered binding on the state courts in view of the provisions of Articles IV and VI of the Federal Constitution. 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1652.

D. G. S.

INJURY TO BUSINESS — FALLING WALLS — DAMAGES — ALLOWANCE FOR ADVERTISING. Defendants owned a three-story brick structure upon a business corner. The interior was destroyed by fire, whereupon the owners had the premises inspected by the city engineer, the city building inspector, the Board of Public Works, a brick contractor, a brick manufacturer and two brick masons, all of whom agreed that the walls were safe. Owners then allowed the walls to stand as they were for a period of 40 days, when they fell during a high wind, damaging the business house next door and injuring an employee therein. *Held:* That the owners were guilty of negligence and hence liable for the damages and injuries. Among the items of damages allowed by the court was the sum of $375 to cover advertising which would be required to rehabilitate the business to its normal state. *Boyd M. Teeter et al v. Olympia Lodge No. 1, I. O. O. F.*, 95 Wash. Dec. 149, 80 P. (2d) 547 (1938).

The allowance for advertising raises the question as to how stringently the court will enforce the rule against the allowance of speculative damages. While the question of damages depends upon many matters, the Washington court has adherred to the principle that damages awarded must be reasonably certain and free from the taint of speculation and conjecture. *DeHoney v. Gjarde*, 134 Wash. 647, 236

Pac. 290 (1925); *Pearce v. Puget Sound Broadcasting Co.*, 170 Wash. 472, 16 P. (2d) 843 (1932); *North Star, etc., v. Alaska Yukon, etc.*, 68 Wash. 457, 123 Pac. 605 (1912). While this rule would appear to be quite rigid, actually it is flexible. Once the fact of damage is established with certainty, the difficulty of determining the amount of damage is no bar to recovery. *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442 (1907). The court does hold, however, that the amount of damage must be shown with "reasonable accuracy" if recovery is to be had. *Schultz v. Wells Butchers' Supply Co.*, 151 Wash. 382, 275 Pac. 737 (1929); *Schermerhorn v. Sayles*, 123 Wash. 139, 212 Pac. 156 (1923). But it clearly appears that "reasonable accuracy" is a rather loose requirement that the evidence define some limits within which the amount may be reasonably determined. The instant case would seem to go rather far as no limits are indicated other than what the parties in interest were willing to spend.

Admittedly some advertising would be required to restore the business to its *status quo*. But such restoration depends not only on advertising, but upon any number of intangible and elusive factors inherent in any business, such as good will, physical location (actually changed in this case), the season of the year, activities of competitors, efficiency of employees, and many others. To single out this one factor without some definite experience to go by, would seem, of necessity, to give a result tainted with the stigma of speculation and conjecture to a most unusual degree.

G. M. M.

KIDNAPING—REWARD—CONSTRUCTION OF STATUTE. Defendant, a fugitive from justice, pressed a knife against the neck of a taxicab driver and forced him to drive toward another city. Defendant was subsequently apprehended and indicted under the new Washington kidnaping statute which provides, "Every person who shall wilfully seize, confine or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service with the intent to extort money or reward for his release or disposition, shall be guilty of kidnaping in the first degree . . ." Wash. Laws Spec. Sess. 1933, c. 6, § 1, REM. REV. STAT. (Supp.) § 2410. *Held:* Kidnaping may be committed either by confining another with intent to secretly imprison, or by confining another with intent to hold him to service. There is no necessity in the present case to determine whether the phrase "to extort money or reward" should be appended to both methods of committing the offense or only to the latter, for the defendant secretly confined the driver within the meaning of the statute and the assistance rendered the defendant in his flight from justice was a benefit amounting to reward under the statute. *State v. Andre*, 95 Wash. Dec. 182, 80 P. (2d) 553 (1938).

The instant case raises two problems regarding the effect and operation of the kidnaping statute in Washington; the interpretation of the phrase "money or reward"; and the construction of the statute as an entirety to determine whether the intent to hold for money or reward is essential to both methods of perpetrating the offense, or only the latter, *viz.*, holding to service.

The United States Supreme Court, intepreting the Federal Kidnaping Act, 18 U. S. C. A. Sec. 408a, containing the phrase "held for ransom

or reward or otherwise," in *Gooch v. U. S.*, 297 U. S. 124 (1936), where an officer was confined in order to prevent the arrest of the fugitive, stated, "holding an officer to prevent the captor's arrest is something done with the expectation of benefit to the transgressor . . . If the word 'reward', as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise.'" The Washington court in deeming a benefit to the transgressor within the contemplation of the reward clause, although without the assistance of an all-inclusive word as "otherwise," relied on *Gooch v. U. S., supra*, and took the view that "The statute should be given a reasonable construction in order to aid in the efficient enforcement of the law and promote the ends of justice." The application and scope of the kidnaping statute in Washington is undoubtedly extended by the instant case, but what "things" will be considered benefits to the transgressor, and hence rewards, are impossible of prior delineation.

A consideration of the second question involves a glance at the development of kidnaping law and the motivating factors of the present statute in Washington. At common law, kidnaping was false imprisonment with the added element of carrying the person detained out of his country and beyond the protection of his laws. *State v. Hoyle*, 114 Wash. 290, 194 Pac. 976 (1921); *State v. Olson*, 76 Utah 181, 289 Pac. 92 (1930); 8 R. C. L. 296. Early statutory enactment, nurtured by the necessity of providing for those cases in which the person detained was confined within the state, established that transportation of the person seized to another state was not an essential part of the offense of kidnaping. *State v. Harrison*, 145 N. C. 408, 59 S. E. 867 (1907); *State v. Rollins*, 8 N. H. 550 (1837). In Washington, as in most jurisdictions, secret confinement of the victim within the state was sufficient to constitute kidnaping. See: *State v. Harmon*, 175 Wash. 94, 26 P. (2d) 614 (1933); *Hackbrath v. State*, 210 Wis. 3, 229 N. W. 83 (1930); *People v. Hope*, 257 N. Y. 147, 177 N. E. 402 (1931); 8 R. C. L. 296.

Such was the tenor of law in Washington before the enactment of the present statute, which was one of many laws enacted throughout the country following the Lindbergh and other kidnaping cases. Since 1932, thirty-one states have revised their kidnaping laws and all but fourteen have provided death penalties. 26 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 762.

In construing the statute it must be kept in mind that, before its enactment, confinement within the state was sufficient to constitute the offense; that the statute was designed to broaden the application of the existing laws, and that, if the ransom clause were appended to both methods of committing the crime, confinement within the state would not constitute kidnaping unless the intent to obtain money or reward were present. It is difficult to believe that such an interpretation would be reasonable under the circumstances, for the operation of the law would be restricted to those cases in which the transgressor had the intent to obtain money or reward. It is submitted, therefore, that the reward clause applies to the second method of committing the offense, *viz.*, holding to service, and that secret confinement within the state is sufficient to constitute the first method of committing the offense.

M. D. L.

PROBATE—STATUTES OF NON-CLAIM. Plaintiff was the sole heir at law of his wife and the sole devisee under her non-intervention will which named him executor. About two years after her death, before filing the will for probate, plaintiff in his individual capacity, presented claims of his deceased wife against an estate represented by the defendants within the six months statute of non-claim, REM. REV. STAT., § 1477-84. The defendants rejected such claims. Plaintiff then probated the will of his wife and became duly appointed executor under it and sought to recover as executor under his wife's will on the claims which he had presented as an individual. *Held:* The plaintiff could recover, since he was the sole heir at law of the testatrix, sole devisee and executor under her will, and since the will was a non-intervention one. *Boettner v. Czerny*, 95 Wash. Dec. 216, 80 P. (2d) 778 (1938).

The court based its decision on *Harvey v. Pocock*, 100 Wash. 263, 170 Pac. 545 (1918), which involved precisely the same facts, except that the will had been filed but not yet probated. The court pointed out in the *Boettner* case, *supra*, that this difference was not vital.

Many states have non-claim statutes similar to REM. REV. STAT. § 1477-84, which in substance provides that all creditors' claims which are not duly presented against decedents' estates within six months of notice to creditors shall be forever barred. Such statutes are really special statutes of limitation, designed to facilitate and expedite the settlement of decedents' estates. BANCROFT'S PROBATE PRACTICE, § 754, 757.

The general rule is that such claims must be presented by the owner or his authorized agent. *Rayburn v. Rayburn*, 130 Ala. 217, 30 So. 365 (1901); *Cook v. Davis*, 12 Ala. 551 (1847). Although some courts have been lenient in fact situations like the *Boettner* case, *supra*, yet the claimant in such a case is a legal stranger to the claim and has neither legal title, *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489 (1903); nor by the majority rule, equitable title to the claim presented. Annotation (1906) 112 Am. St. Rep. 727.

In an early Vermont case the court held that an award in favor of an estate of which plaintiff was administratrix, which was presented against the defendant estate as a claim in favor of the heirs, could later be sued upon by the plaintiff as administratrix. *Holdridge v. Holdridge*, 53 Vt. 546 (1881). In *Hunt v. Curtis*, 151 Ala. 507, 44 So. 54 (1907), the court held that a claim presented by heirs at law of a deceased creditor satisfied the statute of non-claim, on the theory that they had an equitable interest in such a claim, a theory followed by but few states. Annotation 112 Am. St. Rep. 730. The same court holds that a claim presented by an administrator whose appointment was absolutely void and who was not an heir or legatee, does not satisfy the statute. *McDowell v. Jones*, 58 Ala. 25 (1877). California has definitely held that an executor duly qualified in a foreign state who does not take out ancillary letters of administration in the state of the debtor estate can not make an effective presentation of claim satisfying the statute of non-claim. *Winbigler v. Shattuck*, 50 Cal. App. 562, 195 Pac. 707 (1920). *Contra: Feustmann v. Gott*, 65 Mich. 592, 32 N. W. 869 (1887).

It is submitted that on principle, claims presented by a legal stranger, as in the *Boettner* case, *supra*, cannot be upheld, since to permit such claims will result in frustration of the purpose of the non-claim statute, *viz.*, the expeditious settling of decedents' estates. Because no prudent executor or administrator of a debtor estate would allow and pay such

claim to a legal stranger, it will be rejected. And such rejection can only lead to litigation and confusion, prolonging the settlement of the estate, an evil which presentation by the proper party would in most cases avoid.

W. B. D.

PUBLIC SALES—SUBSTANTIAL COMPLIANCE WITH STATUTE. Because of inclement weather, deputy county auditor conducted a public timber sale inside the door, but within view of persons outside, instead of "in front of" the courthouse as required by the sale statute (REM. REV. STAT. § 7797-49); the state land commissioner refused to confirm the sale, otherwise regular, and ordered purchase price returned. The Superior Court upheld commissioner's order. Purchaser appealed. *Held:* The sale as made was conducted substantially as required by law and should have been confirmed. *Polson Logging Co. v. A. C. Martin, Commissioner of Public Lands*, 95 Wash. Dec. 144, 80 P. (2d) 767 (1938).

In the instant case the court relies upon "substantial compliance" as being sufficient. The opinion refers to decisions of other courts holding that substantial compliance with statutory requirements for sale "at the courthouse door" was sufficient. See also *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige (N. Y.) 562 (1837); *Harris v. State ex rel. Dolan*, 72 Miss. 960, 18 So. 387, 33 L. R. A. 85 (1895).

Other Washington statutes require the sale to be held "at the courthouse door" (REM. REV. STAT. § 583, execution sales; REM. REV. STAT. § 11281, notice of tax judgment sale; REM. REV. STAT. § 11294, sale of county property), whereas seemingly only in the statute construed in the instant case appear the words "in front of" the courthouse.

These words have been defined to mean "'immediately in front' or 'in front and near to.'" *Merrill v. Nelson*, 18 Minn. 366, 376; 18 Gil. 335, 339 (1872).

"Before" is synonymous with "in front of." (WEBSTER, NEW INTERNATIONAL DICTIONARY). In *Rubey v. Huntsman*, 32 Mo. 501, 82 Am. Dec. 143 (1862), a sale made inside the courthouse was declared void for failure to comply with the statute requiring the sale to be before the courthouse door. The court said, "It is immaterial whether it was more convenient to all persons or better in any respect to sell within than before the courthouse; the law has prescribed the place of sale and that is the only proper place; and it is so because the law has said so, and there can be no reasoning about it." The following year the above decision was expressly re-affirmed when a sale was held inside the courthouse door. *McNair v. Jenson*, 33 Mo. 312 (1863). In *Harpald v. Arant*, 64 Ore. 376, 130 Pac. 737 (1913), the court considering a statute requiring sale at the courthouse door noted the distinction between the word "before" as employed in the Missouri statute and the word "at" employed in the Oregon statute. *Cf. Smith v. Cox*, 115 Ala. 503, 22 So. 78 (1897).

REM REV. STAT. § 591 provides that execution sales shall be confirmed unless ". . . it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale to the probable loss or injury of the party objecting . . ." Provision for substantial compliance is not specifically made in the other Washington statutes cited above.

As the court in the instant case indicated, however, there is implied in the provisions for confirmation that substantial compliance will satisfy. The commissioner is directed to confirm if it appears the sale was fairly

conducted and other requirements designed to protect the state's interest are met (REM. REV. STAT. § 7797-53).

The principle of substantial compliance adopted by the Washington court seems preferable to the strict construction followed by the Missouri court.

H. M. C.

TAXATION—INHERITANCE TAX—DOCTRINE OF RETAINER—DISTRIBUTIVE SHARES. At the death of the decedent, one of his sons was indebted to him on a note barred by the statute of limitations, in a sum greater than his distributive share of the estate. The son was insolvent at that time. The plaintiff, Supervisor of the State Inheritance Tax Division, sought to fix the tax upon the basis of an evaluation of the estate which included this note at its face value. *Held:* That, while the amount inherited by the insolvent son was properly retained and distributed to the other heirs in the same class, it should not be included as an asset of the estate in fixing its value for inheritance tax purposes. *In re Bower's Estate*, 96 Wash. Dec. 33, 81 P. (2d) 813 (1938).

It is apparently well settled in this state that an executor or administrator may retain against a devisee or heir the amount of any indebtedness due the estate. *Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119 (1901); *In re Braden's Estate*, 122 Wash. 669, 211 Pac. 743 (1923); *In re Doepkes' Estates*, 182 Wash. 556, 47 P. (2d) 1009 (1935). This rule seems to apply even where the indebtedness has been barred by the statute of limitations. *In re Smith's Estate*, 179 Wash. 417, 38 P. (2d) 244 (1934); *In re Hamilton's Estate*, 190 Wash. 646, 70 P. (2d) 426 (1937). And so hold the majority of American jurisdictions. See: *Thompson v. McCune*, 333 Mo. 758, 63 S. W. (2d) 41 (1933); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3rd ed. 1923) § 564; annotations in 1 A. L. R. 991, 1007; 110 A. L. R. 1384, 1385. The Washington court has not had occasion to pass upon the effect of the debtor's bankruptcy upon the doctrine of retainer, but by analogy and on the authority of the prevailing rule in other jurisdictions, it seems likely that the right of set-off will be similarly allowed in this situation. See the cases collected in 1 A. L. R. 991, 1010, 1042; 30 A. L. R. 775, 781; 75 A. L. R. 878, 889; and 110 A. L. R. 1384, 1389. And the same will probably be true where the devisee or heir indebted to the testator is insolvent. *Chase National Bank of City of New York v. Sayles*, 30 F. (2d) 178 (1927); *Woods v. Knotts*, 196 Iowa 544, 194 N. W. 953, 30 A. L. R. 768 (1923); *Lambright v. Lambright*, 74 Ohio St. 198, 78 N. E. 265, 6 Ann. Cas. 807 (1906); *Gosnell v. Flack*, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158 (1892); 9 R. C. L. 110. However, in a number of jurisdictions this rule, in all its variations, is held to be inapplicable where real property passes by descent, no set-off being allowed. *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751, 113 A. S. R. 574, 7 Ann. Cas. 559, 4 L. R. A. (N. S.) 189 (1905); *Procter v. Newhall*. 17 Mass. 81 (1820). *Contra: Boyer v. Robinson, supra; Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. 295 (1894).

The decision is probably sound as far as the tax question is concerned, because no property of any actual market value passes by the discharge of the barred debt in the process of set-off, and so there is no transfer of property to subject to taxation, within the meaning of the statute. REM. REV. STAT. (Supp.) § 11201. *In re Manning's Estate*, 169 N. Y. 449, 62 N. E. 565 (1902); PINKERTON AND MILLSAPS, INHERITANCE AND ESTATE

TAXES (1926) § 311. But see *Fry's Estate*, 74 Pa. D. & C. 577 (1930).

But the implications of the case as to the proper distribution of an estate involving a set-off are somewhat subject to question. For if, as is suggested, the barred debt is to be set off against the debtor's share of the estate, excluding the barred debt, rather than against his share of the estate including the face value of the debt, the result will be to unduly penalize the debtor who is perhaps already insolvent. A fairer and more logical way to handle both the question of distribution and the question of taxation would seem to be to regard this outlawed debt in analogy to an advance on the debtor's share of the decedent's estate. This would mean that the debt would be included in the estate in determining the debtor's distributive share, and then would be set off against that share, as is actually done in the case of an advance. REM. REV. STAT. § 1348, P. C. § 9853; *Springer's Appeal*, 29 Pa. St. (1857); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION § 552; 4 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS (6th ed. 1923) § 3114. Then, if the debtor receives anything in addition to the discharge of his obligation, that and that alone would be subjected to taxation. Such a course would not necessarily be inconsistent with the instant case.

K. A. C.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASES. The Washington Legislature in 1937 passed an amendment to the Workmen's Compensation Act, providing that "Compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:", listing various diseases under twenty-one heads. (Wash. Laws 1937, c. 212, p. 1031). In an action to enjoin enforcement of Chapter 212 against a logging company, the company proved that in its industry there were no "occupational diseases" as defined in this statute. *Held:* The plaintiff was not within the statute. *Polson Logging Company v. Kelly as Director of the Department of Labor and Industries*, 95 Wash. Dec. 132, 80 P. (2d) 412 (1938).

Under the Laws of 1911, c. 74, § 3, "injury" was defined as meaning "An injury resulting from some fortuitous event as distinguished from the contraction of disease". In *Depre v. Pacific Coast Forge Co.*, 145 Wash. 263, 259 Pac. 720 (1927), as the result of improper ventilation, escaping gases and vapors from a tank of muriatic and sulphuric acid greatly lessened the plaintiff's resistance and he contracted tuberculosis. It was held that this was not an injury within the definition. In *Seattle Can Company v. Department of Labor and Industries*, 147 Wash. 303, 265 Pac. 739 (1928), an employee was poisoned by the benzol acid fumes given off in the room wherein she worked. Here also there was improper ventilation and the poisoning had serious physical effects on the plaintiff. It was held that there was an injury within the definition, and the employee was entitled to compensation. The *Depre* case was distinguished in part on the ground that there a "germ disease" was involved. The statute was said to be aimed only at excluding such diseases as are classed as "germ diseases". At this point in the development of the judicial construction of the word "injury", as long as the event was proved to be fortuitous and no germ disease was involved, the workman could recover under the act.

In 1927 the legislature re-defined "injury" to mean "a sudden and

tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical condition as results therefrom". (Wash. Laws, 1927, c. 310, § 2.) In *Pellerin v. Washington Veneer Co.*, 163 Wash. 555, 2 P. (2d) 658 (1931), there was carbon bisulphide poisoning, and no "germ disease" was involved. There was an element of negligence for not having better ventilation. It was held that under the 1927 amendment there could no longer be recovery for poisoning which was the result of the occupation, even if fortuitous, unless the injury were a sudden one and of a traumatic nature. This was followed in *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P. (2d) 943 (1932); and in *Hatcher v. Globe Union Mfg. Co.*, 170 Wash. 494, 16 P. (2d) 824 (1932). Thus, until 1937, the employee was left with his common-law action against the employer for failure to provide a reasonably safe place to work.

By the specific mention in Chapter 212, Laws of 1937 of the diseases to be compensable, the legislature impliedly excluded all other occupational diseases. The legislature was free to adopt a more general definition and to include "all occupational diseases growing out of and incidental to the employment." Such a statute is in force in Wisconsin. (WIS. STATS. 1921 § 2394-32). The obvious advantage of such a general statute is that there is no discrimination among industries as to which are and which are not covered. Neither is there any discrimination among occupational diseases which might arise in the same industry. Yet in Washington the act has the distinct advantage of naming definitely the occupational diseases to come under it. It does not leave that naming to a process of judicial inclusion and exclusion.

J. M. D.