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R. R.

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RECENT CASES

CORPORATIONS—ACTION BY ASSIGNEE. The plaintiff, as assignee of a foreign corporation, brought an action on an account stated. *Held:* The assignee could not maintain an action where the foreign corporation, because of its noncompliance with the laws of the state, could not maintain the action. *Association Collectors v. Hardman,* 102 Wash. Dec. 354, 98 P. (2d) 318 (1940).

The controlling statute, which was formerly REM. REV. STAT. § 3842 and is now REM. REV. STAT. (Supp. 1939) § 3836-12, provides that no corporation should be permitted to commence or maintain any suit in any court in this state without alleging and proving that it has paid its annual license fee.

In holding that the failure of the assignor corporation to pay its annual license fee and to file its articles of incorporation bars the assignee's action, the result is in accord with the holdings of most jurisdictions. *Hogan v. Intertype Corporation,* 136 Ark. 52, 206 S. W. 58 (1918); *Lewis v. Club Realty Co.,* 264 Mass. 588, 163 N. E. 172 (1928); *Flinn v. Gillen,* 320 Mo. 1047, 10 S. W. (2d) 923 (1928); *Halsey v. Henry Jewett Dramatic Co.,* 190 N. Y. 231, 83 N. E. 25 (1907), 123 Am. St. Rep. 548 (1909); *Kinney v. Reid Ice-Cream Co.,* 57 App. Div. 206, 68 N. Y. Supp. 325 (2d. Dep't 1901). Usually the holdings are based upon two grounds: the principle that the assignee of a non-negotiable chose in action takes it subject to all defenses which the obligor may have had against the assignor; and that the opposite result would permit noncomplying corporations to render nugatory the statutes preventing them from suing, by the simple expedient of assignment.

The plaintiff relied upon two prior Washington cases, *Pacific Drug Co. v. Hamilton,* 71 Wash. 469, 128 Pac. 1069 (1913), and *Marshall v. Pike,* 145 Wash. 348, 260 Pac. 531 (1927), in each of which the assignee was allowed to maintain an action which could not have been maintained by the assignor corporation because of non-payment of its annual license fee. In the *Pacific* case, *supra,* the court cited no authority but said that proof of the assignment obviated the necessity of inquiring into the capacity of the assignor to sue, since the assignor was not suing. In the *Marshall* case, *supra,* the court based its decision upon the *Pacific* case alone.

The majority of the court in the principal case distinguished it from these two prior holdings on the ground that in the earlier cases, the assignors were both domestic corporations and had complied with all laws relating to their corporate status except that requiring payment of their license fee while in the instant case, the assignor was a foreign corporation and had failed to comply with any of the laws prerequisite to the right of foreign corporations to engage in intrastate business. The four dissenting judges held that the majority result could not be reached without overruling the *Pike* and *Hamilton* cases, *supra,* as such distinction in fact could make no difference in the result.

The dissent seems sound in this respect, as it is well settled that the failure to pay the license fee *alone,* will prevent a *corporation* from suing and this applies to a *domestic* as well as a foreign corporation. *West Side Telephone Co. v. Kenison,* 147 Wash. 542, 266 Pac. 706 (1928). From the general principle that "the assignee stands in the shoes of the assignor"

the defense good against the domestic corporation should be good against its assignee and there seems to be no reason why a domestic corporation should be allowed to render nugatory the statute by means of an assignment. It is submitted that the instant case is sound and in line with most authorities but that the *Hamilton* and *Pike* cases, *supra*, cannot be distinguished on principle, are unfortunate in result, and should have been overruled.

R. R.

EVIDENCE—SUBSEQUENT REPAIRS. The plaintiff's foot was crushed by the treadle of a foot-operated printing press maintained by the defendant school district. Despite the defendant's admission in court that it was practicable to guard such a treadle, the trial court permitted evidence of a subsequent installation of a guard to go to the jury. On appeal, *held*, affirmed, on the ground that an instruction had been given forbidding use of such evidence on the issue of negligence and limiting it to the issue of practicability of guarding the treadle. A dissenting justice pointed out that, since the defendant had admitted it was practicable to guard the treadle, there was no issue of practicability. *Banks v. Seattle School District No. 1*, 195 Wash. 321, 80 P. (2d) 835 (1938).

By the well-settled rule, evidence of precautions taken by a defendant subsequent to an accident is to be excluded, because, the courts usually say, it is not relevant to the question of the defendant's negligence as an admission by conduct. *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27, 35 Pac. 405 (1894). McCormick has suggested that the exclusionary rule is actually one of privilege, not relevancy, and is designed to encourage the taking of precautions after an accident—a social policy which justifies keeping such facts from the jury, even though relevant. *The Scope of Privilege in the Law of Evidence* (1938) 16 TEX. L. REV. 447, 459. But as a privilege, McCormick points out, it is unique in that such evidence is not excluded for all purposes. McCormick, *supra*, at 460. So, where the evidence of subsequent precautions is to be used otherwise than as an admission of negligence by the defendant, the exclusionary rule is subject to exception, such evidence then being admitted accompanied by the proper qualifying instruction. *Carstens Packing Co. v. Swinney*, 186 Fed. 50 (C. C. A. 9th, 1911). Evidence of subsequent installation of guards to the injury-causing machine or apparatus to prove the practicability of such guards is one such exception well established in Washington law. *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3 (1906); *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588 (1906); *Lindblom v. Hazel Mill Co.*, 91 Wash. 333, 157 Pac. 998 (1916). In each of these cases an employee of the defendant was injured by an unguarded saw and the issue of practicability was clearly and definitely raised by the provisions of the Factory Acts then in force relating to the employer's liability for injuries from unguarded machines which might have been guarded. See also *Wheeler v. Portland-Tacoma Auto Freight Co.*, 167 Wash. 218, 9 P. (2d) 101 (1932).

In the *Banks* case, *supra*, it appears that no clear issue of practicability was raised, either by the pleadings or the evidence. On the contrary, the defendant admitted that it was practicable to guard the printing press. Practically speaking, then, the jury's only possible use of the evidence of

subsequent precaution would be on the forbidden issue of defendant's negligence, as an admission by conduct. Although ordinarily facts may be proved even though admitted (*Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674 (1903)) it would seem to be highly undesirable, when practicability of taking precautions is admitted, to allow evidence of subsequent precautions to go to the jury, since, serving no *useful* purpose, such evidence is subject only to *misuse*.

W. B. B.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT. Claimant, a laborer on the Grand Coulee Dam project, whose duties were to pick up scrap material in and around the dam, had been told by his foreman that before he could expect a raise in pay he would have to "learn his way around a little better". During his lunch hour he went down inside the dam to acquaint himself with the character of the construction, and while walking through a poorly lighted tunnel, fell down a fifty-foot shaft, incurring serious injuries. *Held:* Complainant was not injured "in the course of his employment" and could not recover under the Workmen's Compensation Act (REM. REV. STAT. § 7673 *et seq.*) *Young v. Dep't of Labor and Industries*, 100 Wash. Dec. 118, 93 P. (2d) 337 (1939).

Under the Washington statute as originally enacted (Wash. Laws 1911, c. 74 § 5) it was enough to make the injury compensable that it occurred while the employee was upon his employer's premises, the phrase "in the course of his employment" applying only to injuries received while away from the premises. But in 1927 the statute was amended (Wash. Laws 1927, c. 310, § 4) to require that the injury occur in the course of employment whether upon or away from the premises of the employer.

Although the compensation acts of most states require that the injury be one "*arising out of* and in the course of employment", our act and those of Pennsylvania (PURDEN'S PENN. STAT. (1936) Title 77, § 361), Texas (VERNON'S TEXAS STAT. (1936) art. 8306, § 1) and Utah (REV. STAT. OF UTAH (1933) § 42-1-43) do not require the causal connection between the employment and the injury. All that the employee need show to recover under the act is that he was *injured* while *in the course of his employment*. (See REM. REV. STAT. § 7679.) Hence, it would seem that our act is an expression of a more liberal policy than that obtaining in most jurisdictions. And our court has declared that the statute will be liberally construed in favor of its beneficiaries. *Hilding v. Dep't of Labor and Ind.*, 162 Wash. 168, 298 Pac. 321 (1931); *Hill v. Dep't of Labor and Ind.*, 173 Wash. 575, 24 P. (2d) 95 (1933).

While there has been no previous case in this jurisdiction presenting the question of injuries incurred during the noon hour, it is uniformly recognized in states where the question has arisen that the mere fact that the employee is not working at the time will not take him out of the course of employment. HARPER, TORTS (1933) § 212; 71 C. J. 739. Rather, it has been suggested that the freedom of action permitted to the employee is much broader than during the working hours, so that an act which would take him out of the course of employment if committed while he was on the job would not necessarily do so if committed during the lunch period. Brown, *"Arising Out of and in the Course of the Employment" in Workmen's Compensation Laws* (1932) 7 WIS. L. REV. 67, 81. In *White v. Shafer*

Bros. Lumber & Door Co., 165 Wash. 298, 5 P. (2d) 520 (1931) wherein defendant-employer pleaded the statute as a defense (REM. REV. STAT. § 7673 provides that action under the statute shall be "to the exclusion of every other remedy") the court held that a night worker who, by arrangement with his employer, had come back to the plant during the day to seek extra work, was within the course of his employment, saying, ". . . it is not necessary that any employee . . . must necessarily be actually at work, when injured, in order to be considered as injured in the course of his employment . . ."

The court recognized in the principal case that an employee might be allowed to recover for injuries sustained during the noon hour, but quoted from 71 C. J. 740 to the effect that "he is not compensable if the injury resulted from an independent act of the employee, having no connection with his work or his meal." However, this rule is based upon decisions from jurisdictions wherein the statute requires a causal connection between the employment and the injury, and as is indicated in 71 C. J. 358, decisions of other jurisdictions should have little weight where the wording of the statutes to which they relate is different from that of the statute of the forum. Furthermore, decisions from some of these jurisdictions reveal that even in instances of acts of horseplay, admittedly having no connection with the employee's work, the courts will concede that the injury occurred in the course of employment, denying recovery only because it did not arise out of the employment. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 1164 (1916); *Tarpper v. Weston-Mott Co.*, 200 Mich. 275, 166 N. W. 857 (1918); *Pierce v. Boyer-Van Kuran Co.*, 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D 970 (1916).

The more pertinent decisions construing compensation acts similar to ours have found the employee within the course of his employment where he has been injured while committing acts much more clearly divorced from his work than was the act of the claimant in the *Young* case. *Hale v. Savage Fire Brick Co.*, 75 Pa. Super. 454 (1921) (fell over wall while being chased by co-employees); *Oldinsky v. P. & R. C. & I. Co.*, 92 Pa. Super 328 (1927) (jumped into coal chute to ride on conveyor); *Petroleum Casualty Co. v. Green*, 11 S. W. (2d) 388 (Tex. Civ. App. 1928) (cranking co-employee's auto preparatory to leaving employer's premises); *Maryland Casualty Co. v. Smith*, 40 S. W. (2d) 913 (Tex. Civ. App. 1931) (riding motorcycle on way to work); *Twin Peaks Canning Co. v. Ind. Comm.*, 57 Utah 589, 196 Pac. 853 (1921) (tampering with elevator controls as practical joke on co-employee). So far as any criterion is apparent in these decisions, it is not the connection between the act and the employment, but is the possibility of the employer's reasonably foreseeing the commission of the act by the employee.

While the decision in the *Young* case is not one which may be categorically labelled either right or wrong, it is submitted that, despite an avowed policy of liberal construction, our court has given the Compensation Act a narrower construction than that given any similar act, and that it has relied upon inapposite authority in doing so.

V. C.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—PRE-EXISTING DEFECT. Claimant sought an award under the Workmen's Compensation Act (REM. REV. STAT. §§ 7673 to 7796-2) for permanent partial disability, predicating his claim upon the combined effects of pre-existing tuberculosis, by reason of which his right leg was six inches shorter than the left, and a present injury to his left ankle. The Department award of fifteen degrees permanent partial disability was increased, on appeal to the Superior Court, to forty degrees. *Held:* Judgment reversed. There was not enough evidence to overcome the *prima facie* presumption, fixed by REM REV. STAT. § 7697, that the Department's decision is correct. Furthermore, the facts did not bring the case within the rule that if an injury lights up a latent infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury, and the court erred in granting an award in excess of the amount allowed by the Act for disability to a specific member. *Reid v. Department of Labor & Industries*, 101 Wash. Dec. 372, 96 P. (2d) 492 (1939).

In the first case arising under our Act involving pre-existing disease, although the question of extent of compensation was not in issue, the court held that a ruptured appendix caused by pressure or a blow upon an already diseased member was a compensable injury. *Shadbolt v. Dept.*, 121 Wash. 409, 209 Pac. 683 (1922); *Clark v. Dept.*, 131 Wash. 256, 230 Pac. 133 (1924). And in two subsequent cases claims were allowed where the only result of an extraordinary exertion in the course of employment was to aggravate diseased heart and artery conditions. *Frandila v. Dept.*, 137 Wash. 530, 243 Pac. 5 (1926); *Cole v. Dept.*, 137 Wash. 538, 243 Pac. 7 (1926).

Before the question of the amount of compensation recoverable in such cases had been before the court, REM. REV. STAT § 7679 (g), was amended (Wash. Laws 1927, c. 310, § 4) to provide that: "Should a workman receive an injury to a member or part of his body already from whatever cause permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in permanent total disability . . . his compensation . . . shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof."

Thereafter, the Act again was amended (Wash. Laws 1929, c. 132, § 2) to provide, in what is now REM. REV. STAT § 7679 (1), that: "If . . . an injured workman had, at the time of his injury, a pre-existing disease and . . . such disease delays or prevents complete recovery from such injury the said department shall ascertain . . . the period over which the injury would have caused disability were it not for the diseased condition and/or the extent of permanent partial disability which the injury would have caused were it not for the disease, and award compensation only therefor."

In the first case in which the 1929 amendment was considered, any effect which it may have been intended to have on the rule of previous cases was avoided by the holding that, under its provisions, "it is the duty of the department to deduct for the effect of a pre-existing disease upon an injury, and not deny any recovery . . . because of the effect of the injury upon the disease." *McArthur v. Dept.*, 168 Wash. 405, 21 P. (2d) 418 (1932). And in *Hadley v. Dept.*, 174 Wash. 582, 25 P. (2d) 1031 (1933),

the court said that the statute would apply only where the disease was active and not where it was quiescent.

In *Metcalf v. Dept.*, 168 Wash. 305, 11 P. (2d) 821 (1932), and in subsequent decisions, *Matela v. Dept.*, 174 Wash. 144, 24 P. (2d) 429 (1933); *Anderson v. Dept.*, 174 Wash. 702, 26 P. (2d) 77 (1933); *Sweitzer v. Dept.*, 177 Wash. 28, 30 P. (2d) 980, 34 P. (2d) 350 (1934); *Ray v. Dept.*, 177 Wash. 687, 33 P. (2d) 375 (1934); *Brittain v. Dept.*, 178 Wash. 499, 35 P. (2d) 49 (1934); *McKinnie v. Dept.*, 179 Wash. 245, 37 P. (2d) 218 (1934); *Smith v. Dept.*, 179 Wash. 501, 38 P. (2d) 212 (1934); *McGuire v. Dept.*, 179 Wash. 645, 38 P. (2d) 266 (1934); *Johnson v. Dept.*, 184 Wash. 567, 52 P. (2d) 310 (1935); *Pulver v. Dept.*, 185 Wash. 664, 56 P. (2d) 701 (1936), including the *Hadley* and *McArthur* cases, compensation for disability occasioned by an injury lighting up a latent disease was allowed without any consideration of the 1927 amendment.

Finally, in *Elliott v. Dept.*, 187 Wash. 656, 61 P. (2d) 291 (1936), the court was presented with a situation wherein a workman claimed compensation for injury to a spine already weakened, not by latent disease, but by a non-incapacitating physical malformation, and in that case the 1927 amendment was construed to give the Department discretion to determine to what extent the disability was non-compensable because due to the previous weakness and to what extent it was compensable because due to the injury. Succeeding cases, involving pre-existing disease rather than physical defects, followed and relied upon prior decisions without mentioning the *Elliott* case. *Daugherty v. Dept.*, 188 Wash. 626, 63 P. (2d) 434 (1936); *Devlin v. Dept.*, 194 Wash. 549, 78 P. (2d) 952 (1938); *Bergagna v. Dept.*, 199 Wash. 263, 91 P. (2d) 551 (1939), (1939) 14 WASH. L. REV. 329.

In the very next case involving a physical defect, the construction given to REM. REV. STAT. § 7679 (g) in the *Elliott* case was declared incorrect and the statute was construed to apply only in cases in which the workman already is permanently partially disabled within the meaning of the Act, by his pre-existing condition, and not in cases where the pre-existing defect does not incapacitate him. *Miller v. Dept.*, 200 Wash. 674, 94 P. (2d) 764 (1939). ("Permanent partial disability" is defined by REM. REV. STAT. § 7679 (f) to include any "injury known in surgery to be a permanent partial disability.") Insofar as the decision in the *Reid* case is based on the finding that claimant had not brought himself within the rule applicable to pre-existing infirmities it would appear to be consistent with the holding in the *Miller* case, since claimant was quite clearly permanently partially disabled by his pre-existing condition.

It would seem, too, that the construction given to REM REV. STAT. § 7679 (g) is not inconsistent with the rule applied to cases of disease under REM. REV. STAT. § 7679 (1). In either situation the pre-existing defect will not affect the amount recoverable if it had no incapacitating effect prior to the present injury, but if either the disease or the physicial infirmity is disabling, the workman will recover only for the further disability occasioned by the injury.

This rule is in accordance with the prevailing view (71 C. J. § 361; HARPER, TORTS (1933) § 211) and would seem to represent the logical application of principles of legal causation. While it may be contended that considerations of social policy require treatment of the Act as one for industrial insurance and that compensation should be awarded solely on the basis of extent of disability rather than cause of disability, it is

apparent, in view of the statutes herein discussed, that such criticism must be addressed to the Legislature rather than to the Court. V. C.

NEW TRIAL—MISCONDUCT OF JURORS—VERDICT BY LOT OR CHANCE. In an action for damages because of the defendant's alleged appropriation of the plaintiff's land, a 10 to 2 verdict was returned in favor of the plaintiff. In civil cases this tally is sufficient to sustain a verdict. REM. REV. STAT. § 358. It appeared that the jury had been deadlocked at 9 to 3 for the plaintiff. The judge was informed of the situation when he called in the jury to ascertain their progress. He then advised them that he would give them fifteen minutes more to deliberate. On returning to the jury room, the three jurors who had been holding out for the defendant agreed that the verdict should go for the plaintiff, but in order to see which one would vote for him they cut cards, the high man to cast his ballot in that direction. The defendant alleged that this constituted misconduct under REM. REV. STAT. (SUP. 1939) § 399. ". . .; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by affidavits of one or more jurors." *Held:* Verdict bad on the basis of the statute. *Vogt v. Curtis,* 100 Wash. Dec. 606, 94 P. (2d) 761 (1939).

Did the "chance" affect the verdict? This conduct did not in any way control the direction of the verdict. Its tenor had already been determined. When the cards were cut, all twelve jurors agreed that plaintiff should have the verdict. The device used by the three jurors was apparently used for the mere purpose of making their prior conclusion effective, at the same time operating as a "face-saving" procedure, two of them to continue to dissent. Under the circumstances, can it not be more plausibly argued that the verdict was a *valid 12 verdict* rather than an *invalid 10 verdict?*

S. J. K.

REAL ESTATE BROKERS—MISREPRESENTATION TO PURCHASERS. Respondent, a real estate broker, called on appellants in response to their advertisement for sale or exchange of their ranch, and exhibited property listed with him. Appellants investigated the property and had it appraised, but were dissuaded from meeting the owner by respondent. Respondent falsely stated his principal demanded $15,000, and the deal was made for $4,500 cash, assumption of a $5,000 mortgage, and $5,000 in real estate, a total of $14,500. Respondent told appellants that farm property was not acceptable to his principal, and managed an indirect trade of appellants' ranch for some city property (apparently non-existent) which was purportedly to be given for his principal. The principal in fact asked only $8,500, and received only $3,484.52 in cash and the appellants' assumption of the mortgage. The ranch was transferred to the asserted owners of the city property and by them to the respondent, instead of to his principal. This action is for recovery of the ranch. *Held:* Broker is not liable as there was no fiduciary relationship between the parties; appellants' investigations precluded their relying on respondent's statements; the appellants received what they bargained for; and the broker is privileged to make such misrepresentations in bargaining as are permitted the principal. *Buckley v. Hatupin,* 198 Wash. 543, 89 P. (2d) 212 (1939).

Appellants' contention that respondent was their agent was summarily dismissed, and the decision then rests upon the determination of the question whether the respondent was liable for his fraudulent representation despite the absence of any fiduciary relation. The court held that because of appellants' independent investigations "any false statements made by respondent were not relied upon by appellants." This would be uncontrovertibly true were the misrepresentations as to the *value* of the property, all appellants' investigations being devoted to ascertaining that value. The misrepresentations, however, were as to the *price* asked by the owner, and all investigations begun by appellants with a view to approaching the owner concerning the price were blocked by respondent. The broker should not be heard to say that by giving credit to his false and fraudulent statements, the purchaser must be held to have been cheated and defrauded as a result of his own negligence and credulity. *Stevens v. Reilly*, 56 Okla. 455, 156 Pac. 157 (1916). Appellants' reliance upon the misrepresentations seems sufficiently proved by the fact that he paid the price quoted by respondent, there being a general assumption, "that in the usual course of human affairs, purchasers do not pay the higher in preference to the lower price." *Estes v. Crosby*, 171 Wis. 73, 175 N. W. 933, 8 A. L. R. 1383 (1920). It follows that the court could well have found that appellant did rely on respondent's misrepresentations.

The court found that injury, another requisite to an action in fraud, was lacking because appellants received what they bargained for. The fact that appellants got value is not conclusive that they received no injury. *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873 (1904). The respondent's principal asked and received a certain sum. The amount above that sum is thus an extraction from the appellants of an amount unnecessary to close the bargain and is a palpable injury to that extent. *Lear v. Bawden*, 75 Colo. 385, 225 Pac. 831 (1924).

The decision in the instant case states that the broker was privileged to make misrepresentations as to the price demanded by his principal, and that therefore even if they were relied upon to the injury of the appellants, they were not actionable. The authorities relied upon are RESTATEMENT, AGENCY (1933) § 348 (seller's talk); *Sanders v. Stevens*, 23 Ariz. 370, 203 Pac. 1083 (1922); *Bradley v. Oviatt*, 86 Conn. 63, 84 Atl. 321 (1912), 42 L. R. A. (N. S.) 828 (1913). Directly opposing this line of authorities is one holding that misrepresentations as to the lowest sum an agent's principal would take are not mere statements of opinion, but relate to facts calculated to influence a buyer, and on which he has a right to rely. *Hokanson v. Oatman*, 165 Mich. 512, 131 N. W. 111 (1911); *Booker v. Pelkey*, 173 Wis. 24, 180 N. W. 132 (1920). To the same effect on analagous facts is *Cook v. Skinner*, 50 Wash. 317, 97 Pac. 234 (1908), which was not cited to the court in any of the briefs of counsel.

A sound intermediate position is adopted by Kentucky. A broker is held for misrepresentation of the owner's price only when he has used fraud or artifice to prevent the purchaser from inquiring or investigating whether the property may be bought for a less price. *Kice v. Porter*, 21 Ky. L. R. 871, 53 S. W. 285 (1899). In the instant case the respondent dissuaded the appellants from making such investigation. It is submitted that either by following the previous Washington decision of *Cook v. Skinner, supra,*

or by applying the Kentucky rule the injury to the appellants could have been redressed and a seemingly unconscionable result avoided.

H. J. D.

SALES—EXPRESS WARRANTY. When the plaintiff purchased his Plymouth automobile from the dealer he saw pictures of a sedan which had been overturned safely day after day at the Chicago World's Fair, and he read written advertising matter stressing the all-steel body. Both the pictures and the reading matter were published by the defendant, Plymouth Motor Corporation. Subsequently, the body of the plaintiff's car was badly smashed when it overturned rounding a slippery curve. Plaintiff recovered damages for injuries to himself and to the car. *Held:* Reversed and plaintiff's cause dismissed. The representation that a skilled driver can overturn a Plymouth on a smooth course does not warrant that the plaintiff can spill his own car into a cow pasture without smashing the body. *Murphy v. Plymouth Motor Corporation*, 103 Wash. Dec. 155, 100 P. (2d) 30 (1940).

In *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (1932), 88 A. L. R. 527 (1934), a purchaser recovered from the manufacturer on the theory of an express warranty contained in advertising matter, despite the absence of privity. The vast majority of courts still hold privity an essential element in these actions (*Chanin v. Chevrolet Motor Co.*, 15 F. Supp. 57 (N. D. Ill., 1936) ("The *Baxter* case stands alone."), *aff'd*, 89 F. (2d) 889, 111 A. L. R. 1239 (C. C. A. 7th, 1937)), unless a "dangerous" tort case can be established. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). The Uniform Sales Act (REM. REV. STAT. § 5836-12) is in accord with the majority on this issue, for in declaring that any affirmation of fact promoting reliance is an express warranty, it uses the words buyer and seller. Inasmuch as it tends to discourage false and misleading advertising, the decision in the *Baxter* case seems to have justifiably expanded the statutory purpose by extension to manufacturers. See Comment (1932) 7 WASH. L. REV. 351; Comment (1933) 33 COL. L. REV. 868; Comment (1933) 18 CORN. L. Q. 445; Note (1932) 81 PENN. L. REV. 94.

Since the abolition of a privity requirement was an innovation in this field of *ex contractu* actions, it seems proper that the instant case should require plaintiffs to show clearly "an affirmation of fact" which has been breached. In the *Baxter* case, defendant Ford Motor Co. had advertised, "the windshield . . . will not fly or shatter under the hardest impact." When the plaintiff lost his eye from sprayed glass after a rock hit the windshield, the falsity of this representation, and the fact that the representation obviously covered such an injury permitted a recovery upon an express warranty. Recovery against a manufacturer has been denied, however, under an advertisement stating, "this glass is the best available protection against flying particles," because of the plaintiff's inability to show that another type of glass was a "better protection". *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F. (2d) 597 (C. C. A. 2d, 1938) (The court did not pass on the privity requirement, but held that even if privity is not essential, still no breach of warranty could be found). Compare the construction in *Ireland v. Liggett Co.*, 243 Mass. 243, 137 N. E. 371 (1922), where, in an action against the immediate seller with whom the buyer had

privity, it was held that an express warranty, "cold cream is pure and healthful", was breached by the presence of a foreign substance. Although it is probable that the Plymouth Co. subjectively intended purchasers to believe the body smash-proof, the court in the case apparently requires proof of a representation that explicitly negatives the defect alleged by the plaintiff.

While the term *implied* warranty is found in the instant case, the litigation seems to involve only an alleged *express* warranty. Neither the *Baxter* case nor the present case contain any facts which would justify the pleading or discussion of an implied warranty of quality. Possibly the court used the term *implied* warranty to mean a representation of fact, which, when followed by reliance, is given the effect of a promise irrespective of a promissory intent. *Huntington v. Lombard,* 22 Wash. 202, 60 Pac. 414 (1900) (prior to enactment of Sales Act); *Brennan & Cohen v. Nolan Laundry Co.,* 209 Iowa 922, 229 N. W. 321 (1930).

This strict application of the *Baxter* rule affords advertisers a reasonable leeway in what they can safely assert. Moreover, the opposite result in the present case would encourage the litigation of ill-founded claims.

R. A. P.

WITNESSES—RIGHT TO IMPEACH ONE'S OWN WITNESS—PRIOR INCONSISTENT STATEMENTS. In a prosecution for statutory rape, the child allegedly assaulted, testifying as a witness for the state, denied having had sexual intercourse with the appellant. The prosecuting attorney, taken by surprise, introduced over appellant's objection, a prior inconsistent statement for the purpose of impeaching her credibility. *Held:* When a party calling a witness is taken by surprise by reason of affirmative testimony prejudicial to the interests of the party calling the witness, his prior contradictory statements may be shown for the purpose of affecting his credibility. *State v. Thomas,* 101 Wash. Dec. 258, 95 P. (2d) 1036 (1939).

As a general rule, a party who is surprised by unfavorable testimony given by his own witness may interrogate the witness concerning prior inconsistent statements made by him. The two requisites for impeaching one's own witness are: (1) surprise, and (2) affirmatively prejudicial testimony. *State v. Bossio,* 136 Wash. 232, 239 Pac. 553 (1925); Note (1931) 74 A. L. R. 1042; 28 R. C. L. 644; 70 C. J. 1043.

These essential elements were found by the court in allowing impeachment in the instant case, as well as in *Burger v. Taxicab Motor Co.,* 66 Wash. 676, 120 Pac. 519 (1912); *State v. Kellogg,* 91 Wash. 665, 158 Pac. 344 (1916); *Blystone v. Walla Walla Valley Ry. Co.,* 97 Wash. 46, 165 Pac. 1049 (1917); *State v. Fry,* 169 Wash. 313, 13 P. (2d) 491 (1932). The cases in which the requirements were found to be lacking are represented by *State v. Simmons,* 52 Wash. 132, 100 Pac. 269 (1909), in which the court refused to permit the defendant to impeach his own witness because the witness testified to a mere negative and "had he been ever so successfully impeached, the only effect would be to destroy testimony which was in itself worthless." *Cf. State v. Catsampas,* 62 Wash. 70, 112 Pac. 1116 (1911); *Ferris v. Todd,* 124 Wash. 643, 215 Pac. 54 (1923); *State v. Bossio,* 136 Wash. 232, 239 Pac. 553 (1925); *State v. Lloyd,* 138 Wash. 8, 244 Pac. 130 (1926); *State*

v. Delaney, 161 Wash. 614, 297 Pac. 208 (1931); *State v. Stephens*, 116 La. 36, 40 So. 523 (1906); *Arine v. United States*, 10 F. (2d) 778 (C. C. A. 9th, 1926). In the *Bossio* case, it is true that the prosecuting attorney disclaimed surprise, but a critical reading of the case as a whole will disclose that the court would have refused to permit impeachment irrespective of surprise.

The tendency in Washington seems to be to construe the rule strictly, allowing impeachment only when the effect of the adverse testimony is definitely prejudicial to the party calling him, as in the instant case, and excluding it where the witness merely fails to give beneficial testimony. The adverse testimony must be affirmative to be prejudicial. *State v. Fry, supra; Ferris v. Todd, supra.* The difficulty with this rule lies in determining just what is affirmative testimony, since a denial of certain material facts may be negative in form but affirmatively prejudicial in effect, as in the *Thomas* case. In *State v. Fry, supra,* cited in the instant case and with a substantially similar factual situation, the court said that testimony that the act charged did not occur, though in form in the negative, was in effect in the affirmative. This same distinction was recognized in *State v. Kellogg, supra,* where the court permitted impeachment, but as contrasted with the present case, it would seem that the rule was there misapplied. In the *Kellogg* case, the issue was the chastity of the prosecuting witness, and the denial of intercourse with her by this particular witness did not constitute a negation of unchastity. In the *Thomas* case, the issue was the fact of intercourse between this witness and the defendant, and the witness' denial negatived a material issue. In both cases, there was negative testimony of a positive fact, but in the *Kellogg* case, it was not affirmatively prejudicial, while in the *Thomas* case, it was.

According to the Washington interpretation of the rule, it is the substance of the testimony and not its mere form that is determinative. If the calling party claims surprise, and the unexpected testimony is harmful, the court will permit impeachment, regardless of the form in which the statement was made.

J. S. A.