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RECENT CASES

Appeal and Error—Possible Methods of Review of Action of a Board of County Commissioners. The Pierce County commissioners created a planning commission pursuant to REM. REV. STAT. §§ 9322-1 to 9322-12 [P.P.C. §§ 776-1 to 776-23], and, by various resolutions, established certain types of use districts and general zoning requirements to promote the public health, safety, morals, and general welfare. One type of use district was called a highway-use district, and it was provided that no establishment selling intoxicating beverages could operate in such a district. At a public hearing and on recommendation of the planning commission, the county commissioners refused to grant a petition for removal of zoning restrictions from a certain highway-use district. A few days later the county commissioners, without referring the matter to the planning commission, granted a variance permit to operate a tavern in this highway-use district. *P*, property owner in the district, who had protested the granting of the permit, appealed to the superior court from the commissioners' decision. The tavern operators were permitted to intervene. After a hearing, the exact nature of which was not known, there being no statement of facts and nothing to indicate what procedure was used, the superior court determined that the variance permit was invalid because the commissioners have no power to grant such permits under the above statutes. Appeal by commissioners and intervenors. *Held*: Reversed. The superior court had no jurisdiction to consider an appeal from action of the board of county commissioners because the board was acting under a special statute for a special purpose, and therefore the statute upon which *P* relies for his right to appeal, *i.e.*, REM. REV. STAT. § 4076 [P.P.C. § 480-43], is not applicable. *State* ex rel. *Lyon v. Board of County Commissioners of Pierce County*, 131 Wash. Dec. 337, 196 P. (2d) 997 (1948).

It seems well settled that REM. REV. STAT. § 4076, which makes the procedure on appeals from the justice court to the superior court applicable to appeals from the board of county commissioners, does not apply where the board acts under a special statute for special purposes. Thus in *Lawry v. County Commissioners*, 12 Wash. 446, 41 Pac. 190 (1895), it was held that an appeal to the superior court would not lie from a decision of the board of county commissioners with respect to the removal of a county seat, on the ground that the statute relating to such removal casts special duties on the commissioners, which are separate and distinct from their ordinary duties; and in *Olympia Water Works v. Thurston County*, 14 Wash. 268, 44 Pac. 267 (1896), the court held that the right of appeal from decisions of the commissioners carrying out their general powers and duties was not available to review decisions of the board when acting as a board of tax equalization. The case of *Adams County v. Scott*, 117 Wash. 85, 200 Pac. 1112 (1921), held the general appeal provision inapplicable to action by the county commissioners under the Donohue Road Law. *Cf. Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192 (1901); *James v. McMillan*, 115 Wash. 159, 196 Pac. 881 (1921); *State* ex rel. *Klaas v. County Commissioners*, 140 Wash. 43, 248 Pac. 76 (1926).

It would seem, then, that the only time an appeal can be made in accordance with Section 4076 is when the board has made a decision with respect to its general powers and duties as listed in REM. REV. STAT. § 4056 [P.P.C. § 480-15]. What possible methods of review are open, then, where the board has acted under some special statute for a special purpose, and no appeal procedure is provided in such special

statute? *Adams County v. Scott, supra,* indicates one possibility. It is there said that, even though the case reaches the superior court on direct appeal, if there has actually been a trial *de novo* in the superior court, and the board appears in such action and does not raise the objection of lack of jurisdiction, the court may treat the case as being tried by the consent of the parties as an independent action. From the language used by the court in the instant case, it is apparent that this course would have been followed but for the fact that the record did not show what type of hearing was actually had in the superior court.

A second possible method of review, as indicated in the instant case, is the issuance of a writ of certiorari as authorized by REM. REV. STAT. § 1002 [P.P.C. § 15-3]. This method was used in *State* ex rel. *Klaas v. County Commissioners, supra.* It would seem that this is a perfectly valid method of review, especially where the special statute authorizing the board to act has not provided for an appeal. The legality of the board's action, its jurisdictional power, and all errors of law are reviewable under this method.

Where the basic question is the construction of a statute, as in the *Lyon* case, another method of review might be available. This is the declaratory judgment, provided for in REM. REV. STAT. §§ 784-1 to 784-17 [P.P.C. §§ 65-1 to 65-33]. This remedy has been used rather sparingly to date, especially for questions of statutory construction, but it seems that it could be validly used here. There appears to be no adequate remedy at law, in view of the fact that the special statute under which the board is acting has not provided for any appeal procedure. The cases have also laid down the requirement that there be a justiciable controversy in order to make use of a declaratory judgment. *Inland Empire v. Department of Public Service,* 199 Wash. 527, 92 P. (2d) 258 (1939). This requirement can be easily met in many cases, and is met under the facts of the *Lyon* case, for the parties certainly have direct and substantial opposing interests and are involved in a present actual dispute, as distinguished from one which is possible or potential.

P.T.B.

Code Pleading—Joinder of Causes of Action—Joinder of Parties Plaintiff. *P,* individually, and as administratrix of her husband's estate, brought action against *D* to recover damages for personal injuries to herself and for the death of her husband. Verdict and judgment for *P* on both causes of action. *Held*: Affirmed. No mention was made of the propriety of joining the two causes of action. *Parrish v. Ash,* 133 Wash. Dec. 254, 203 P.(2d) 330 (1949).

In *Lamb v. Mason,* 26 Wn. (2d) 879, 176 P.(2d) 342 (1947), involving precisely the same situation, though the question was not in issue, the court gratuitously stated that the causes could not be joined in the same action. Neither case provides a definitive statement of Washington law on joinder of parties plaintiff, but they raise a doubt as to the result should the point be raised.

An inconsistency exists between REM. REV. STAT. § 296 [P.P.C. § 86-25] and REM. REV. STAT. § 308-2 [P.P.C. § 93-3]. The former, relating to joinder of causes of action, requires that the causes so united "must affect all the parties to the action." The latter provides that "all persons may be joined in one action, as plaintiffs, in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate action, any common question of fact or law would arise." A literal interpretation of the provision for joinder of causes operates to emasculate the provision for joinder of parties plaintiff of its liberal qualities.

No predictability exists as to the future attitude of the court on this subject. In *Koboski v. Cobb,* 161 Wash. 574, 297 Pac. 771 (1931), two minors brought an action for damages arising out of a collision. Two causes of action were stated: one for personal injuries to one minor and a second for personal injuries to the other and for damage to his automobile. The trial court overruled the defendant's demurrer for improper joinder of two causes of action. In affirming, the supreme court referred to Section 308-2, saying that the case fell clearly within this rule, since the causes arose out of the same transaction and contained common questions of fact. That the parties were not similarly affected by both causes, as Section 296 requires, was ignored.

In overruling one defendant's demurrer to a complaint stating actions on two promissory notes and a suit upon a written guaranty in *Capitol National Bank of Olympia v. Johns,* 170 Wash. 250, 16 P.(2d) 452 (1932), the trial court applied Section 308-2. On appeal the supreme court declared that the purpose of that section was to enable parties to be brought in that were in any wise affected by the controversy to determine all subjects of the controversy in one action. Such a declaration would be most salutary in a case involving joinder of plaintiffs, but it seems inapplicable where the issue concerned joinder of defendants.

A better approach is illustrated by *Williams v. Maslan,* 192 Wash. 616, 74 P.(2d) 217 (1937), where it was stated, "When a question arises as to whether there has been a proper joinder of plaintiffs, the acid test under this rule [Section 308-2] is: Does their right to relief arise out of the same transaction or a series of transactions? If their right to relief does not arise out of the same transaction or a series of transactions, the rule furnishes no warrant for joinder." If it does so arise, the inference is that joinder is proper, irrespective of the requirement of Section 296 that all causes of action so united must affect all the parties to the action. Yet in *Bank of California v. American Fruit Growers,* 4 Wn. (2d) 186, 103 P.(2d) 27 (1940), the court returned to the rigid position that two causes of action, though arising from the same contract, cannot be joined unless all parties are affected by all causes.

The zigzag course taken by the Washington court in handling the joinder problem points out the need for further legislation or adoption of additional rules of court to obviate the present confusion. Although a square holding would solve the problem, the period of continued unpredictability while awaiting such a decision is undesirable. The framework for holding that the adoption of Section 308-2 impliedly repealed the conflicting provision of Section 296 is already present in REM. REV. STAT. § 13-2 [P.P.C. § 110-55], which abrogates all laws in conflict with the rules of court therein authorized to be promulgated. Yet, no reference has been made to this section in any of the cases here discussed.

The Supreme Court of California, in the leading case of *Peters v. Bigelow,* 137 Cal. App. 135, 30 P.(2d) 450 (1934), adopted the sensible procedure of holding that the statute liberalizing joinder of parties should be given prevailing effect. The problem in that state was identical with that which still exists in Washington, both statutes being verbatim adoptions of the English pleading reform. CLARK, CODE PLEADING 369 (2d ed. 1947). In New York the liberal view has been adopted by statute. N. Y. CIVIL PRACTICE ACT, § 258, as amended, N.Y. Laws 1935, c. 339. For the Washington court to follow the California lead or the Washington legislature to follow the New York lead, would greatly simplify the problem of the lawyer at the pleading level as well as at the trial stage of litigation.

F.J.C.

Real Covenant as an Encumbrance. *P* contracted with *D* to buy *D*'s land, *D* giving the usual warranty against encumbrances or defects in his title. *P* sues to recover his earnest-money deposit, alleging that the following agreement between *D* and the city of Seattle, appearing in the title report, was an encumbrance preventing *D* from passing clear title:

Agreement to indemnify the City of Seattle against all or any damages to arise by reason of permission to occupy portion of inside parking strip 4 feet back from inner edge of walk by erecting and maintaining therein, in accordance with the application therefor, a concrete garage and rockery in front of and to be used in connection with Lot 1, Block 3, said addition. . . .

Held: The indemnity agreement is not an encumbrance. "Passing the serious question of whether such an indemnity agreement is a right to, or interest in, land, the right to use the parking strip for a garage and rockery might well be, and probably is, a valuable one; and that right, coupled with the indemnity agreement, would not necessarily diminish or depreciate the value of the property, but in all probability would enhance it. We cannot say that such an indemnity agreement is, as a matter of law, an encumbrance." *Merlin v. Rodine*, 132 Wash. Dec. 734 (1949).

This agreement is susceptible of classification as a covenant running with the land, and considerations more directly in point are whether the agreement is a real covenant and, if so, whether the burden of such a covenant is an encumbrance. The court looked mainly to the benefit of the whole agreement and did not discuss the burden of the indemnity covenant at any length. It is true that the right to use the strip enhanced the value of the estate, but it is equally true that the burden of paying inchoate damages rested on *D*. If this burden was so attached to the lot that it passed to *P*, and the further question of whether or not the burden was an encumbrance is answered affirmatively, the result of the instant case should have been judgment for *P*.

The requirements of a covenant running with the land are (1) privity of estate between the covenantor and covenantee and their successors in interest, (2) the end of the covenant which "runs" must "touch and concern" the land, and (3) there must be intent between covenantor and covenantee that the covenant shall run. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 94 (2nd ed. 1947).

The problem of privity of estate has created much confusion in American law among both courts and textwriters. There are three prevailing views. The general American rule, followed in Washington (*see Messett v. Cowell*, 194 Wash. 646, 79 P.(2d) 337 (1938), where the rule was applied without discussion), is that sufficient privity of estate exists when there is a grantor-grantee relationship between covenantor and covenantee. The same succession of interest must exist between the assigns of either party in order that the covenant run. CLARK, *op. cit.*, 111. The "Massachusetts" privity requirement is more stringent, and requires a "mutuality of interest" in the sense that both covenantor and covenantee have an interest in the land outside of the covenant; CLARK, *op. cit.*, 128; which is satisfied if an easement is granted in the contract. *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885), *Morse v. Aldrich*, 36 Mass. 449 (1837). The third view requires only privity of contract between covenantor and covenantee. CLARK, *op. cit.*, 131, *165 Broadway Building Co. Inc. v. City Investing Co.*, 120 F.(2d) 813 (C.C.A. 2nd 1941).

In the instant case there was a transaction in which a right in the nature of an easement in the parking strip was conveyed by the city to *D*, and *D* covenanted to pay for any damages resulting from his use. This easement conveyance would satisfy the Massachusetts privity requirement, and *ipso facto* the majority requirement. *165 Broadway Building Co. v. City Investing Co., supra.*

The test of when a covenant "touches and concerns" land has been variously stated. See Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914);

Aigler, *Note and Comment,* 17 MICH. L. REV. 93 (1919); CLARK, *op. cit.,* 96. (Clark suggests that it is impossible to state any absolute test, and that the question is one for the court to determine in the exercise of its best judgment upon the facts of each case.) Broadly, the test is whether the legal relations of the parties *as owners of land* are affected by the covenant, or whether they are affected by the contract only as *persons. Neponsit Property Owner's Ass'n v. Emigrant Industrial Bank,* 278 N.Y. 248, 15 N.E. (2d) 793 (1938); *165 Broadway Building Co. v. City Investing Co., supra.* If the covenant is personal as to either the benefit or burden, that end of the covenant cannot run.

In the principal case the burden on *D* is a money payment which appears personal but actually does touch and concern *D's* land. It is not the promise itself which is examined, but the effect of the promise on the legal relations of the promisor as the owner of land which is decisive. "A promise to pay for something to be done in connection with the promisor's land does not differ essentially from a promise by the promisor to do the thing himself, and both promises constitute, in a substantial sense, a restriction upon the owner's right to use the land, and a burden upon the legal interest of the owner. On the other hand, a covenant to perform or pay for performance of an affirmative act disconnected with the use of the land cannot ordinarily touch or concern the land in any substantial degree. Thus, unless we exalt technical form over substance, the distinction between covenants which run with the land and covenants that are personal must depend on the legal effect of the covenant on the legal rights which otherwise would flow from ownership of the land and which are connected with the land." *Neponsit Property Owner's Ass'n v. Emigrant Industrial Bank, supra.* In the instant case the duty to pay for damages will arise only when something done on the land itself, and in relation to the land, creates the liability in *D* and therefore the burden can be said to touch and concern the lot.

As to the third requirement, that of intent, the problem in the principal case is easier. The common law rule was that the word "assign" must be used when the covenant related to a thing not *in esse* at the time the contract was formed. *Spencer's Case,* 5 Coke 16a, 77 Eng. Rep. 72 (Q.B. 1583). How strong this rule is modernly is questionable. In *Sexauer v. Wilson,* 136 Iowa 357, 113 N.W. 941, 14 L.R.A. (N.S.) 185, 15 Ann. Cas. 54 (1907) the court said: "Our conclusion is that the word 'assigns' is not used in a technical sense and as the only word appropriate for the purpose, but that equivalent words, or any clear manifestation of intent, will suffice." The *Sexauer* case was cited with approval in *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.,* 102 Wash. 608, 173 Pac. 508 (1918), and appears to properly state the general rule. *Masury v. Southworth,* 9 Ohio St. 340 (1859), *Fowler v. Kent,* 71 N.H. 338, 52 A. 554 (1902). Of course, where the words "heirs and assigns" are used, there is no problem. *Ellensburg Oddfellows v. Collins,* 68 Wash. 94, 122 Pac. 602 (1912).

Was the burden of the covenant an encumbrance? The court said no, and reached this result on a test which appears inconsistent with the test applied in a similar situation in *Hoffman v. Dickson,* 65 Wash. 556, 118 Pac. 737 (1911). From the language of the opinion in the principal case, the court evidently looked at the whole transaction between *D* and the city, and by balancing the probable benefit of the easement in the parking strip against the burden of the indemnity covenant decided that the agreement as a whole was not so burdensome that it could be classed as an encumbrance.

However, this broad test—that of balancing the benefit of the whole transaction against its burden—is not the strict one applied in *Hoffman v. Dickson.* There the plaintiff, who was held liable in *Biggs v. Hoffman,* 60 Wash. 495, 111 Pac. 576 (1910) to pay one-half the cost of erecting a party wall because of the covenant to that effect of his predecessor in title, sued his grantor alleging that the burden of the party wall

covenant was a breach of a covenant of warranty given him by the grantor. The court refused to look to the benefit plaintiff would derive from his use of the party wall, and said it was no defense for the defendant grantor to point out that the benefit derived from the agreement rendered the burden less harsh; nor did they listen to the grantor's argument that the value of the land was not depreciated by the agreement. Thus in the *Hoffman* case, the court considered only the burden of the covenant as the encumbrance, and affirmatively refused to balance the benefit of the agreement against its burden in determining whether the burden constituted an encumbrance—the direct opposite of the test applied in the instant case. See also *Green v. Tidball,* 26 Wash. 338, 67 Pac. 84, 55 L.R.A. 879 (1901).

From the foregoing analysis, it appears that both of the questions presented could have been answered affirmatively and, unless the doctrine of encumbrances in Washington has been restricted by the case, the decision should have been for *P*. Perhaps a more logical holding would be that a technical legal encumbrance arising out of a transaction which in fact materially benefits the estate conveyed is not sufficient to constitute a breach of a warranty against encumbrances, *contra* to the *Hoffman* case. For cases holding the burden of a real covenant as a breach of a covenant against encumbrances, see *Burbank v. Pillsbury,* 48 N.H. 475, 97 Am. Dec. 633 (1869); *Fraser v. Bentel,* 161 Cal. 390, 119 Pac. 509, Ann. Cas. 1913B 1062 (1911).

C.P.M. JR.

Probate—Award in Lieu of Homestead—Fractional Award. *P*'s wife died intestate February 1, 1947, leaving as her sole heirs *P* and a minor daughter. The estate consisted of a home valued at $6,500, household furniture worth $500, and other property totaling $1,454.68. *P* petitioned for an award in lieu of homestead of the value of $4,000, as provided by REM. REV. STAT. § 1473 (Supp. 1945) [P.P.C. 45 § 205-1], and asked that the award include the household furniture, plus an undivided 35/65 interest in the home. The trial court refused the award. *P* appeals. *Held*: Reversed. An undivided interest in the home is "property of the estate" within the meaning of the statute. Therefore, it is proper to award such an interest equivalent in value to the statutory amount where the value of the home exceeds $4,000. In re *Williams' Estate,* 31 Wn. (2d) 303, 196 P.(2d) 340 (1948).

This decision removes the uncertainty created by In re *Small's Estate,* 27 Wn. (2d) 677, 179 P.(2d) 505 (1947); Note, 23 WASH. L. REV. 70 (1948). In the *Small* case, the court held that it was error to award to the surviving spouse a home having a value in excess of the statutory amount, even though such award was made subject to a lien in favor of the estate for the excess. The court did not indicate the correct procedure to be followed where the home has a value in excess of the statutory amount. The resulting uncertainty is demonstrated by the refusal of the trial judges in the principal case and in the later case of In re *Cooper's Estate,* 132 Wash. Dec. 440 (1949) to award to the surviving spouse an undivided interest equivalent in value to the statutory amount. This method of coping with the practical problem created by recent inflation of property values, as suggested in the *Washington Law Review,* has now been approved by the supreme court. Note, 23 WASH. L. REV. 70 (1948).

The practical consequences of the method followed by the trial judge in the *Small* case and the method now approved by the *Williams* case are of interest. The effect of the procedure attempted by the trial court in the *Small* case was to give the surviving spouse a preferential right to buy the interest in the property in excess of the statutory

amount. The effect of the *Williams* case is to defer the problem to some later stage in the probate proceeding or to some later disposition by the voluntary action of the parties. The court calls attention to the fact that under the statutes of descent a 15/65 interest in the property (being one-half of the 30/65 interest remaining after the award of 35/65 to *P*) will go to *P* on final distribution. The court goes on to suggest, obviously by way of dictum, that the trial court in the final decree of distribution may assign the child's 15/65 share to the surviving spouse and require him to secure its value to the child. If this is done, the end result will be the same as that sought by the trial judge in the *Small* case, but the procedure will be more strictly in accord with the statute. This procedure is authorized by the literal terms of REM. REV. STAT. § 1533 [P.P.C. § 192-19], which deals with the final decree of distribution of an estate, but the supreme court has not previously discussed the application of this statute to this problem.

If the matter is not thus solved by application of Section 1533, the surviving spouse would take as a tenant-in-common with the other heirs and devisees, with the right of any such tenant-in-common to compel partition. Since, as a practical matter physical partition of the residential property would be impossible in substantially all cases, a partition proceeding would require a sale, with the result that the surviving spouse (unless the successful bidder at the sale) would be compelled to take money in place of the home. This result would defeat the primary purpose of the statute which is to permit the surviving spouse to obtain the home. Therefore, the suggested procedure under Section 1533 offers the better solution as opposed to the more direct approach rejected by the court in the *Small* case as contrary to Section 1473.

P.A.K.

Taxation—Business and Occupation Tax—Compensating Tax. *P*, a manufacturer of plywood doors, seeks to recover taxes collected from him as a manufacturer under the Business and Occupation Tax, REM. REV. STAT. § 8370-4 (Supp. 1943) [P.P.C. § 965-1], and taxes collected under the Compensating Tax, REM. REV. STAT. § 8370-31 (Supp. 1943) [P.P.C. 967-1]. The taxes were levied on the production and use by *P* in his own furnaces of "hogged fuel." "Hogged fuel" consists of ground up wood scraps left over from *P's* manufacturing operation. *P* uses part of the fuel so produced to supply all his own fuel needs, sells as much as he can, and dumps the rest. The only taxes in dispute here are those levied on that portion of the fuel used by *P* himself. *Held*: judgment for *P* affirmed. The hogged fuel is not itself "manufactured" since it is only the waste product of *P*'s primary manufacturing operation, that of making plywood doors. Thus the manufacturers' tax cannot be rightfully imposed on *P* as to hogged fuel. Nor was the compensating tax properly applicable to the use of the fuel. By its terms this tax is imposed on " the privilege of using within this state any article of tangible personal property produced or manufactured for commercial use." *P*'s use of the fuel in his own furnaces was *industrial* rather than *commercial*. *Buffelen Lumber and Mfg. Co. v. State*, 132 Wash. Dec. 49, 200 P.(2d) 509 (1948).

As to manufacturers' taxes paid after May 1, 1949, the problem of the instant case is moot. By amendments to that tax statute, the 1949 legislature specifically made the Manufacturers' Tax applicable to by-products. Wash. Laws 1949, c. 228, § 1, REM. REV. STAT. § 8370-4 (Supp. 1949). The future of the compensating tax is not clear. It too was amended in 1949 and the "commercial use" requirement was eliminated so that the tax is now imposed on the use of articles "manufactured by the person so using the same." Wash. Laws 1949, c. 228, § 7, REM. REV. STAT. § 8370-31 (Supp. 1949). Oppon-

ents of the tax may argue that it still isn't applicable since the definition of "use" or "using" therein requires an active *assumption* of "dominion or control over the article" and one cannot actively assume dominion over articles manufactured by him and already in his possession. Wash. Laws 1949, c. 228, § 9, REM. REV. STAT. § 8370-35(b) (Supp. 1949). This argument loses weight in the face of language in the amendment clearly intended to apply the tax to situations just such as this. The question of the construction to be given these statutes is an important one, especially as to taxes collected prior to the amendment. This is well demonstrated by a recent decision of the superior court of Thurston County where two lumber companies successfully sued for the return of manufacturers' and compensating taxes paid by them on lumber which they manufactured and used in the construction and repair of their own buildings; also a major oil company, relying on the *Buffelen* case, has applied to the Tax Commission for a refund of all compensating taxes paid by it on the gasoline it produced and then used in its own delivery trucks and other vehicles.

The opinion is open to criticism on several grounds. Ground up wood scraps are a marketable commodity and are clearly "manufactured" even though not the primary product of *P*'s manufacturing operation. To hold that valuable by-products are not "manufactured" within the meaning of the act is to exempt many commodities from its operation, an unnecessary result and undoubtedly not one contemplated by the legislature.

In deciding that *P*'s use of the fuel was not a taxable use under the compensating tax because it was *industrial* rather than *commercial,* the court has reached what again seems to the writer to be an undesirable result. Though the Washington State Tax Commission has collected a compensating tax on by-products such as hogged fuel in the past and the legislature has never sought to modify the law (until after this decision), the court declined to follow the rule that where a statute is ambiguous the interpretation of a commission charged with its administration controls. *Smith v. Northern Pacific R. Co.* 7 Wn. (2d) 652, 110 P.(2d) 851 (1941). The rule was rejected on the ground that it applies only where a statute is ambiguous, and this statute is not ambiguous. Granted that it is not; still the interpretation given it by the Tax Commission ought to be controlling for another reason—because the statute expressly leaves the determination of what constitutes a commercial use to the commission. The act supplies four definitions of commercial use, the last of which is, "Any other use of products extracted or manufactured on a commercial scale under such rules and regulations as the Tax Commission shall prescribe." REM. REV. STAT. § 8370-5 (L-4) (Supp. 1943) [P.P.C. 965-3]. See also REM. REV. STAT. § 8370-35(e) (Supp. 1943), [P.P.C. 967-13]. Pursuant to this authority the Tax Commission determined that the use in question is a commercial use. As an example of a use taxable under the compensating tax the commission states: "The use of lumber by the manufacturer thereof to build a lumber shed for himself." *Rule 134, Rules Relating to the Revenue Act* (1947). Both lumber and hogged fuel are marketable commodities and any distinction between the quoted example and the facts in the instant situation, drawn on the ground that hogged fuel is a by-product while lumber is not, is not persuasive. Again opponents of the tax will argue that this is an unconstitutional delegation of legislative power in violation of Art. 2, Sec. 1 of the state Constitution. That position is untenable in view of the clearly defined limits of applicability contained in the Compensating Tax Act.

In an attempt to define what *would* be a commercial use the court has further confused the issue by saying that an article is used commercially if "it . . . is sold in the ordinary way of selling commodities of this kind and delivered to the purchaser." The negative inference from this statement would render the compensating tax completely inapplicable to any articles consumed by the manufacturer thereof, since obviously such

articles are never sold and delivered to a purchaser. Such a result was not intended by the legislature and probably not contemplated by the writer of the opinion, which states elsewhere that the tax *would* apply to the use by a manufacturer of his own goods if that use were a commercial use. The compensating tax is imposed on the use of property (1) purchased at retail or (2) manufactured for commercial use. This distinction in the mode of acquisition was evidently made by the legislature "to effect equality as to the Compensating Tax liability of consumers who purchase property at retail and those who use property manufactured by themselves." *Rule 134, Rules Relating to the Revenue Act* (1947). The decision in the *Buffelen* case seems to ignore this function of the compensating tax entirely.

W.A.H.

Unemployment Compensation—Shutdown by Agreement. An employer and a union bargaining agency entered into a vacation agreement under which the employer could, and did, shut down his plant to give vacations with pay to certain of his employees. Other union employees, not entitled to vacations, applied for unemployment compensation, which was granted by both the commissioner and the superior court. On appeal, *held*: Reversed. In re *Employees of Buffelen Lumber & Manufacturing Co.*, 132 Wash. Dec. 218, 210 P.(2d) 194 (1948).

The court reasoned that the claimants were not entitled to benefits, inasmuch as they were voluntarily unemployed, referring to the period of unemployment as a leave of absence. The immediate effect of this decision makes this type of agreement, relating to shutdowns for vacations, undesirable from the employees' viewpoint, for some will be entirely without compensation for the duration of the shutdown. More important is the question raised by the basis of this decision as to the status of employees whose bargaining agencies agree to uncompensated shutdowns made necessary by weather conditions, a need for retooling, or other causes beyond the control of the employees. In the event that the shutdown is of lengthy duration, will the employees be found to be on a prolonged leave of absence? If so, it would seem that the policy of the Unemployment Compensation Act would be thwarted, since the employees are unemployed through no fault of their own, and they are the ones who are the intended beneficiaries of the unemployment reserves. Wash. Laws 1945, c. 35 § 2; REM. REV. STAT. § 9998-141 (Supp. 1945) [P.P.C. 45 § 923b-53].

The Act also provides that any agreement by an individual to waive or release his rights to benefits is void. Wash. Laws 1945, c. 35 § 182; REM. REV. STAT. § 9998-321 (Supp. 1945) [P.P.C. 45 § 923b-55]. By entering into a vacation agreement similar to the one in the instant case, an employer in effect obtains a valid waiver of rights, since the employer has a right to close his plant, and were it not for the agreement the employees would be involuntarily unemployed and hence entitled to benefits under the Act. In addition, the decision might impose a penalty for union membership. In *Rhea Mfg. Co. v. Industrial Commission*, 231 Wis. 643, 285 N.W. 749 (1939), a nonunion employee was held not to be bound by the union's demands for increased wages which led to a layoff, and hence not voluntarily unemployed. Thus a nonunion employee receiving the benefits of the bargaining agency's agreements would not have agreed to the shutdown under vacation agreement, and might be eligible for unemployment benefits; whereas the union employees, bound by the agreement, would be taking a leave of absence without compensation of any type.

There would seem to be no satisfactory solution to the problem posed by the facts of the instant case. On the one hand, the purpose of the Act is to pay benefits, out of a temporary fund created by enforced contributions, to those unemployed through no fault of their own. On the other hand, is the danger that employers will utilize such agreements to maintain labor needed only for peaks of production, by relying upon compen-

sation payments to keep such labor in the area. The all-or-nothing approach does not seem to be the final answer. It is interesting to note that the problem has been similarly treated by the courts of two other jurisdictions in the only reported cases on this point which this writer has been able to discover. *Mattey v. Unemployment Compensation Board of Review,* 164 Pa. Super. 36, 63 A.(2d) 429 (1949); *Moen v. Director of Division of Employment Security,* ..... Mass. ....., 85 N.E. (2d) 779 (1949).

W.B.H.

Workmen's Compensation—Occupational Disease. An employee contracted asthma from breathing smoke in the air at the lumber mill of appellant employer. He claimed and was granted compensation for suffering "disability from an occupational disease in the course of an extrahazardous employment." REM. REV. STAT. § 7679-1 (Supp. 1941) [P.P.C. § 705-5]. The award was sustained by the Joint Board and the superior court; the employer appealed on the ground that asthma is not an occupational disease within the meaning of the statute. *Held*: Affirmed. Although the employee's asthma was admittedly not an occupational disease as previously defined by the court, the legislature has since redefined the term by statute so as to include it. *Simpson Logging Co. v. Dept. of Labor and Industries,* 132 Wash. Dec. 466, 202 P.(2d) 448 (1949).

Until 1937 the Washington statute covered only occupational accidents; disability from occupational disease was not compensible. Sholley, *Workmen's Compensation,* 16 WASH. L. REV. 153 (1941). In 1937 the coverage of the act was extended to include disability or death from specified diseases if the claimant was employed in an occupation named in connection with each specified disease. Wash. Laws 1937, c. 212 § 1. In 1941 the act was amended to its present form, extending broad coverage over occupational disease similar to occupational accident coverage. REM. REV. STAT. § 7679-1 (Supp. 1941) [P.P.C. § 705-5]. The new act entitles "each workman who shall suffer a disability from an occupational disease in the course of an extrahazardous employment" to compensation. The old system of enumerated diseases and employments was abandoned in favor of the following general standard: "Within the contemplation of this act, 'occupational disease' means such disease or infection as arises naturally and proximately out of extrahazardous employment."

Prior to the instant case the court had never authoritatively construed "arising naturally and proximately out of extrahazardous employment." However, the court had previously defined "occupational disease" in another connection before passage of the 1941 act, as follows: an occupational disease must be peculiar to a given occupation, caused by harmful conditions which are constantly present in that occupation, and all the workmen in a given industry must be exposed to them. *Seattle Can Co. v. Dept. of Labor and Industries,* 147 Wash. 303, 265 Pac. 739 (1928); *Polson Logging Co. v. Kelly,* 195 Wash. 167, 80 P.(2d) 412 (1938). In other words, the disease must be within the special risk which makes that occupation especially dangerous. A similar concept was implicit in the 1937 statute which specified only diseases peculiar to a given occupation as compensible. In three decisions subsequent to the 1941 act, the court reiterated the old definition, implying that it applied to the new statute, though in each case it was dictum. See *Romeo v. Dept. of Labor and Industries,* 19 Wn. (2d) 289, 142 P.(2d) 392 (1943); *St. Paul & Tacoma Lumber Co. v. Dept. of Labor and Industries,* 19 Wn. (2d) 639, 144 P.(2d) 250 (1943); *Rambeau v. Dept. of Labor and Industries,* 24 Wn. (2d) 44, 163 P.(2d) 133 (1945).

In the principal case the employee's asthma is not an occupational disease within the old definition because it is not peculiar to lumber mill workers. Thus the court

was forced to decide whether the old definition applied to the new statute. Sweeping aside its prior dicta, it held that the old definition is not controlling; the 1941 statutory definition of "occupational disease" was intended by the Legislature to change the law.

The court then proceeded to redefine "occupational disease" in the familiar terminology of proximate cause: " the condition of the extrahazardous employment must be the proximate cause of the disease for which claim for compensation is made, and the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the extrahazardous employment." The introduction of proximate cause into the occupational disease formula makes workmen's compensation almost as unpredictable as ordinary tort recovery, and so tends to defeat somewhat the insurance coverage aspect of the act. However, this new definition will undoubtedly increase awards made for occupational disease and thus be another step in the gradual broadening of workmen's compensation coverage.

M.C.T.