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Rights of a Vendee under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on the Washington Law

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RIGHTS OF A VENDEE UNDER AN EXECUTORY FORFEITABLE CONTRACT FOR THE PURCHASE OF REAL ESTATE. A FURTHER WORD ON THE WASHINGTON LAW

ALMOST two years have passed since the six-three[1] decision in *Ashford v. Reese*,[2] holding that in this state an executory *forfeitable* contract for the sale of real estate creates no title, legal or equitable, in the vendee. Since that time a Department of the Court has once reaffirmed the doctrine,[3] and the legislature has initiated, but not consummated, an attempt to change the rule.[4]

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[1] The majority opinion of Mackintosh, J., was concurred in by Fullerton, Mitchell, Holcomb, and Main, JJ., Askren, J., concurred reluctantly, on the theory that a rule, though questionable, had been so long followed; Tolman, C. J., and Bridges and Parker, JJ., dissented.

[2] 132 Wash. 649, 233 Pac. 29 (1925).

[3] *Peck v. Farmers National Bank*, 137 Wash. 627, 243 Pac. 861 (1926). This case rests on *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 Pac. 658 (1913), stating that this latter case was followed in *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925). It is pointed out later in this article that the *Tieton Hotel Co.* case appears to be overruled by *Roy v. Vaughn*, 100 Wash. 345, 170 Pac. 1019 (1918). *In re Kuhn's Estate*, 132 Wash. 678, 233 Pac. 293, was decided on the same day as *Ashford v. Reese* and rests on the same theory.

[4] Substitute House Bill No. 170, Extraordinary Session, 1925, entitled, "An Act relating to contracts for the sale of real property," reads as follows:

"Section 1. A contract for the sale of real property, when acknowledged by the vendor, may be recorded in the same manner as a deed of the property, and when recorded shall be constructive notice to subsequent purchasers and encumbrancers of the rights of the vendee under the contract.

"Sec. 2. If real property in the possession of a vendee under an executory contract for the purchase thereof be destroyed or damaged without fault of the vendor, the vendee is not thereby relieved of his obligation to perform. A vendee is deemed to have possession if he has the right thereto and the vendor has not actual possession."

This bill passed the House with a vote of 75—2 (House Journal 1925, p. 224). In the Senate this bill was unanimously passed in an amended form (Senate Journal, p. 455) by striking out all but the enacting clause and sub-

It is not the purpose of this brief article to reiterate what has heretofore been discussed both in the opinions of the Court and in these pages;[5] but merely, for the sake of completeness, to refer to some of the Washington cases not heretofore referred to in this controversy, in either the majority or dissenting opinion or elsewhere, because they have been misdigested and lost in the books. The most significant cases are perhaps *State Ex rel. Trimble v. The Superior Court,*[6] *Crowley v. Byrne,*[7] *and Roy v. Vaughn*[8] The astonishing feature of the first case is that it expressly repudiates the doctrine which is now the rule of the Court, stating that the rule of the vendees' equitable ownership is,

> "so firmly settled against the contention of the relators by a train of uncontroverted authority that it is now beyond the realm of legitimate controversy."

In the case of *State Ex rel. Trimble v. Superior Court,*[9] the question arose whether the vendee under an executory *forfeitable* contract to

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stituting therefor the following (which was almost *verbatim* Senate Bill No. 254, introduced in the Senate earlier in the session)

"Section 1. An executory contract for the sale of real property to be valid at law must be in writing and signed by both vendor and vendee. The vendee shall thereby acquire an equitable interest in such property, subject to becoming forfeited or divested on default of any payment as provided in the contract or default in the performance of any other covenant or promise on his part to be kept and performed in the manner provided in such contract or in such manner as may be in accord with the principles and practice of equity. Accidental destruction, in whole or in part, of the property described in such contract while the same is executory, or other accidental change in the condition of the property, or the taking or damaging of the whole or part of the property by the exercise of eminent domain, shall not relieve the vendee of his obligation to pay the purchase price or perform any other covenant therein to be performed by him unless expressly so provided therein. The vendee, having paid the full purchase price and kept the covenants and conditions to be performed by him, shall be entitled to a deed of conveyance from the vendor in manner and form as provided in such contract. Such contract, when acknowledged by vendor in the manner and form provided for acknowledgment of conveyances of real property, shall be entitled to record in the office of the auditor of the county where such property is situated, and when so recorded and properly indexed, shall be constructive notice to all the world of the rights and interest therein of the vendor and vendee as set forth in such contract. Provided, that the plaintiff in any action on such an executory contract wherein part or whole of the remedy sought is possession of the premises the plaintiff may apply for and obtain possession and the defendant may retain possession by means of the summary proceeding provided in sections 819, 820 and 821 of Remington's Compiled Statutes of Washington, 1922."

The House refused to concur in the amendment and requested that the Senate recede. This the Senate refused to do, and asked for a conference. (House Journal, 1925, pp. 562, 594; Senate Journal, 563). And there the bill died.

[5] P John Lichty, "Rights and Estates of Vendor and Vendee under an Executory Contract for the Sale of Realty." 1 WASH. L. REV. 9.

[6] 31 Wash. 445, 72 Pac. 89 (1903).

[7] 71 Wash. 444, 129 Pac. 113 (1912).

[8] 100 Wash. 345, 170 Pac. 1019 (1918).

[9] See note 6, *supra.*

purchase real estate was entitled to damages in a condemnation proceeding. In holding that the vendee's interest was real property, and that he was therefore entitled to damages, the Court said (p. 452)

> "And, such being the law in this state, the learned counsel for the relators contend that the relators have no estate, either legal or equitable, therein, *and they cite several authorities holding, in effect, that in law the vendee in a mere executory contract for the sale of land obtains no real property or interest in real property that the relations between the parties to the contract are wholly personal, that the vendee's right is a mere thing in action, and that it is only when the vendee performs, or offers to perform, all the acts necessary to entitle him to a deed, that he has an equitable title and may compel a conveyance.* We have no doubt that, as between the parties to a contract for the sale and purchase of land, the vendee therein named does not became the full equitable owner until he performs or offers to perform all the acts necessary to entitle him to a conveyance of the land and to a specific performance of the contract in a court of equity; but it does not necessarily follow that a vendee in such a contract has no interest or estate whatever in the land covered by the agreement, which may not be controlled or divested by law. (p. 453) It (the respondent corporation) simply seeks, as we have already said, to appropriate, condemn, and acquire the entire interest of the relators in said tide lands, namely, their *equitable ownership* thereof, and their entire interest in said agreement with the State of Washington for the sale and conveyance thereof; and also the entire apparent interest of said Remsberg and wife therein, all subject to the obligation imposed by the terms of said agreement upon the vendee therein named, and his assigns, to pay to the state the balance of the purchase price therein specified, with interest as therein provided for. *We are clearly of the opinion that counsel are in error in assuming that the relators have, as between themselves and the railroad company no interest in the lands in controversy,* which is subject to be taken under the power of eminent domain. (p. 454). The interest of the relators is, to say the least, *an interest in land,* and as such may be taken for a public use by condemnation, upon payment of just compensation thereof (p. 455). "

The Court then refers to the decision of *Martin v. Scofield,*[10] in which it is held that the vendee in an ordinary land contract with right of possession, is to be regarded as the equitable owner, and, after quoting at length from that decision, our Court, per Anders, J., says as follows: (p. 459)

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[10] 41 Wis. 167 (1876).

> "The doctrine announced in the case last cited as to the relation between the parties to a valid contract for the sale of land is so firmly settled against the contention of the relators *'by a train of uncontroverted authority that it is now beyond the realm of legitimate controversy.* This doctrine of 'equitable conversion' has been applied in a great many cases and under divers circumstances."

Thereupon the Court *quotes* at length from a great many authorities, including the leading English case of *Lysaght v. Edwards,*[11] holding that an executory contract for the purchase of real estate changes the ownership in equity, and that the purchaser becomes the equitable owner of the land. Among other things, the Court supports its position with the following significant statement (p. 461)

> "The doctrine of equitable conversion has also been frequently invoked in determining upon whom should fall the loss, and who should be entitled to the insurance, if any, in case of destruction by fire of buildings situated upon land under an executory contract of sale."

A number of cases are cited to support the foregoing statement in all of which it is held that the vendee, being the equitable owner, should bear the loss. This appears to be the only statement that our Court has made, prior to *Ashford v. Reese, supra,* with reference to who shall bear the loss where the land in question is held under an executory contract of sale; and while risk of loss from destruction by the elements was not squarely in issue in that case, the argument of the Court assumes, and the conclusion reached in that case recognizes, that the vendee, being the equitable owner, suffers the loss whether it be one imposed by law, as in a condemnation proceeding, or accomplished by the elements, such as fire.

Then the Court, after quoting with approval the statement from LEWIS ON EMINENT DOMAIN to the effect that "the vendee under an executory contract of sale is the equitable owner," concludes as follows (p. 462)

> "It seems clear to us, in view of the foregoing authorities, that *the relators must be regarded as the real owners of the lots in question, subject only to the right of re-entry and forfeiture* on the part of the state in the event of a failure on their part, or that of their successors or assigns, to pay the balance of the purchase price according to the terms of the state's contract."

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[11] 1 L. R. 2 Ch. Div. 499 (1875).

The Court then quotes from *Washington Iron Works Company v. King County,*[12] in which the Court said.

> "In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer, and dispose of as they choose; and the state cannot deprive them of this right. The naked legal title is in the state, but for one purpose only—to secure the unpaid purchase price."

This case, then, stands for the doctrine that under an executory *forfeitable* contract for the purchase and sale of real property, the vendee acquires an equitable interest in land.

The *Trimble* case, *supra,* has been interpreted by the federal courts, following the state law, as holding that the vendee under an executory contract of sale becomes the equitable owner thereof.

In *Scofield v. Baker,*[13] Neterer, District Judge, concludes that the vendee under a contract for the purchase and sale of real estate, is the equitable owner thereof, after a review of a number of Washington cases.[14]

In the appeal of the same case to the Circuit Court of Appeals for the Ninth Circuit,[15] the question arose whether an executory contract for the purchase of real estate on which there was still a number of installments due, constituted real property or personal property in the hands of the vendee. In that case the receiver of an insolvent bank under an order authorizing him to sell certain *personal* property, assumed to convey the vendee's interest under an executory contract of sale. The Circuit Court of Appeals in holding that the receiver's action with without right and authority, said as follows:

> "But there is a stronger reason why the order of the court was insufficient to confer upon the receiver authority for the assignment to Simpson. The assets to be sold were stated to consist of 'bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments on stockholders of said bank, and other personal and chattel property and evidence of indebtedness.' The order of the court in terms applied only to personal property. Under the decisions of the Supreme Court of the State of Washington, the interest of the bank in the tide land *under the agreement to purchase was real*

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[12] 20 Wash. 150, 54 Pac. 1004 (1898).

[13] 212 Fed. 504, 508 (1914).

[14] *Washington Iron Works Co. v. King County,* 20 Wash. 150, 54 Pac. 1004 (1898), *State ex rel. Wilson v. Grays Harbor and Puget Sound Ry. Co.,* 60 Wash. 32, 110 Pac. 676 (1910), *State ex rel. Trimble v. Superior Court,* 31 Wash. 445, 72 Pac. 89 (1903), *State v. Frost,* 25 Wash. 134, 64 Pac. 902 (1901), *Hotchkin v. Bussell,* 46 Wash. 7, 89 Pac. 183 (1907).

[15] 221 Fed. 322, 329, 136 C. C. A. (9th Circ.) 320 (1915).

estate. Washington Iron Works v. King County 31 Wash. 150, 54 Pac. 1004, *Trimble v. Superior Court,* 31 Wash. 445, 72 Pac. 89, *State Ex. rel. Wilson v. Grays Harbor & Puget Sound Railway Company* 60 Wash. 32, 110 Pac. 676."

In the case of *Crowley v. Byrne,*[16] the Court went still further. It was there held that a mere option contract which had not yet reached the stage of a binding executory agreement for the purchase and sale of land, *gave the holder of the option an interest in real estate.* In that case the Court refused to follow a line of authorities holding that an option does not vest in the holder of the option an interest in land, and chose to follow a line of authorities holding that the granting of an option to purchase constitutes the grantee the equitable owner of an interest in real property. Interestingly enough, the conclusion in that case was based in part on a case deciding that the holder of an option to purchase real estate was entitled to the insurance money payable for damage to the property on which the option was held, after the making of the contract for the option, but before the exercise of the option, on the theory that the mere making of the option, even before its exercise, gave the holder thereof an equitable interest in real estate.[17] Following that line of reasoning our Court concludes (p. 450)

> "We are of the opinion that as between parties the option contract gave appellant *an interest in the land* such as respondents were bound by, having notice thereof, even though, at the time they acquired the quit claim deed from Sarah J. Waits, appellant had not exercised his option or paid any part of the purchase price, and that upon receiving the deed from Sarah J. Waits within the life of the option, thus evidencing the exercise of the option on the part of appellant and the receipt of the purchase price on the part of Sarah J. Waits, the title acquired by appellant related back to the date of his acquiring the option."

This case has never been overruled or referred to, and creates the anomalous situation that the holder of a mere option has an equitable interest in land, whereas the holder of a binding executory contract of purchase has not.

In *Roy v. Vaughn,*[18] *supra,* where *the contract was executory and contained a forfeiture clause,* the Court said.

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[16] See note 7, *supra.*

[17] *People St. Ry. Co. v. Spencer* 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 221 (1893).

[18] See note 8, *supra; Roy v. Vaughn,* note 3, *supra.* Respondent's Brief, p. 2: "The contract is in usual form and contains a forfeiture paragraph."

> "We have here nothing more than the relation between the vendor and vendee in the ordinary contract of sale and purchase wherein the vendor retains the legal title as security for the payment of the purchase price, covenanting that, when so paid, he will convey the land to the vendee, a relation analogous to that of mortgagor and mortgagee. When default is made in such a contract, the vendor may, as in other cases, either affirm or disaffirm the contract. In the first case, which is the remedy here sought, he seeks enforcement of the contract by either suing at law, for the amount due, or foreclosing it in equity, as he would a mortgage given to secure the payment of money, there being 'no sensible distinction between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.' JONES, LIENS (3d. ed.), § 1108."

In the foregoing case the forfeiture clause was directly in issue and was not overlooked. The original complaint sought enforcement of the forfeiture clause, the amended complaint sought recovery of the balance due, to have that amount declared a lien, and to have the lien foreclosed. The point was squarely decided that this change did not constitute an election of remedies, because certain conditions precedent to invoking the forfeiture clause had not been complied with.

Moreover, it seems a safe contention to make that the case of *Roy v. Vaughn, supra,* is a repudiation of *Tieton Hotel Co. v. Manheim,*[19] and *dicta* from the cases on which it is based. In the first place, in the legal conception of the relation between vendor and vendee in an executory forfeitable contract the cases are opposed. Furthermore, an examination of the briefs in *Roy v. Vaughn, supra,* shows that the apparent conflict between *Tieton Hotel Co. v. Manheim,*[20], and *Taylor v. Interstate Investment Co.,*[21] was argued in the briefs and the language in the *Tieton* case, *supra,* shown to be out of harmony

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[19] 75 Wash. 641, 135 Pac. 658 (1913).

[20] See note 19, *supra.*

Roy v. Vaughn, note 3, *supra.* Respondent's Brief, p. 26: "The above section of Pomeroy, on page 502 [Reference is to second edition; in fourth edition see 1 Pomeroy Eq. Jur. pp. 686, 688] is appended a note which makes clear the apparent ambiguity in the Washington cases (*Taylor v. Interstate Investment Co.* and *Tieton Hotel Co. v. Manheim,* 75 Wash. 641)."

The note from Pomeroy referred to, which is set forth in full in the respondent's brief, reads as follows:

"It is a great mistake, opposed to the fundamental notions of equity, to suppose that the equity maxim does not operate, and the vendee does not become the equitable owner until and as far as he has actually paid the stipulated price. This erroneous view has sometimes been suggested, and sometimes even held in a few American decisions; but it shows a misconception of the whole equitable theory."

[21] 75 Wash. 490, 135 Pac. 240 (1913). See discussion of the conflict in 1 WASH. L. REV. 9, 17.

with the general law Therefore, it seems a safe assumption that when the Court used the above quoted language in *Roy v. Vaughn,*[22] where an executory *forfeitable* contract was before the Court, and cited *Taylor v. Interstate Investment Co.,*[23] in support of the above quotation, the language in *Tieton Hotel Co. v. Manheim, supra,* was disapproved and overruled and the theory of the *Taylor* case, *supra,* adopted as to forfeitable executory contracts. It is unfortunate that the *Tieton* case, *supra,* was not expressly repudiated rather than repudiated merely by implication.

Roy v. Vaughn, supra, was followed in *Barton v. Tombari,*[24] although in that case the contract did not contain a forfeiture provision.

Our Court then has often committed itself to the doctrine that the vendee under an executory *foreitable* contract to purchase real estate acquires an equitable interest in land. As said in *State Ex rel. Trimble v. Superior Court,*[25] *supra,* this doctrine

> "is so firmly settled against the contention of the relators 'by a train of uncontroverted authority' that it is now beyond the realm of legitimate controversy."

The case of *Reddish v. Smith,*[26] to which the present doctrine that the vendee has no interest in land is usually traced, was written by Judge Dunbar, the question there not being squarely in issue. It is to be observed that the decision of the *State Ex rel. Trimble v. Superior Court,*[27] *supra,* in which the question is discussed at length, with many appropriate quotations, for ten pages and the conclusion reached that the vendee has an equitable interest in real estate was written by Judge Anders and concurred in by Judges Dunbar, Fullerton, Mount and Hadley. The case of *Crowley v. Byrne*[28], *supra,* in which it was held that the holder of a mere option to purchase acquired an equitable interest in real estate, was concurred in by Judges Parker, Mount, Crow, Gose and Chadwick. The decision in *Roy v. Vaughn,*[29] *supra,* was approved by Judges Morris, Holcomb, Ellis, Mount and Chadwick.

Moreover, the decision in the case of *Schaefer v. Gregory Company* [30] which may be said to be the leading case for the recent doctrine,

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[22] See note 8, *supra.*
[23] 75 Wash. 490, 135 Pac. 240 (1913).
[24] 120 Wash. 331, 207 Pac. 239 (1922) 124 Wash. 696, 214 Pac. 170 (1923).
[25] 31 Wash. 445, 459, 72 Pac. 89 (1903).
[26] 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781 (1894). See discussion of this case in 1 WASH. L. REV. 9, 13.
[27] See note 6, *supra.*
[28] See note 7, *supra.*
[29] See note 8, *supra.*
[30] 112 Wash. 408, 192 Pac. 968 (1920).

is squarely contrary in result to *State ex rel. Trimble v. Superior Court*,[31] *supra*. In the latter case it was held that the vendee under a forfeitable executory contract, being the equitable owner, was entitled to damages in a condemnation proceeding, whereas in the former case (without any reference to the *Trimble case, supra,* and without overruling it) the Court held that the vendee under an executory contract was not the equitable owner and therefor not entitled to damages in a condemnation proceeding.

Furthermore, the case of *Schaefer v. Gregory Co., supra,* is rested on cases all decided prior to *Roy v. Vaughn, supra,* principally *Tieton Hotel Co. v. Manheim, supra,* and *Converse v. LaBarge*,[32] which follows it. Hence we have the anomalous situation of *Schaefer v. Gregory Co., supra,* being rested on impliedly overruled cases, and of this same case being the sole authority cited by the majority of the Court in *Ashford v. Reese, supra.*

It now seems to be the law of this state that where a contract does not contain a forfeiture clause the vendee has an equitable interest in land which may be foreclosed. (See *Taylor v. Interstate Investment Co.*,[33] *Barton v. Tombari*,[34] *Stevens v. Irwin*,[35].) However, where the contract contains a forfeiture clause, the vendee has no interest in land either legal or equitable. (See *supra, Schaefer v. Gregory Co.*,[36] *Ashford v. Reese*[37].) Is it logical to say that a forfeiture clause, which does not purport to make any declaration as to the character of the title conveyed by the contract, but merely to operate upon the title conveyed, whatever it may be, shall be construed to determine the very nature of the title conveyed? If so, may it not be argued with equal force that a lease containing a forfeiture clause, does not convey any element of title to the lessee?[38] Yet it has never been so held.

If the Court now endeavors to maintain its most recent position with reference to the rights of the vendee under an executory contract of sale, by making a distinction between an executory contract containing a

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[31] See note 6, *supra.*
[32] 92 Wash. 282, 158 Pac. 958 (1916).
[33] See note 23, *supra.*
[34] See note 24, *supra.*
[35] 132 Wash. 289, 231 Pac. 783 (1925). According to *Roy v. Vaughn,* foreclosure may also be had if the contract contains a forfeiture clause.
[36] See note 30, *supra.*
[37] See note 2, *supra.*
[38] It is true that in a lease a legal estate is conveyed to the lessee, whereas in an executory contract, under the established equity rule, merely, an equitable estate is conveyed. But this distinction can, on principle, have no bearing on the effect of a forfeiture clause.

forfeiture clause and one not containing a forfeiture clause, it is sufficient to say that neither at law nor in equity has such a distinction ever been made. Moreover, it does not seem logical to say that the vendee has no interest in real estate because his interest may be forfeited. The very provision for forfeiture assumes that he has an interest and that interest, not a mere chattel interest, but such an interest as the vendee would have under the applicable law, because the forfeiture clause does not assume to change the character of the interest acquired by the vendee but merely to forfeit that interest, whatever the law says it consists of. It is not the forfeiture clause which, *ipso facto*, negatives the vendee's having an equitable interest in land. The same equity jurisprudence which gives the vendee an equitable interest also recognizes the propriety and enforcibility of forfeiture clauses; for while equity abhors a forfeiture, it will nevertheless, in a proper case enforce it.[39]

The established doctrine of equity and the one that is regarded by the overwhelming weight of authority as in accord with sound policy and practice, is that the vendee under a forfeitable executory contract acquires an interest in land, upon which a judgment is a lien, which may be attached, and upon which execution may be levied,[40] and which is devisable by the vendee, and descendible to his heirs as real estate.[41] If our Court would now so hold (which it is not too late[42] to do in view of the conflicting holdings in our decisions, and the different views which different members of the present Court have taken at different times) the rule in this state would again be in accord with the virtually uniform current of authority elsewhere and make it unnecessary for the legislature to intervene.

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[39] 10 R. C. L. 331.

[40] See in *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 461, 72 Pac. 89 (1903), the approved quotation from *Fish v. Fowlie*, 58 Cal. 373 (1881). See also legal incidents of the relation as stated in *Mark v. L. & L. & G. Ins. Co.*, 159 Minn. 315, 198 N. W 1003 (1924).

[41] See in *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 461, the approved quotation from *King v. Ruskman*, 21 N. J. Eq. 559 (1870).

[42] In view of the conflicting decisions down to very recent date and of the fact that the late cases by inadvertence rest on decisions previously impliedly overruled, it is respectfully submitted that no fixed rule of property has been established. Moreover, this Court has not hesitated to overrule cases relating to community property. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917) *Olive Co. v. Meek*, 103 Wash. 467, 175 Pac. 33 (1918).

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