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RECENT CASES

CONDITIONAL SALES—NEGOTIABILITY BY CONTRACT—PUBLIC POLICY. *A* sold *B* a stoker on a conditional sale contract. The contract provided that, upon assignment, the assignee would take the contract free of all defenses, counter-claims, or cross-complaints by *B*, the buyer. *A* assigned the contract to *C*. The stoker didn't work properly. *B* defaulted on his payments. When *C* brought suit to collect, *B* set up as a defense the breach of *A's* warranties. *Held:* the no-defense clause bars this defense. *United States ex rel. and for the benefit of Administrator of Federal Housing Administration v. Troy-Parisian*, 115 F. (2d) 224 (C.C.A. 9th, 1940).

Normally a conditional sale contract is not negotiable. *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 298 Pac. 705 (1931). As a non-negotiable instrument, it is subject to REM. REV. STAT. § 191, which provides that all defenses the buyer had against the seller can be set up against the seller's assignee.

No-defense clauses like that in the present case are an attempt by vendors and their assignees (who are generally finance companies) to evade this statute. They hope thereby to impart to their contracts one of the most important characteristics of negotiability, freedom from defenses possessed by the maker when the instrument passes to a holder in due course. In Washington the ordinary negotiable note, secured by the conditional sale contract, is not a desirable device. Our court, recognizing the economic injustice inherent in giving the assignee additional power over a buyer already carrying over his head the drastic threat of repossession, has ruled that title to the chattel vests in the buyer when the seller negotiates the note apart from the conditional sale contract. This completely destroys the assignee's right of forfeiture. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817 (1911).

Because of this, vendors have resorted to devices like that in the instant case. Since the clause results in the vendee giving up statutory rights, courts have questioned the validity of the clauses on public policy grounds. The holdings have not been uniform, but it would seem that generally such clauses are to be considered invalid where they purport to give up defenses such as illegality, fraud, usury, or want of consideration. Where there has been merely a breach of warranty, probably most courts would consider such clauses valid, though even as to this there is a split of authority. Clearly no agreement of the parties can make the instrument completely negotiable. *Motor Contract Co. v. Van Der Volgen, supra.*

Cases holding no-defense clauses valid are: *Howie v. Lewis*, 14 Pa. Super. Ct. 232 (1900) (fraud); *Anglo-California Trust Co. v. Hall*, 61 Utah 223, 211 Pac. 991 (1922) (breach of warranty); *Elzey v. Ajax Heating Co.*, 10 N. J. Misc. 281, 158 Atl. 851 (1932) (declaratory judgment that clause was entirely valid); *Refrigeration Discount Corp. v. Haskew*, 194 Ark. 549, 108 S. W. (2d) 908 (1937) (breach of warranty); *National City Bank v. Prospect Syndicate*, 170 Misc. 611, 10 N.Y.S. (2d) 759 (1939).

Cases holding such provisions invalid as contrary to public policy are: *Motor Contract Co. v. Van Der Volgen, supra* (usury); *San Francisco Securities Corp. v. Phoenix Motor Co.*, 25 Ariz. 531, 220 Pac. 229 (1923) (breach of warranty); *American National Bank v. Sommerville*, 191 Cal. 364, 216 Pac. 376 (1923) (failure of consideration); *Pacific Acceptance Corp. v. Whalen*, 43 Idaho 15, 248 Pac. 444 (1926) (fraud and lack of

consideration); *San Joaquin Finance Corp. v. Allen*, 102 Cal. App. 400, 283 Pac. 117 (1929) (usury); *Progressive Finance and Realty Co. v. Stempel*, 231 Mo. App. 721, 95 S. W. (2d) 834 (1933) (holds no-defense clause completely invalid); *Industrial Loan Co. of Cape Girardeau v. Grisham*, 115 S. W. (2d) 214 (1938) (usury, fraud and breach of warranty); *Equipment Acceptance Corp. v. Arwood Can Mfg. Co.*, 117 F. (2d) 442 (C.C.A. 6th, 1941) (fraud but perhaps the assignee took with notice).

Law review articles arguing that parties should be permitted to thus give their non-negotiable instruments some of the incidents of negotiability are: Buetel, *Negotiability by Contract* (1933) 28 ILL. L. REV. 205; Notes, (1924) 33 YALE L. J. 302; (1933) 8 WIS. L. REV. 272.

Certainly it would seem that public policy should be against the waiver of such defenses as illegality and fraud, if only for the reason that it would tend to encourage such practices among vendors. With the defense of breach of warranty, courts have had more difficulty. Some seem to feel that there can be no public policy against this. A large part of this feeling arises from the fact that, under the Uniform Sales Act, parties are permitted to give up warranties by express agreement. REM. REV. STAT. § 5826-71. It can well be argued that the same rule should apply to a conditional sale contract. However, this fails to take into account the drastic remedy of forfeiture already possessed by the conditional vendor. Nor does it consider the fact that to deny the setting up of a defense in the suit against the assignee forces the vendee to bring a second suit against the vendor for damages for the breach of warranty, a result highly undesirable both to the vendee, in that it puts him to the uncertainty and expense of an added law suit, and also to the courts, already clogged with litigation. Add to this the further fact that in making such a contract there is a grossly disproportionate advantage in bargaining power on the part of the vendor in most cases and there are built up strong policy reasons for denying effect to a no-defense clause in a condtional sale contract, even when it only involves the denial of the defense of breach of warranty.

H. R.

DIVORCE—MODIFICATION OF DECREE. *H* obtained a divorce from *W* in Washington by default, upon service by publication, *W* at the time residing in California with two of their three minor children. No provision was made in the decree for custody and support of any of the children. Subsequently *W* returned to Washington with the two children. Thereupon *H* instituted an action to have himself appointed guardian of these two children. While this action was pending, *W* filed a petition in the original divorce proceeding asking for modification of the divorce decree to the extent that she be granted exclusive custody of all three children and that *H* be required to pay for their support. *H* applied for a writ of prohibition to prevent further proceedings by the superior court in the divorce cause, on the ground of lack of jurisdiction. *Held:* REM. REV. STAT. § 988 confers continuing jurisdiction upon the court which grants a divorce to modify the decree to the extent of providing for custody and support of minor children, even when no such provision was made in the original order. *State* ex rel. *Ranken v. Superior Court*, 106 Wash. Dec. 53, 106 P. (2d) 1082 (1940).

Prior to 1933 the court which granted a divorce retained jurisdiction to modify the decree in two situations: First, where jurisdiction was

expressly reserved for that purpose in the decree; and second, if minor children were provided for in the decree, the court had continuing jurisdiction to modify those provisions at any time during the minority of the children. *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2 (1911); *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634 (1911); *Delle v. Delle*, 112 Wash. 512, 192 Pac. 966, 193 Pac. 569 (1920). In all other cases the decree was *res adjudicata* like any other judgment, and was not subject to modification. *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721 (1917); *Anderson v. Anderson*, 97 Wash. 202, 166 Pac. 60 (1917); *Cooper v. Cooper*, 146 Wash. 612, 264 Pac. 1 (1928); *Rehberger v. Rehberger*, 153 Wash. 591, 280 Pac. 8 (1929); *Blethen v. Blethen*, 177 Wash. 431, 32 P. (2d) 543 (1934); *Fisch v. Marler*, 1 Wn. (2d) 698, 97 P. (2d) 147 (1939). The result of this rule was frequently very harsh, particularly in cases where substantial alimony had been awarded to the wife and subsequently the husband's financial condition became such that continued payment of the alimony left him with little or nothing for himself. The injustice of the rule caused it to be the subject of considerable criticism, and legislative reform was advocated. See Chadwick, J., concurring in *Ruge v. Ruge, supra.* In 1933, when the rigor of the rule was most strongly felt, the agitation for its abolition finally bore fruit, in the form of an amendment to REM. REV. STAT. § 988, Wash. Laws 1933, c. 112, § 1, which provided that the order "as to alimony and the care, support and education of children may be modified, altered and revised by the court from time to time as circumstances may require." Although, as has been pointed out, the provisions in a divorce decree for the care, support and education of children were already subject to modification, it was desirable to restate that rule in the amendment, so that the new statute would cover all situations in which the decree could be modified, and preclude the possible argument that the legislature, having spoken as to one, intended to exclude all others.

In the *Ranken* case, the court, having conceded that in the absence of statute the decree there involved was not subject to modification because it neither expressly reserved jurisdiction nor provided for minor children, held that the amendment above referred to was an expression of legislative intent to confer continuing jurisdiction on the court in any case in which the parties to a divorce had minor children, regardless of whether or not those children were mentioned or provided for in the divorce decree. It is difficult to perceive, and the court did not explain, just where in those words such an intent could be found, particularly since the intent may be otherwise adequately explained as above. Also, the court apparently assumes without discussion, that "care, support and education," as used in the amendment, includes "custody." However, from a practical standpoint, the adoption of the procedure followed in the *Ranken* case may be justifiable, since it is advantageous to the court, in determining what will, under the circumstances, best serve the welfare of the children, to have before it the record of the divorce proceedings, and this procedure eliminates the necessity of preparing and filing a transcript of that record. The arguments against it are probably more theoretical than actual. Fourteen states have adopted this procedure by express statutory enactment. 2 VERNIER, AMERICAN FAMILY LAWS (1932) § 95.

The real difficulty with the decision in the *Ranken* case arises from the fact that the clause in the statute, upon which it is squarely based, per-

tains to alimony provisions as well as to provisions for the care, support and education of children. It seems inescapable that the rule must be applied to the case where an ex-wife petitions the court for an award of alimony after a final divorce decree has been granted and a property settlement made with no provisions for payment of alimony. If the rule is so applied, the Washington Court will stand virtually alone on this point. The cases in point are collected in Note (1933) 83 A. L. R. 1248, where the annotator concludes that "It has been generally, though not invariably, held that statutes permitting modifications or changes as to alimony do not apply where no alimony has been granted in the decree." An examination of the few cases wherein the statutes were held to apply will reveal that the statutes involved expressly provided that the court could, in addition to modifying existing orders, make such new orders as to alimony as the circumstances required, so they are not in point in Washington. Since no new personal service on the ex-husband would be necessary to obtain jurisdiction to render a personal judgment against him by this method, the dangers of permitting it can be readily seen.

The *Ranken* opinion also contains some interesting implications bearing upon the Conflicts of Laws problem, discussion of which is outside the scope of this note.

F. K. F.

EVIDENCE—PRESUMPTION OF DUE CARE—INTERESTED TESTIMONY. In an action for wrongful death arising out of a collision between plaintiff's intestate's car and defendant's truck, physical evidence established that both the car and the truck were on the wrong sides, respectively, of the highway when the collision occurred. Defendant, the only surviving witness to the accident, also testified to that effect. The lower court instructed, *inter alia,* that because of the presumption of due care, the law presumed that the deceased was driving on his own side of the highway, but that the presumption could be overcome by evidence in the case to the contrary. Whether it had been overcome being a question for the jury. The jury found for the defendant. The plaintiff's exception was taken on the ground that the instruction failed to tell the jury that contributory negligence must be established by disinterested witnesses, *i. e.,* that only the testimony of disinterested witnesses could overcome the presumption. *Held:* Affirmed. The instruction ought not have been given, but the error was favorable to plaintiff. *Dissent:* The instruction was properly given, but was erroneous in that it failed to tell the jury that the presumption could not be overcome by interested testimony. *Erickson v. Barnes,* 106 Wash. Dec. 180, 107 P. (2d) 348 (1940).

The Washington decisions are not harmonious as to the quantum and quality of evidence required to overcome a presumption. See Falknor, *Notes on Presumptions* (1940) 15 WASH. L. REV. 71. The court has often stated that "a presumption is not evidence of anything" and should never be placed in the scale to be weighed as evidence once it has served its purpose of requiring the opposing party to adduce *prima facie* evidence. *Scarpelli v. Wash. Water Power Co.,* 63 Wash. 18, 114 Pac. 870 (1911). Cited with approval in *Morris v. Chicago, M., St. P. & Pac. R. Co.,* 1 Wn. (2d) 587, 97 P. (2d) 119 (1939). See also 5 WIGMORE, EVIDENCE, (2d ed. 1923) § 2491 following THAYER, PRELIMINARY TREATISE ON EVIDENCE, (1898), pp. 339, 346. On the other hand, the court has approved the submission

of a presumption to the jury where the only opposing evidence is that of interested witnesses, *Steiner v. Royal Blue Cab Co.*, 172 Wash. 396, 20 P. (2d) 39 (1933), or of disinterested witnesses who might reasonably be disbelieved. *Luna de la Puente v. Seattle Times Co.*, 186 Wash. 618, 59 P. (2d) 753 (1936); *Karp v. Herder*, 181 Wash. 583, 44 P. (2d) 808 (1935).

It will be noted that the presumption is submitted to the jury only in those cases where the jury might reasonably disbelieve the only testimony going to rebut it. If such testimony were disbelieved, the presumption controls since it ultimately stands uncontradicted. However, if the jury does believe the evidence adduced, even though that be the testimony of interested witnesses alone, the presumption, being thereby overcome and not partaking of the character of evidence, is of no further effect at all.

The statement in the dissent that the presumption cannot be overcome by interested testimony seems questionable in two regards. First, the distinction between interested and disinterested testimony in opposition to a presumption has heretofore been deemed of significance only in determining whether the presumption should be submitted to the jury at all, *i. e.*, whether it has been overcome as a matter of law. Second, the suggestion in the dissent would make the presumption conclusive where the only evidence opposing it consists of the testimony of interested witnesses. In such circumstances, it would be idle to even put on interested testimony. Telling the jury that certain testimony can be given no weight (and this would be the effect where the testimony could not overcome the presumption) might well be unconstitutional as denying the right to trial by jury, since the determination of whether the testimony of an interested witness is credible or not is taken from the jury. It would at least amount to a comment by the judge on the testimony.

H. J. D.

HOMICIDE—PRESUMPTION OF SECOND DEGREE MURDER. In a criminal prosecution for the homicide of the accused's mother, the trial court refused to instruct the jury, upon the defendant's request, that if the killing were admitted, it would be presumed that the crime, if any crime had been committed by the defendant, was that of murder in the second degree. *Held:* The defendant could not claim error in the failure to give the instruction. Mr. Justice Blake dissented, holding that the instruction should have been given. *State v. Davis*, 106 Wash. Dec. 567, 108 P. (2d) 641 (1940).

A careful search has failed to disclose a prior case, either in Washington or elsewhere, where this precise question has been determined. In all of the cases relied upon by the defendant, the defendants, having pleaded not guilty, objected to the *giving* of the instruction, contending that it placed upon them an undue burden. In this case, the defendant pleaded guilty to the charge of murder in the first degree, and claimed error in the *failure* to give the instruction.

The court concluded that as the jury was otherwise properly and completely instructed, no right of the defendant was violated by the failure to instruct on the presumption, holding that the presumption was to aid the prosecution. It was a rule originally adopted out of necessity to assist the state in establishing a connected and complete *prima facie* case. Unlike the statutory presumption of innocence this presumption is not one established for the benefit and protection of a person charged

with the commission of a crime. In the early case of *State v. Payne,* 10 Wash. 545, 39 Pac. 157 (1895) the court made a careful study of the history of and reasons for the doctrine that the jury should be instructed that a homicide having been proved it should be presumed that it was murder in the second degree. The same rule was approved in the case of *State v. White,* 10 Wash. 611, 39 Pac. 160, 41 Pac. 442 (1895); *State v. Melvern,* 32 Wash. 7, 72 Pac. 489 (1903); *State v. Clark,* 58 Wash. 128, 107 Pac. 1047 (1910); *State v. Duncan,* 101 Wash. 542, 172 Pac. 915 (1918); and *State v. Gallagher,* 4 Wn. (2d) 437, 103 P. (2d) 1100 (1940).

In Washington, the burden of persuasion is put upon the state to prove beyond a reasonable doubt that the defendant killed, with design, and maliciously, that is, not excusably or justifiably. Thus it can be seen that there is room for a true presumption. Once the homicide has been proved or is admitted, the presumption is that it was murder in the second degree. If the basic fact—the homicide—is shown, the presumed fact—murder in the second degree—must be taken as true, unless there is something in the case to rebut it. By this presumption, the burden of going forward with the evidence shifts to the defendant, although the ultlimate burden of persuasion remains upon the state.

One can readily perceive that such a presumption is necessary to effectively administer justice. In the leading case of *State v. Payne, supra,* Mr. Justice Hoyt, in a well-reasoned opinion, recognized that, "If it is held that the fact of killing does not raise the presumption that it was malicious, the administration of criminal justice will be greatly interfered with." He continues with the classical example that without such presumption to aid the prosecution it might happen that two persons would be alone in a room, and one kill the other, without any justification whatever, and yet the prosecution be utterly unable to secure his conviction, for the reason that there was nothing to show the circumstances surrounding the killing.

Thus, as the presumption is to relieve the prosecution of its initial burden of going forward after the homicide is proved, and the state is entitled to an instruction upon the presumption, there is no right of an accused violated if the instruction on such presumption is not given, as it is not the accused's right to request such an instruction.

The brief statements of the law enunciated in the dissent, to the effect that a homicide having been admitted or proven beyond a reasonable doubt the presumption is that it is murder in the second degree; that the presumption will prevail if there is nothing in the case to rebut it; that if the defendant would reduce the crime to manslaughter, the burden is on him to rebut the presumption; and that if the state would elevate the crime to murder in the first degree, the burden is upon it to establish the essential characteristics of that crime, and that the jury should be so instructed, are well supported by the authorities, but do not appear relevant to the issue of whether the *accused* is entitled to the instruction.

J. G.

LABOR LAW—LABOR DISPUTE—SECONDARY BOYCOTT. Plaintiff, the employer, and defendant union entered into an agreement which provided, among other things, that: "There shall be no goods delivered to or sold at the plant for resale from trucks to persons not in good standing with Local Union No. 524." Although there was no dispute between *P* and his employees, defendant called a strike and put a picket in front of *P*'s store

because *P's* main customer employed non-union truck drivers. *P* sought an injunction. *Held:* injunction denied. *Marvel Baking Co. v. Teamsters' Union Local No. 524,* 105 Wash. Dec. 297, 105 P. (2d) 46 (1940). The court held that the above-mentioned provision converted the disagreement into a lawful labor dispute (see REM. REV. STAT. (Supp. 1939), § 7612-13 which the court cites) and that there was no secondary boycott since none of *P's* customers had been intimidated not to buy.

In previous Washington cases where injunctions have been sought, the problem has been largely one of determining whether a "labor dispute" existed. *Safeway Stores v. Retail Clerks' Union,* 184 Wash. 322, 51 P. (2d) 372 (1935), *Fornili v. Auto Mechanics' Union,* 200 Wash. 283, 93 P. (2d) 422 (1939). In the instant case, the court adopted the same approach in reaching its decision, holding that since there had been a contract made between the union and *P,* and since that contract had been breached, a labor dispute existed.

The court stated at the inception that under these facts, a labor dispute would have existed according to the following cases: *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 81 L. ed. 1229 (1937); *Lauf v. Shinner & Co.,* 303 U. S. 323, 82 L. ed. 872 (1938); *New Negro Alliance v. Sanitary Grocery Co.,* 303 U. S. 552, 82 L. ed. 1012 (1938). But it is suggested that this case differs from these and other previous cases in that here the real dispute did not exist between *P* and the union. The court viewed the case wholly in the light of a two-party relationship, and thus no consideration was given to the validity of the mentioned provision as in effect legalizing a secondary boycott.

Considering *P* as the court did, as the primary disputant, it is clear that the mere picketing of his establishment did not coerce any third persons from withholding their business relations with him. A real problem of secondary boycott arises, however, not when we consider *P* as the primary employer with whom the union has the dispute, but as the third party who is being coerced in the dispute between the union and *P's* main customer. Does not such coercion clearly fall within the generally accepted view of a secondary boycott? *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 65 L. ed. 349 (1920); *United Union Brewing Co. v. Beck,* 200 Wash. 474, 93 P. (2d) 772 (1939).

It should be noted that the relationship between the union and the *P* is different than the usual secondary boycott case, since here it is the retailer, rather than the manufacturer, that has the dispute with the union and thus no "non-union product" enters the picture. The ordinary practice of declaring the retailer who purchases the non-union product as unfair is universally condemned, although it must be mentioned that recent decisions from New York have permitted picketing if the banners are considered to be directed against the product rather than the retailer himself. *Goldfinger v. Feintuch,* 267 N. Y. 281, 11 N. E. (2d) 910, 116 A. L. R. 477 (1937). But this reasoning is not applicable to those cases where the union has picketed the *supplier* of the employer with whom they have the dispute, and such practice has been declared illegal, even in liberal New York. *Wohl et al. v. Bakery & Pastry Drivers' Local, etc.,* 14 N. Y. S. (2d) 198 (1939) (injunction granted against picketing a manufacturer of baking goods because two peddlers would not employ union men to distribute goods); *Feldman v. Weiner,* 17 N. Y. S. (2d) 730 (1940) (picketing a wholesaler who had no quarrel with the union to

coerce another company to whom *P* sold products, declared a secondary boycott). See also *Vonnegut Mach. Co. v. Toledo Mach. & Tool Co.*, 263 Fed. 192 (Dist. Ct. N.D. Ohio 1920). (It might be noted that N. Y. has a statute similar to our own.)

The instant case is distinguishable from these only because of the provision in the contract between the supplier and the union. Is this, then, a new device to legalize what would otherwise be a secondary boycott? Should not such a provision as this, which forces one man to pay the cost of another's failure to concede to the union's demands be carefully scrutinized before being given legal sanction? See Barnard and Graham, *Labor and the Secondary Boycott* (1940), 15 WASH. L. REV. 137, 153.

It should be mentioned that the recent case of *A. F. of L. v. Swing*, 61 S. Ct. 568, 85 L. ed. 513 (1941) where an injunction was denied even though there was no dispute between the employees and the employer does not bolster this case, since there a real dispute as to unionization existed between the picketing union and the employer.

It may be that the stage has been reached where the validity of union agreements has been so firmly established that the court feels it unnecessary to inquire past the fact of the forming of a contract, even though such contract permits conditions outside the control of the employer to create a "labor dispute" between himself and the union. Whatever the attitude of the court, it might well have taken a more definite stand on the important question of secondary boycott involved herein, instead of being content to confine its inquiry to a search for a "labor dispute" and, having found a violation of a union contract, hold against the employer.

H. E. K.

TENANCY IN COMMON—CONTRIBUTION FOR TAXES—STATUTORY CONSTRUCTION. Plaintiffs and defendants were tenants in common of land, their interests being one-third and two-thirds respectively. Plaintiffs paid the entire tax levied without seeking a segregation as permitted under REM. REV. STAT. § 11264, and now seek to recover two-thirds of the amount so paid and to have a lien therefor upon the defendants' interest in the land. The trial court denied relief upon the theory that, the statute permitting segregation of the tax upon cotenant's interests, the payment of the whole tax was unnecessary to protect plaintiffs and, thus, voluntary. *Held:* That the statute does not provide an exclusive method of procedure and that plaintiffs are entitled to the lien requested. *Olson v. Chapman*, 4 Wn. (2d) 522, 104 P. (2d) 344 (1940).

The general rule is that the tenant in common who has paid the entire amount of taxes has a right to contribution from his cotenant, proportionate to the latter's interest, and acquires a lien upon this interest to enforce contribution. 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 460; Note (1927) 48 A. L. R. 586. However, those states granting such recovery either have no statute expressly permitting segregation or else there exists a statute expressly granting the cotenant a lien if he pays all of the taxes.

The reason generally stated for allowing the recovery is that since one tenant must pay an obligation levied against the common property to protect himself from loss of his own interest, he should be entitled to a refund from the other. Tested by this, the tenant in common in Washington does not seem compelled to make payment of taxes on his cotenant's share, and should be denied recovery. *Preston v. Wright*, 81 Me.

306, 17 Atl. 128, 10 Am. St. Rep. 257 (1889), and *In re Lohr's Estate*, 132 Pa. Super. Ct. 125, 200 Atl. 135 (1938), in so holding, denied the paying tenant any recovery. And *see Wilson v. Sanger*, 57 App. Div. 323, 68 N. Y. S. 124 (1900), and the dissent in the *Olson* case. This argument is stressed in a note upon this same case. (1941) 54 HARV. L. REV. 499.

The result reached here is desirable, however, in that it may be sustained upon other grounds. It encourages the prompt payment of taxes, which is clearly in accordance with the policy of the state. Manifest injustice results where one tenant may have charges levied against his own interest paid by his cotenant, and retain full right to his interest with no expense or liability to himself. A tenant may pay in order that the undivided share of the other should not be sold for taxes, so that the land will be kept intact, or will not fall into the hands of strangers. Although he will fail in this purpose if the other never makes an effort to pay and the interest must be sold for taxes or foreclosure on a lien, if he had reasonably hoped the other would later contribute his share, he should have a claim on the other's interest for these taxes. If the other intended to let the property go for taxes, and then desires to reclaim it from the tenant who paid, clearly he should be forced to compensate the other first. Likewise, under many circumstances it seems desirable to allow one tenant in common the right to acquire title to the entire interest. He cannot do this by letting the land go for taxes and buying in at the tax sale. *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858 (1909); *Dwight v. Waldron*, 96 Wash. 156, 164 Pac. 761 (1917); *Buchanan v. First National Bank*, 184 Wash. 185, 50 P. (2d) 520 (1935). While he may do so by having a separate assessment made and buying in when the other's interest is sold for nonpayment, 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 465, Note (1928) 54 A. L. R. 874 at 906, this places the extra burden upon him of securing the separate assessment, and he has no hope of accomplishing those purposes set forth above. But under the lien granted in the *Olson* case he may acquire the full interest in the property upon foreclosure of his lien. 2 THOMPSON, REAL PROPERTY (2d ed. 1940) § 1853, Note (1928) 54 A. L. R. 874, 906.

S. K.

WORKMEN'S COMPENSATION—PRE-EXISTING DISEASE. A logger, suffering from a pre-existing heart disease, induced by chronic alcoholism, was sawing down a tree, making no extraordinary effort, when he fell dead from heart failure. His widow was granted compensation upon a showing that he might have continued to live if he had not been engaged in this heavy work. *Held:* That where one engaged in a hazardous industry dies upon the job, compensation will be allowed if the causal relationship between the labor and the death can be demonstrated. *McCormick Lumber Co. v. Dept. of Labor & Industries*, 106 Wash. Dec. 629, 108 P. (2d) 807 (1941).

This case raises the problem of the definition of the term "injury." Our legislature has been more specific in defining this term than legislatures of other states. See ALA. CODE ANN. (Michie, 1928), §§ 7554 and 7596; N. Y. Workmen's Compensation Law, § 2(7). Under the first Washington Workmen's Compensation Act of 1911, "injury" was defined as: "The words injury or injured as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease." WASH. LAWS 1911, c. 74 § 3. From the first the court allowed

recovery where a pre-existing disease, coupled with an unusual exertion in the course of employment, resulted in disability or death. For, said the court, the statute did not limit its benefits only to those in perfect health. *Zappala v. Ind. Ins. Comm.*, 82 Wash. 314, 144 Pac. 54 (1914); *Shadbolt v. Dept. of Labor & Industries*, 121 Wash. 409, 209 Pac. 683 (1922); *Frandila v. Dept. of Labor & Industries*, 137 Wash. 530, 243 Pac. 5 (1926); *Cole v. Dept. of Labor & Industries*, 137 Wash. 538, 243 Pac. 7, (1926).

Apparently with the intent of defeating recovery in just this situation, the legislature in 1929 amended the statute to read as follows: "The word 'injury' as used in this act means 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." REM. REV. STAT. § 7675. But the court continued the rule that recovery would be allowed where the disability or death was the result of the combination of extraordinary exertion and an existing disease, and continued to cite cases decided before the amendment as authority. *Smith v. Dept. of Labor & Industries*, 179 Wash. 501, 38 P. (2d) 212 (1934); *McGuire v. Dept. of Labor & Industries*, 179 Wash. 645, 38 P. (2d) 266 (1934); *Daugherty v. Dept. of Labor & Industries*, 188 Wash. 626, 63 P. (2d) 434 (1936); *Devlin v. Dept. of Labor & Industries*, 194 Wash. 549, 78 P. (2d) 952 (1938); *cf. Flynn v. Dept. of Labor & Industries*, 188 Wash. 346, 62 P. (2d) 728 (1936). See also, Note (1939) 14 WASH. L. REV. 329.

In the instant case, however, the court has extended the doctrine. The requirement of extraordinary exertion has been abrogated because the court felt that to fix a standard, as to what is unusual exertion, would be impossible. Instead the court advances the test: "An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, *whatever the degree of exertion or the condition of the workman's health.*" This is a liberal interpretation of the statute. In effect, as Justice Simpson pointed out in the dissent, it makes the Workmen's Compensation Act a form of industrial insurance. It may be that this is advisable, but surely it is wthin the province of the legislature to so determine.

In Alabama, the legislature has tried to solve the same problem by defining the effect upon recovery where the pre-existing disease is a contributing cause, but the Supreme Court in that state held it applicable only in cases of disability, not where the workman died. ALA. CODE ANN. (Michie, 1928) § 7561; *U. S. Cast Iron Pipe Co. v. Hartley*, 217 Ala. 462, 116 So. 666 (1928). It seems that the general trend of authority is in accord with the Washington holding, in that courts generally construe such statutes liberally. Note (1929) 60 A. L. R. 1316; *cf. Cal. Notion & Toy Co. v. Ind. Acc. Com.* 59 Cal. App. 225, 210 Pac. 524 (1922); *Barnabas v. Bersham Colliery Co.*, 103 L. T. N. S. (Eng.) 513, 55 Sol. Jo. 63, 4 B. W. C. C 119 (1910).

Since the employer pays into the fund at a rate determined by his "cost experience" (REM. REV. STAT. § 7676) it behooves him to select only healthy young men as employees. This may have definite disadvantages to the welfare of the state. If the doctrine of this case is to be continued, it might be well if a new means of measuring "cost experience" be devised, whereby such deaths would not count against the employer. Such a bill (Senate Bill No. 207) was introduced in the 1941 legislative session but was not voted upon. F. P.