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RECENT CASES

CARRIERS—COLLECTION OF CHARGES—ESTOPPEL. The Bestway, Inc. of Los Angeles, California, shipped a carload of merchandise, in the performance of its business as a freight forwarder, to appellant in Seattle, Washington, via the Southern Pacific Railroad to Portland, Oregon, and via the Union Pacific Railroad from Portland to Seattle. The shipment was sent on a collect bill of lading; the appellant, acting as agent for the owner, refused to accept the goods unless they were prepaid. Communications were exchanged between the appellant and the consignor in which the consignor stated that the shipment should have been prepaid; this letter was shown to respondent, who, after conferring with the Southern Pacific, changed the bill of lading from collect to prepaid. There was nothing by which the appellant could tell that the charges had not, in fact, been paid; appellant, relying upon the prepaid bill of lading, accepted the freight car and distributed the goods to the various parties as directed. The respondent then attempted to collect the charges from the consignor but failed to do so because of its insolvency. Now, two years later, the Union Pacific has brought this action to collect the charges from the consignee, the appellant. *Held:* Judgment for respondent affirmed, notwithstanding verdict for appellant; doctrine of estoppel cannot be used to prevent a railroad from collecting the full legal rate due on this shipment, *Union Pacific Railroad Company v. Eyres Transfer & Warehouse Company*, 12 Wn. (2d) 282, 121 P. (2d) 340 (1942).

Chapter 1 of the Interstate Commerce Act, 49 U. S. C. A. Sec. 3 (2), provides that a consignee of freight who is not the actual owner of the freight but is merely the agent of the owner can relieve itself from liability for the freight charges by notifying the carrier in writing, prior to the delivery of the goods, of the fact of such agency and of the lack of beneficial title. The majority in the present case refers to this section of the act and states that the appellant could have protected itself from any possibility of liability for freight charges by the giving of such notice. It seems, however, as was strongly urged by the dissent, that this provision was designed to protect agents who received goods upon collect bills of lading and that it should not be necessary for persons receiving goods upon prepaid bills of lading to so protect themselves.

The most controversial and most interesting point of the case is the court's ruling on the appellant's assertion of estoppel as a defense. The Interstate Commerce Act, 49 U. S. C. A., Sec. 2, provides that the railroads are required to collect the full legal charges as set out in the various tariffs established through the Interstate Commerce Commission, and that any failure to collect equal charges from all is discrimination. The majority, in denying the appellant's claim of estoppel, follows a considerable line of cases in which it has been ruled that, "Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates . . .", *Pittsburgh, etc., Ry. Co. v. Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919); see also *Texarkana & Ft. S. Ry. Co. v. Brewer*, 19 S. W. (2d) 334 (1929). But there is a real difference in the factual situation presented in those cases and the facts of the present case; of this difference only the minority opinion takes cognizance. Those cases involve a situation in which the shipment was delivered and accepted on a collect

bill of lading and in which the consignee paid the charges as stated by the railroad, only to later find that the railroad had discovered an error that had been made in the computation of the charges and that a greater sum was due than had been originally charged. In these cases it has been correctly held that the consignee is liable for the charges and that estoppel will not apply since the consignee, by accepting the shipment and thereby acknowledging liability for the charges, is liable for the full legal charge, *Fink* case *supra*, *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924); *Atlantic Coast Line Ry. Co. v. Bristol Steel & Iron Works, Inc.*, 30 Fed. Supp. 726 (1939). The present case, on the other hand, is distinctly different in that the goods were accepted on a prepaid bill of lading. This distinction is recognized and flatly accepted in *Cincinnati Northern R. Co .v. Beveridge et al.*, 8 F. (2d) 372 (1925). The consignee becomes liable for the freight charges by expressly or impliedly agreeing to pay those charges and by no stretch of the immagination can it be said that a consignee on a prepaid bill of lading agrees to pay the freight charges, especially where, as in the instant case, he has previously refused to accept the collect bill of lading. Clearly the court in the *Beveridge* case *supra* was correct in applying the doctrine of estoppel.

Another case in point in which the court applied estoppel, although on a slightly different rationale, is *Davis, Director General of Railroads, v. Akron Feed and Milling Co.*, 296 Fed. 675 (C. C. A.-8th, 1924). There the court pointed out that the basic reason for holding the consignee when the railroad has made an error in ascertaining the charges is the fact that the consignee who has accepted the collect bill of lading has an opportunity equal to that of the carrier to ascertain the correct charges; whereas, the consignee on a prepaid bill of lading does not have an equal opportunity in that he has no direct means (reference to the tariffs) by which to ascertain the reliability of the carrier's statement that the charges have been paid. To force the consignee in the latter situation to check the reliability of the carrier by communication with the consignor would severely strain the business of transportation; especially would such result where the particular shipment had been re-consigned several times.

In nearly all the cases where estoppel has been denied, correctly or otherwise, the court has argued that the right of the railroad to collect the correct charge is actually a public duty to protect the public from any vestige of discrimination and the fact that some private rights are bound to be injured is an unavoidable consequence. Such is a valid argument but it must be asked whether all private rights can be sacrificed and still leave any public rights. A rule that will, in effect, whitewash all the negligent and tortious acts of one party to a legal contract can hardly be rationalized in the catch-all of "public good". The better rule would seem to be to allow the normal application of estoppel where the consignee clearly has accepted no liability, by implication or otherwise, and where the consignee actually has not had opportunity equal to that of the carrier to know the facts as to the freight charges.

D. G. A., JR.

COMMUNITY PROPERTY—EFFECT OF COMMINGLING. Action was brought on a promissory note made by the defendant corporation and endorsed by *H*. Judgment was in favor of the plaintiff and against the community as well as *H* individually. At the time of his marriage, *H* had $5,000 invested in a fruit brokerage business, which business involved a rapid turnover of capital. His original capital was combined with money borrowed from the bank and from other sources, his indebtedness at one time reaching $45,000. During this period, the profits from the brokerage business was the only source of community income. In the fall of 1927, *H* had about $5,000 in cash with which he purchased one-third of the stock of a corporation, thereafter exchanged this stock for the corporation's property, and later exchanged the property thus acquired for 150 shares of stock in the defendant corporation, then newly organized. *Held:* The commingling in the brokerage business of separate property and community funds and labor so that the separate property could no longer be traced and identified, left undisturbed the presumption that all was community property. As the presumtion was not rebutted by the facts, the stock in defendant corporation purchased by such property was held to be community property; hence, the community was rightly held on the note. *E. I. du Pont de Nemours & Co., Inc., v. Garrison,* 113 Wash. Dec. 37, 124 P. (2d) 939 (1942).

It is well established that the status of property is determined as of the date of its acquisition. *Conley v. Moe,* 7 Wn. (2d) 355, 110 P. (2d) 172, 133 A. L. R. 1089 (1941); *In re Binge's Estate,* 5 Wn. (2d) 446, 105 P. (2d) 689 (1940); *In re Brown's Estate* 124 Wash. 273, 214 Pac. 10 (1923). Separate property will remain separate through all of its changes in form as long as it can be clearly traced and identified. Moreover, the rents, issues and profits of such property will retain a separate status. *In re Binge's Estate, supra; State ex rel. Van Moss v. Sailors,* 180 Wash. 269, 39 P. (2d) 397 (1934); *In re Brown's Estate, supra.* But if separate funds are commingled with community funds, making it impossible to apportion the total, all of the funds will be treated as community property. *In re Buchanan's Estate,* 89 Wash. 172, 154 Pac. 129 (1916); *Yesler v. Hochstettler,* 4 Wash. 349, 30 Pac. 398 (1892); MCKAY, COMMUNITY PROPERTY (2d ed. 1925) § 308.

Commingling of separate property and community labor was considered in detail by the Washington court in the *Buchanan* case, *supra* The court held in that decision that, though the foundation of the business was laid by separate capital outlay, the increase was due almost entirely to the business acumen of the husband. In its opinion, the court suggested that the proper test should be the relative contributing force of the separate investment and the personal effort of a community member. A conclusion to be drawn from the *Buchanan* case is that a community member will endanger the status of his separate property if he devotes unlimited effort to its improvement. *Jacobs v. Hoitt,* 119 Wash. 283, 205 Pac. 414 (1922) weakened the effect of the preceding case by recognizing the necessity of an apportionment, allowing as separate property that portion of the profits which would "confirm the original investment as separate property." It was no long step from the *Jacobs* case to *In re Brown's Estate, supra.* Brown invested a certain amount of separate property which, during the existence of the community, greatly increased in value due to Brown's skillful management. The court reached the conclusion that all of these

assets were but "the original separate property of the decedent, together with rents, issues and profits thereon." Accordingly, a man could devote all of his time to increasing his separate property and receive all the returns as his separate property. *See also In re Hebert's Estate,* 169 Wash. 402, 14 P. (2d) 6 (1932) in which the salary paid by the corporation to the husband was held fair compensation to the community for his efforts; hence the increased value of his stock in the corporation were profits of his separate property and so they were separate, too.

Thus the court seems consistently to have repudiated the Buchanan approach to the problem of establishing the status of accumulations resulting from the combined use of separate and community property. It is surprising, then, to note in the instant case that the court unequivocally reverts to the Buchanan doctrine. Although the husband in the present case invested $5,000 separate property, none of the increase was held separate property because it was impossible to trace the specific $5,000 through the maze of financial dealings necessary while in the fruit brokerage business. The court in the Brown opinion stated that the borrowed funds were a result of decedent's separate credit. In the present case, no such concessions are made to the husband. The only separate property involved was the $5,000—the community contributed the credit and the effort of a member. Though the court attempts to distinguish the cases on their facts, there seems to be no valid basis for the difference in result. From the standpoint of the presumptions favoring community property, the instant decision is certainly preferable.

L. L.

CONTRACT FOR PAYMENT OF WAGES—STATUTORY INTERPRETATION. In an action to recover wages alleged to be due for labor performed for defendants by plaintiff in a coal mine, defendants established a written agreement entered into between plaintiff and defendant corporation by which plaintiff obligated himself to receive one-half of his compensation in cash and to leave the remainder of his compensation on deposit with his employer for the purpose of developing the coal mine, and, if the property were later incorporated, plaintiff agreed to subscribe for stock in that corporation and pay par value therefor to the amount of the one-half of his wages left on deposit. After the subsequent incorporation of the mine property and the later discharge of the plaintiff, the defendant corporation tendered to the plaintiff certificates of stock of the par value equal to the amount plaintiff had left on deposit. Plaintiff demanded that he be given cash for the shares of stock, and, upon refusal by defendant corporation, instituted an action under REM. REV. STAT., § 7594. In a five-to-four decision, *Held:* The contract was illegal and void, as it was in contravention of the public policy of this state declared by the legislature in REM. REV. STAT., § 7594, which statute is mandatory that wages be paid forthwith, on ceasing work, in lawful money of the United States or by order or check redeemable in cash at its face value in the county where the labor was performed. *Pillatos v. Hyde et al.,* 11 Wn. (2d) 403 (1941).

Only three months before the decision in the *Pillatos* case, the court had had occasion to discuss the wage and employment statute in *Smaby v. Shrauger et al.,* 9 Wn. (2d) 691 (1941). In another five-to-four decision, the court there held that the particular contract involved was not violative of REM. REV. STAT., § 7594. The dissent in the *Smaby* case and the majority in the *Pillatos* case (which included the four dissenters in the *Smaby* case)

failed to look behind the words of the statute to the real purpose or public policy sought to be achieved by its enactment.

It is quite evident that the purpose of the statute was limited to put an end to the evils occasioned by the pernicious practice of certain employers of labor of paying their employees in orders, or checks, drawn upon the employer's company store and redeemable only in commodities rather than in lawful money of the United States, and of the further practice of postponing the day of payment until long after the wages were earned, thus subjecting the laborer to unnecessary expense and delay. That such was the evident purpose of the statute is aptly enunciated in the two leading cases of *Shortall v. Puget Sound Bridge and Dredging Co.*, 45 Wash. 290, 88 Pac. 212 (1907); and, *State v. Chehalis Furniture and Manufacturing Co.*, 47 Wash. 378, 92 Pac. 277 (1907).

There is a lack of pertinent authority to substantiate the holding of the majority in the instant case. The court relied upon only two cases. The case of *Burdette v. Broadview Dairy Co.*, 123 Wash. 158, 212 Pac. 181 (1928), was cited merely for the proposition that where an employer and his or its employee attempt to make a contract of employment *in violation of the clearly expressed provision of the statute*, the natural right of the employer and employee to contract between themselves must yield to what the legislature has established as the law. Not even the dissent, it seems clear, would take issue with such a rule. The difference of opinion occurs over whether the particular agreement involved in the instant case was "in violation of the clearly expressed provision of the statute." The dissent felt that it was not, following a more liberal construction of the statute. The only other authority relied upon by the majority opinion is the case of *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253 (1890). As the dissent astutely pointed out, the contract involved in that case was a perfect illustration of what the wage and employment statutes intend to prohibit, for the employee there agreed to accept his pay in goods and merchandise at the employer's store and waived his *right* to receive his wages in lawful money of the United States. The Indiana court held that the antecedent contract was invalid insofar as it assumed to waive the employee's right to receive his wages in lawful money. The majority in the instant case felt that this case was indistinguishable, in principle, from the case at bar. They considered the plaintiff's agreement to accept shares of stock for a portion of his wages as in fact a waiver of his right to demand and receive his wages in lawful money. The dissent more accurately viewed the transaction as not a waiver of the laborer's *right* to be paid in lawful money, but as a subscription for stock, with a direction to the employer to apply a certain portion of the lawful *money* earned by him to the payment of his stock subscription.

In each of the Washington cases wherein the wage and employment statute has been held to be applicable, the employer had endeavored, by his contract, to postpone the date of final payment of wages in the event the employee ceased work. Nothing of this sort was attempted in the *Smaby* case, where the workman made a contract to relinquish his claim against an insolvent and financially embarrassed employer, in consideration of the substitution of a debtor who was solvent and legally liable in place of the debtor who had been discharged. It is submitted that neither was such a result sought in the *Pillatos* case, where the plaintiff laborer was merely paid partly by satisfying a lawful debt which he had contracted,

a debt which arose out of his agreement to purchase a certain amount of stock to be paid for out of his accrued earnings.

None of the practices or evils aimed at by the statute were involved in either the *Smaby* or *Pillatos* cases. Therefore, it would seem that the contract in neither case violated the spirit of the statute. Nor is the letter of the statue infringed, because, in the *Pillatos* case, what the corporation did was to issue stock in return for the money which plaintiff had left with the corporation for that very purpose.

The dissent in the *Pillatos* case took an enlightened view in holding that "there is no public policy against the making of such a contract, and the statute should not be construed to that effect." It seems that there is no merit in making it against public policy to permit an employer and his employee to enter voluntarily into a contract whereby they agree that the employee will purchase stock in a corporation formed or to be formed by the employer and will apply a portion of the agreed amount of his wages to such purchase. Surely, there would be no doubt of the validity of a transaction by which the same result is reached by the parties' entering into two contemporaneous agreements, one covering merely the amount of the wages to be paid for work performed by the laborer, and the other covering a subscription for stock by the laborer. J. G.

CONVERSION—MEASURE OF DAMAGES. A had a contract which allowed him to cut and remove timber from plaintiff's land for two years. After the termination date of the contract, A continued to cut and remove timber, dumping the logs in a river where some of them were caught, sorted and rafted by B, most of the logs, however, being placed in rafts of C, who sold them and remitted the proceeds to B, who in turn delivered the money to A. Plaintiff sues B and C for conversion to recover not only the original stumpage value of the logs but all additions in value subsequent to the cutting. *Held:* In an action against a converter who was not a party to the original conversion and who has himself converted the chattel subsequent to an addition in value caused by the labor of the original converter the measure of damages depends upon the good or bad faith of the original converter. If the original conversion was *mala fides*, damages should be based upon the market value of the chattel as of the time and place the defendant first exercised control and dominion, but if the original conversion was inadvertent or unintentional, and no bad faith was existing, then damages are based upon the market value of the chattel at the time and place of the original conversion. Since A acted in bad faith, the plaintiff recovered the full value. *Watkins v. Siler Logging Co.*, 9 Wn. (2d) 703, 116 P. (2d) 315 (1941).

The ordinary measure of damages in an action of trover is the value of the chattel at the time of the conversion. Who, then, is to receive the benefit of any increase in value due to the labor and material which has been subsequently attached to the chattel by the converter?

If we strictly follow the ordinary rule of damages, the trespasser would logically receive the increase. Since the measure is to be at the instant of conversion and since the increase in value occurred subsequent to that time, the original owner could not receive the benefit of this increase. Instead, it remains in the hands of the wrongdoer. But, if the owner had elected to replevy the chattel, the owner would have received the increase rather than the trespasser. How to reconcile this anomalous

result? In actions of trover this dilemma has usually been approached by the court's assuming the right to an action in replevin and then examining the state of mind or intent of the parties. That is, if the trespasser were honestly mistaken and his conversion were inadvertent, these facts may be shown in mitigation of damages. *Gunstone v. Chicago, Milwaukee & Puget Sound Ry.*, 79 Wash. 629, 140 Pac. 907 (1914); *John Smith Co. v. Hardin*, 133 Wash. 194, 233 Pac. 628 (1925); *Alma de la Pole v. Lindley*, 131 Wash. 354, 230 Pac. 144 (1924). If the conversion were intentional and willful, the plaintiff may recover the value of the chattel without a deduction for the converter's labor and materials, or, conversely, the value of the chattel at the time of the conversion plus any enhancement in value which the chattel has received. *Fischnaller v. Sussman*, 167 Wash. 367, 9 P. (2d) 378 (1932). The desire to prevent the wrongdoer from gaining by his own wrong led to the forfeiture of his labor and materials, while there was no such reason to penalize the converter who was not in *mala fides* and to overcompensate the plaintiff, so the innocent converter was allowed to retain the value of his efforts and materials. In short, the damages were punitive in the former case and merely compensatory in the latter.

A further complication arises when the original converter sells the enhanced chattel to an innocent purchaser. The technical common law doctrine of conversion holds an innocent purchaser from a converter to be a converter also and the original owner has the same remedies as against any converter. In computing damages the court is again confronted with the dilemma of the plaintiff's alternative remedies and to this is added the fact that the defendant is completely an innocent man. Again, the usual measure of damages, logically followed, would give the original owner the benefit of any increase in value without further reference to the good or bad faith of the original converter. This good or bad faith would be immaterial for the court would simply determine the value (and damages) at the instant of the later conversion and necessarily the increase would be included in the figure. But, following the lead of the previous special rule, the usual rule is again modified. In effect, the subsequent converter is placed in the position of the person from which he purchased, since it is a mere matter of chance that his vendor acted in good or bad faith.

When an innocent third party buys from the innocent original converter the courts are swayed by the obvious injustice which would be worked upon the defendant if a recovery were allowed for the increased value. Here the courts usually find that the defendant will be at least "treated as standing in the shoes of his innocent vendor," *Birmingham Mineral Co. v. Tennessee Coal, Iron & R. Co.*, 127 Ala. 137, 28 So. 679 (1900), and only allow a recovery based on the value of the chattel at the time of the original conversion. *Wright v. Skinner*, 34 Fla. 453, 16 So. 335 (1894); *Hoyt v. Duluth & I. R. R. Co.*, 103 Minn. 396, 115 N. W. 263 (1908).

When the subsequent converter buys from a *mala fide* original converter, almost all courts forget the natural justice and the desire for fair dealing which was used on the obviously innocent defendant and become enmeshed in those technicalities which had so recently been ignored in almost identical circumstances. Most courts now find that they must follow the usual rule of damages, that is, the value of the chattel at the time of the later conversion and include as damages the increase in value.

There are two lines of reasoning used by courts in this situation. The rationale followed in most courts is expressed by the often cited *Wooden Ware Co. v. United States*, 106 U. S. 432, 27 L. Ed. 230, 1 Sup. Ct. 398 (1882). The court there stated that the timber at all times was the property of the original owner. Its purchase by an innocent third party did not divest this right of possession, and *caveat emptor* applies. Since the plaintiff could have acquired full title to the chattel before the sale by suing in replivin, the court would not allow the sale itself to bestow any better title in the defendant. *Central Coal and Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49 (1901); FRYER, PERSONAL PROPERTY (3rd ed. 1938) 651. The courts following a contrary rule agree that the original wrongful converter should be liable for the increased value because he should not gain from his own wrong. But this reasoning cannot apply to the innocent purchaser, for the simple reason that he has done no wrong. It is inequitable "that against those who have done no wrong, these owners should recover three times the value of what they lost." *Railway v Hutchins*, 23 Ohio St. 571, 30 Am. Rep. 629 (1887); *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111 (1903); *But see Godwin v. Taenzer*, 122 Tenn. 101, 119 S. W. 1133 (1909); BROWN, PERSONAL PROPERTY (1936) § 28.

In the instant case it would seem that the Washington court has reached a decision which is inconsistent and palpably unjust. This is especially true in view of the fact that, while most courts allow punitive damages, the Washington court has consistently refused to do so. Whether the damages in the *Watkins* case are frankly called punitive or not is immaterial; the result is the same. The plaintiff is being over-compensated by a judgment against a *bona fide* defendant.

R. ESPEDAL.

EVIDENCE—EXPERT WITNESSES—OPINION ON THE ULTIMATE FACT. In an action to recover monthly payments under an insurance contract with a clause defining total disability as "any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation," two physicians testified to plaintiff's symptoms and to her affliction, diagnosed as thyroid deficiency, which did not respond completely to standard treatment. Then, over the objection that the witness was not qualified and that a conclusion was called for, each physician testified that, in his opinion, plaintiff was unable to pursue any gainful occupation. *Held:* The opinion of the physicians on this ultimate issue was admissible. *Metsker v. Mutual Life Insurance Co. of New York*, 12 Wn. (2d) 618, 123 P. (2d) 347 (1942).

The general rule is that a witness must testify to facts, not opinions, and whenever an inference to be drawn from the facts is within the common experience of men in general, such inference is to be drawn by the jury and not the witness. *Johnson v. Caughren*, 55 Wash. 125, 104 Pac. 170, 19 Ann Cas. 1148 (1909); *Randanite Co. v. Smith*, 172 Wash. 390, 20 P. (2d) 33 (1933). To this rule are two exceptions: (1) A percipient witness may give his opinion when the facts upon which it is based cannot be adequately reproduced to the jury. *Sears v. Seattle Consolidated St. R. Co.*, 6 Wash. 227, 33 Pac. 389 (1893). Thus an ordinary witness who has observed the subject or event can give his opinion upon speed, *Nicktovich v. Olympia Motor Transit Co.*, 150 Wash. 278, 272 Pac. 736 (1928); *Hines v. Foster*, 166 Wash. 165, 6 P. (2d) 597 (1932); distance, "if it is a calcula-

tion rather than a conclusion," *Shelley v. Norman*, 114 Wash. 381, 195 Pac. 243 (1921); *Hamilton v. Cadwell*, 195 Wash. 683, 81 P. (2d) 815 (1938); appearances—that the individual was strong and healthy, *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 54 L. R. A. 586 (1900); *Geortz v. Continental Life Insurance and Investment Co.*, 95 Wash. 358, 163 Pac. 938 (1917); appearances—of the feeling or apparent mental attitude of people who are in frequent association, *State v. George*, 58 Wash. 681, 109 Pac. 114 (1910); appearances—that there had been a scuffle in the room, *State v. Coella*, 8 Wash. 512, 36 Pac. 474 (1894); sanity, *Halbach v. Luckenbach*, 152 Wash. 492, 278 Pac. 178 (1929); mental condition, *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489 (1902); *Rust v. Washington Tool and Hardware Co.*, 101 Wash. 552, 172 Pac. 846 (1918); and degree of darkness, *Blackwell v. City of Seattle*, 97 Wash. 679, 167 Pac. 53 (1917). (2) "Where the question to be determined is one which involves the exercise of special knowledge or skill, persons possessing either education or experience in particular lines may be permitted to express an opinion." *Tacoma and Eastern Lumber Co. v. Field and Co.*, 100 Wash. 79, 170 Pac. 360 (1918). Although Professor Wigmore distinguishes such "experiential capacity" from the opinion rule and maintains that expert testimony should be admitted for the sole purpose of helping the jury and only where it will do such, 2 WIGMORE, EVIDENCE, (3rd Ed. 1940) § 557, pp. 637-8, it seems more rational to classify the admission of expert opinion evidence as an exception to the opinion rule.

In some prior cases an expert witness, in response to a hypothetical question which contained a summary of the facts, has been permitted to give his opinion on the ultimate issue. Thus a doctor was permitted to express his opinion whether treatment given the plaintiff was such as an ordinary skillful physician in the community would have prescribed for the plaintiff's injury, *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406 (1913); a mining engineer has been permitted to express his opinion on the very issue the jury was to decide, *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076 (1913). *See also, Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626 (1909); *State v. Swartz*, 108 Wash. 21, 182 Pac. 953 (1919); *State v. McKeown*, 172 Wash. 563, 20 P. (2d) 1114 (1935).

The rule in the instant case seems very desirable if one agrees with Professor Wigmore that the true theory and purpose of the opinion rule is to exclude superfluous testimony, 7 WIGMORE, EVIDENCE (3rd Ed. 1940) §§ 1918-1922, pp. 10-21; and, conversely, that expert testimony should come in whenever it can be of appreciable help to the jury. 2 WIGMORE, EVIDENCE (3rd Ed. 1940) § 557, pp. 637-638. It would seem pretty clear that the physicians in the instant case are better able than the jury to draw the conclusion concerning the plaintiff's ability to pursue a gainful occupation, and that, consequently, their opinions should be of appreciable help to the jury. Commenting on the view that opinion evidence should not be received when it touches "the very issue before the jury," Professor Wigmore says, ". . . it remains one of those impossible and misconceived utterances which lack any justification in principle." 7 WIGMORE, EVIDENCE, (3rd Ed. 1940), § 1921, p. 19.

C. C. G.

HABITUAL CRIMINAL—VOID SENTENCE—DISCHARGE PROCEDURE. D was convicted of the crime of petit larceny, and was also found to be an habitual criminal. He was sentenced twice, once upon the petit larceny charge, and once upon the habitual criminal charge. Both sentences being void, D sought a writ of *habeas corpus* and an immediate and absolute discharge from all official custody. *Held:* That *habeas corpus* is the proper remedy for a void sentence, but that D was entitled only to a *particular* discharge and not an absolute one. *In re Towne*, 114 Wash. Dec. 511, ... Pac ..... (1942).

This case is the latest of several recent Washington decisions holding the above-mentioned rule. It seems to definitely establish the policy of the Washington court on this subject, which, prior to *In re Cress*, 112 Wash. Dec. 501 (1942), had not been discussed by the court. The same ruling was held in a slightly earlier case, *Blake v. Mahoney*, 9 Wn. (2d) 110 (1941), but no authority at all was given for the decision.

In the *Cress* case, D was given a life sentence as being "guilty of the crime of habitual criminal." He sought a writ of *habeas corpus* and an absolute discharge on the ground that the sentence was void. The court supported his contention that the sentence "for the crime of being an habitual criminal" was void, as there is no such crime as being an H. C., but that is a statute, and in doing so upheld an unbroken line of decisions. *Blake v. Mahoney, supra; In re Lombardi*, 112 Wash. Dec. 497, 123 P. (2d) 764 (1942); *State v. Dooly*, 114 Wash. Dec. 356, 128 P. (2d) 486 (1942). It also held that *habeas corpus* was the proper remedy. Accord. *In re Blystone*, 75 Wash. 286, 134 Pac. 827 (1913); *Williams v. McCauley*, 7 Wn. (2d) 1, 108 P. (2d) 822 (1940); *Voigt v. Mahoney*, 10 Wn. (2d) 157, 116 P. (2d) 300 (1941). Such is the general rule. *See* 25 AM. JUR. 184, Habeas Corpus, § 55; 29 C. J. 51, Habeas Corpus, § 46; note (1932) 76 A. L. R. 468, 495. The court refused to grant an absolute discharge, though it granted a *particular* one, and in doing so for the first time gave Washington's view on this subject. It was virtually an initial declaration of the court's policy, as the *Blake* case, *supra*, while holding to the same rule, gave absolutely no authority for its decision. Justice Millard dissented in the *Cress* case, but it seemed to be a dissent of opinion, as no authorities were cited.

All jurisdictions are not in agreement on the procedure to be followed regarding the custody of a D after his sentence has been found void. Some decisions give a complete discharge. See the note in 76 A. L. R. at page 495, under the subtitle: "Rule Where Sentence Is Void." However, the majority rule appears to be that while the D is entitled to a particular discharge, he may be kept in custody and be again brought before the court for a valid sentence. Decisions supporting this view may be found on page 503, under the subtitle, "Prisoner Remanded for Proper Sentence." Also 25 AM. JUR. 249, § 153; 29 C. J. 175, Habeas Corpus, § 195; *In re Bonner*, 151 U. S. 242, 260, 38 L. Ed. 149, 14 S. Ct. 323 (1893); *State v. Dooly, supra.*

This rule would seem to be the better, because the D has already been found guilty of a crime, and of the status of an habitual criminal. To allow him an absolute discharge would be to permit him to escape punishment, and to perpetrate a gross wrong upon the public at large. This was

the view taken in the *Bonner* case, *supra*. The Washington court is in line with this authority.

The procedure for passing judgment and sentencing the D in an habitual criminal case seems to be clearly decided. It was reiterated in the *Towne* case as the following: (1) Conviction of crime, (2) filing of information charging D with being an habitual criminal, (3) finding that D has the status of an habitual criminal by reason of prior convictions in keeping with REM. REV. STAT. § 2286, (4) sentencing D for the first charged crime, the severity of the sentence to be governed by the allegations in the information charging D as an H. C.—and the verdict of the jury as to the D's status as an habitual criminal. *State ex rel. Edelstein v. Huneke*, 138 Wash. 495, 244 Pac. 721 (1926); *State ex rel. Edelstein v. Huneke*, 140 Wash. 385, 249 Pac. 784 (1926); *State v. Blautz*, 18 Wash. 578, 55 P. (2d) 1057 (1936); *State v. Delano*, 189 Wash. 230, 64 P. (2d) 511 (1937); *State v. Courser*, 199 Wash. 599, 92 P. (2d) 264.

J. C. B.

WORKMEN'S COMPENSATION—APPEAL—REVIEW—JURY TRIALS. In an appeal to the superior court from a workmen's compensation award of the Department of Labor and Industries, a judgment reversing the Department's order was entered upon the verdict of the jury without considering whether or not the evidence had overcome the statutory presumption in favor of the department's order. *Held:* UNDER REM. REV. STAT. § 7697-2 (Supp. 1939). either party in an industrial insurance appeal has the right to a jury trial upon demand, and if the jury's verdict is supported by any substantial evidence it may not be set aside by the court, despite the presumption accorded the board's findings by REM. REV. STAT. § 7679. *Alfredson v. Dept. of Labor & Industries*, 5 Wn. (2d) 648, 105 P. (2d) 37 (1940).

Prior to 1939 the question of whether workmen's compensation appeal cases should be submitted to a jury was within the discretion of the trial court. If the court submitted the facts to the jury, the findings of the jury were deemed merely advisory upon the court. *Hodgen v. Dept. of Labor & Industries*, 194 Wash. 541, 78 P. (2d) 949 (1938). Under this rule the presumption accorded the findings of the department survived.

The legislature in 1939 changed the law relating to jury trials in workmen's compensation appeals by the enactment of REM. REV. STAT. § 7697-2 (Supp. 1939), which reads, "In all appeals to the superior court from any order, decision or award of the joint board of the Department of Labor and Industries, either party shall be entitled to a trial by jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. . . ." As applied in the instant case, this statute makes a jury's verdict binding upon the court irrespective of the preponderance of the evidence, so long as there is some substantial evidence to support the verdict. In *Nelson v Dept. of Labor & Industries*, 9 Wn. (2d) 621, 115 P. (2d) 1014 (1941), despite the fact that the great weight of the evidence was *contra* to the verdict—only one of the several doctors who testified failed to support the department's order—the verdict reversing the department's order was not allowed to be set aside because the evidence offered room for difference of opinion in the minds of reasonable men. This rule was also applied in *Calkins v. Dept. of Labor & Industries*, 110 Wash. Dec. 527, 117 P. (2d) 640 (1941); *Darling v. Dept. of Labor & Industries*, 6 Wn. (2d) 651, 108 P. (2d) 1034 (1940); *Cooper v. Dept.*

of Labor & Industries, 111 Wash. Dec. 155, 118 P. (2d) 942 (1941); *Kuhnle v. Dept. of Labor & Industries*, 112 Wash. Dec. 26, 120 P. (2d) 1003 (1942).

Where the case is tried without a jury the Supreme Court still requires that a judgment reversing an order of the department be supported by a preponderance of the evidence. *Weinheimer v. Department of Labor & Industries*, 8 Wn. (2d) 14, 111 P. (2d) 221 (1941) The *Weinheimer* case demonstrates the advantage the party attacking the department's order gains by requesting a jury trial, as only in the presence of a jury verdict is the presumption of the correctness of the department's decision removed.

By permitting a jury verdict to remove the presumption in favor of the department's decision, this statute will have a tendency to make the hearings of the board merely preliminary inquiries preceding a jury trial. Parties dissatisfied with the board's decision will be encouraged to appeal, thus defeating the purpose of the departmental hearings which was to give a more expert, uniform and less expensive administration of workmen's compensation.

A. R. P.