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Recent Cases

A. G.

of the Law School of the University of Wyoming, in 1922. In 1923, Dean Shepherd went to Stanford, where he served as Associate Professor of Law until 1926, and as Professor of Law from 1926 to 1929. During this period, Dean Shepherd taught summer school classes at Columbia University and the University of Minnesota, as visiting professor. In 1929 he became Professor of Law at the University of Chicago, in which position he served until appointed to the deanship of this Law School.

Dean Shepherd brings with him to Washington a thorough understanding of the problems of the modern law school, and a determination to keep Washington abreast of the leading law schools of the country in quality of teaching, library facilities, and scholarship of students.

NEW LAW SCHOOL BUILDING

It is with great satisfaction that the University of Washington Law School, and its friends, greet the recent announcement that the Board of Regents have authorized the construction of a new four-story building designed exclusively for a law school. It is understood that plans for the building are practically completed, and construction will begin early in the year, so that the building will be ready for occupancy in the autumn quarter of 1932. The building will contain seven class rooms equipped with modern built-in desk type seats; seminar rooms; twelve faculty offices; and a large library reading room with accommodations for three hundred students. The library stacks will provide room for about 175,000 volumes. One of the features of the building of particular interest to those in the active profession, is the provision for commodious quarters for the Bar Association members who desire to make use of the facilities of the Law School Library.

NEW FACULTY MEMBERS

Two new members were added to the faculty of the University of Washington, beginning with the Fall quarter of 1931. Professor J. W Richards, LL.B., LL.M., and S.J.D., comes to the University from Harvard, and will teach, among other subjects, Torts and Evidence. Professor John Ritchie, III., LL.B., and S.J.D., comes from the Yale Law School, and is teaching the subjects of Wills, and Introduction to Law.

RECENT CASES

SALES—CONDITIONAL SALES—RETENTION OF POSSESSION BY VENDOR. An automobile dealer entered into a conditional sales contract with one of its salesmen for the conditional sale of an automobile. This contract, along with the document of assignment to plaintiff finance company, was filed in the auditor's office of the county wherein at the time of taking possession, the vendee resided. The car, however, was kept in possession of the dealer, and mingled with the others for sale on the floor at the dealer's place of business, of which facts plaintiff had notice. The dealer thereafter sold the car to defendant, who paid by check and the transfer of his old car, for which he received $1,000, the total purchase price of the car in question being $1,700. No bill of sale was filed by the finance company under the retention of possession act. (Rem. Comp. Stat., 5827.) Defendant had no actual notice of the conditional sales contract. Plaintiff brought an action of replevin. *Held*. Judgment for defendant, on the ground that plaintiff's failure to file a bill of sale under Rem. Comp. Stat., 5827, precluded him from claiming title from a purchaser in good faith. The court also considered the case under the theory of comparative innocence, holding that defendant was the more innocent of the two parties, and found it unnecessary to view the case in the light of the Uniform Sales Act (Laws 1925, Ext. Sess. Ch. 142). *Northwestern Finance Co. v. Russell*, 61 Wash. Dec. (5) 349, 297 Pac. 186 (1931)

The result of the principal decision that a buyer who leaves his vendor in possession cannot recover as against a subsequent innocent purchaser for value from the vendor, is in accord with the weight of authority under

the Uniform Sales Act, Sec. 25 (Rem. 1927 Supp., 5836-25) *Kearby v. Western States Securities Co.*, 31 Ariz. 104, 250 Pac. 766 (1926) *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511 (1912) *Stem v. Crawford*, 133 Md. 579, 105 Atl. 780 (1919) *Tripp v. National Shawmut Bank*, 263 Mass. 505, 161 N. E. 904 (1928) *Halliwell v. Trans-States Finance Corp.*, 98 N. J. Law 133, 118 Atl. 837 (1922) *New England Auto Investment Co. v. St. Germaine*, 45 R. I. 225, 121 Atl. 398 (1923) *Flynn v. Garford Motor Truck Co.*, 149 Wash. 264, 270 Pac. 806 (1298). The decisions cited above reach their conclusions solely through the Uniform Sales Act, *supra*, and not by reference to any recording statute, such as Rem. Comp Stat., 5827.

Undoubtedly, it is true in Washington, that a buyer who has left his vendor in possession cannot file under Rem. Comp. Stat., 5827, in order to protect himself as against an innocent purchaser for value, since the Uniform Sales Act, *supra*, has supplanted and repealed it. 3 *Wash. Law Rev.* 166, *and note.* Outside the Sales Act, the authority seems to be evenly divided as to whether retention of possession by the vendor is constructive or presumptive fraud. *Gump Investment Co. v. Jackson*, 142 Va. 190, 128 S. E. 506 (1925) *Warrant Warehouse Co. v. Cook*, 209 Ala. 60, 95 So. 282 (1922). The court by failing to apply Sec. 25 of the Uniform Sales Act has lost an opportunity to establish the rules of this state under an uniform and commercially acceptable statement, which by its application would have saved them much of the "difficulty" mentioned in the case. The act reads: "Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." This section ignoring Rem. Comp. Stat., 5827, which would seem to have no effect, appears to cover the entire case.

The court finds a great deal of difficulty in deciding whether the purchaser is innocent. They evidently have overlooked Sec. 76(2) of the Uniform Sales Act, which states: "A thing is done 'in good faith' within the meaning of this act when it is done honestly, whether it be done negligently or not." This definition virtually enacts a rule of law. WILLISTON ON SALES (2d ed.) Vol. II, p. 558, Sec. 619; *Wooley v. Crescent Automobile Co.*, 83 N. J. Law 244, 83 Atl. 876 (1912). This definition is taken directly from that used in the Negotiable Instruments Act, according to Mr. Williston, WILLISTON ON SALES, *Supra*, and is the England law, *Jones v. Smith*, 1 Hare 43. (See page 1566, Vol. II, WILLISTON ON SALES for further citations.)

The court's holding that the filing of a conditional sale contract is not sufficient constructive notice to a vendee where the goods remain in the possession of the vendor is in accord with former Washington cases, *Flynn v. Garford Motor Truck Co., supra*, and the weight of authority, under the Sales Act, *Halliwell v. Trans-States Finance Corp., supra, Kearby v. Western States Securities Co., supra,* and outside of it, *Warrant Warehouse Co. v. Cook, supra, Gump Investment Co. v. Jackson, supra.* This is so because the two filing acts are intended for two different purposes, the former to protect the seller, *C. I. T. Corporation v. First National Bank*, 33 Ariz. 483, 266 Pac. 6 (1928), and the latter to protect the vendee, *Flynn v. Garford Motor Truck Co., supra.*

It is unfortunate that the court spends so much time reviewing the case under the theory of comparative innocence because the theory probably has no foundation in law. Anyway it is not desirable in a commercial subject, since it leads to uncertainty and difficulty. In the principal case, the application of the Sales Act would have obviated any necessity for the further enlargement of this theory. The result of the case seems correct, however, especially from a commercial standpoint. *Gump Investment Co. v. Jackson, supra, Kearby v. Western States Securities Co., supra.*

A. G.

EVIDENCE—RES GESTAE—OPINION OF A BYSTANDER. The following question was asked on cross-examination of defendant stage-driver in an auto accident case:

> "Let us ask you whether or not immediately following the accident a gentleman came up to you and expressed himself very critically to you about the way that you were driving, .?"

Although counsel objected, the driver was obliged to answer, "He did." Judgment for the plaintiff was reversed, the court holding: The record fails to show that the speaker had any connection with the accident. He was a mere bystander. Assuming the expression was sufficiently near in time and place and also spontaneous; still, it is not admissible under the *res gestae* rule because there was no expression of fact, the gentleman's opinion only being conveyed. *Field v. North Coast Transportation Co.*, 64 Wash. Dec. 89 (1931).

In reference to *res gestae* statements, Washington has adopted the rule of spontaneity. *Heg v. Mullen*, 115 Wash. 252, 197 Pac. 51 (1921). We have been rather liberal in admitting declarations after the happening of the main event, having permitted statements in evidence after eight days (during which the declarant was unconscious) *Britton v. Washington Water Power Co.*, 59 Wash. 440, 110 Pac. 20, 140 Am. St. 858, 33 L. R. A. (n.s.) 109 (1910) three hours; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111 (1902) two hours; *Walters v. Spokane International Ry.*, 58 Wash. 293, 108 Pac. 593 (1910) one hour· *Whiting v. Seattle*, 144 Wash. 668, 258 Pac. 824 (1927) *Star v. Aetna Life Insurance Co.*, 41 Wash. 199, 83 Pac. 113 (1905) and one-half hour· *Lucchesi v. Reynolds*, 125 Wash. 352, 216 Pac. 12 (1923).

Declarations of bystanders are admitted, *Britton v. Washington Water Power Co., supra,* but the declarant must have some connection with the transaction, *Dixon v. Northern Pacific Ry.*, 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 2 Ann. Cas. 620, 107 A. S. R. 810 (1905) must not be in a place too far away or speak prior to the accident; *Barnett v. Bull et al.*, 141 Wash. 139, 250 Pac. 955 (1926) although prior statements have been allowed, *Heg v. Mullen, supra, Mathewson v. Olmstead*, 126 Wash. 269, 218 Pac. 226 (1923) The third party's statement must characterize the principal act. *Crock v. Magnolia Milling Co.*, 147 Wash. 589, 266 Pac. 727 (1928).

Our court has refused remarks as *res gestae* on the ground that they were narration of a past event. *Hobbe v. Northern Pacific Ry.*, 80 Wash. 678, 142 Pac. 20 (1914). In regard to this last proposition a note in 42 L. R. A. (n.s.) 918 comments that all verbal *res gestae* after an accident are narrative, and a case that discards the evidence as narration "without considering the proximity of time or the probability of the truth of the matter," is not of much value.

It is submitted that a similar comment might be made about cases which discard certain statements as *res gestae*, by simply saying they are opinion. Many statements which are admitted have an element of opinion about them; so if a declaration is refused on that ground, the reasoning behind the decision should be given. Without going into their correctness, the following decisions are listed as examples of the court refusing a bystander's evidence as opinion, giving few reasons and no authorities; *Baird v. Webb*, 160 Wash. 589. — Pac. — (1931) *Crook v. Magnolai Milling Co., supra, Riggs v. Northern Pacific Ry.*, 60 Wash. 292, 111 Pac. 162 (1910) *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776 (1909).

This lack of authorities might be explained by the case of *Walters v. Spokane International Ry., supra,* which quotes from WIGMORE ON EVIDENCE, Vol. 3, Sec. 1700, page 2256, to the effect that supreme courts waste much time in trying to create precedents in the *res gestae* field because each case, in the long run, must be treated upon its own circumstances. We must observe that these remarks are directed specifically to the question of the contemporaneousness of a *res gestae* declaration, but it might easily be that our court has been influenced to this attitude toward the entire subject of *res gestae* evidence.

If one is troubled by seeming inconsistencies in the admission and rejection of *res gestae* statement, he may be helped by remembering that they must relate to matters about which the declarant could testify if called as a witness in court. This is pointed out in part in the case of *Sullivan v. Seattle Electric Co.*, 51 Wash. 71, 97 Pac. 1109, 130 A. S. R. 1082 (1908). For example: a witness may give his opinion as to the speed of an object; *Heg v. Mullen, supra,* but not as to the degree of fault of some participant in an act; *Baird v. Webb, supra.*

Applying this test to the principal case, it would appear that it has been decided correctly. Since the declarant could not testify in court that he was of the opinion the bus-driver was at fault, the plaintiff should not be permitted to create the impression that such was his opinion by claiming his remarks to be within the *res gestae.* A. D.

MORTGAGES—NATURE OF CONVEYANCE—RIGHTS OF MORTGAGEE—RENTS AND PROFITS. This suit was brought on behalf of a trustee appointed by the owner and mortgagor to collect rents from certain properties. Along with the appointment an assignment was made of rents to the trustee for the purpose of paying interest on the loan of the mortgagee and for other designated purposes. The appointment was provided for in the mortgage and thereafter notice was given to the tenant to pay rents to the trustee. Still later the mortgagee advanced money to pay delinquent taxes, at which time the mortgagor and mortgagee agreed that the amount advanced should be added to the amount secured by the mortgage, at the same time authorizing the trustee to pay out of the rentals collected, the principal, interest, insurance premiums and certain repairs. The tenant of the mortgagor defaulted and a receiver was appointed. This action was brought to require the receiver of the tenant to pay a reasonable rental to the plaintiff as trustee.

In the present action the mortgagor opposes the claim of her assignee, plaintiff, for the rents. The lower court refused to issue a writ. But the Supreme Court held that the receiver should pay a reasonable rental to the trustee to be dispersed in accordance with the terms of the trust. Justice Millard dissented. *State of Wash. ex rel. Allen v. Sup. Court of King Co. et al.*, 64 Wash. Dec. 437, 2 Pac. 2nd 1095 (1931).

The basis of the majority opinion is not clear, as the court state that Sec. 804 of Wash. Comp. Stat. is not applicable to the facts stated. This section reads:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law."

Justice Millard considers that the above section is applicable and dissents on the basis that a provision allowing the mortgagee the rents and profits prior to foreclosure is against public policy as therein expressed.

While the assignment of rents and profits to a trustee for the purpose of paying the mortgagee may possibly not be considered a mortgage, it is undoubtedly equivalent thereto at least where such assignment is made to the mortgagee. If there is a question of public policy involved to the effect that the mortgagor, by reason of the statute, may not give possession of real property until foreclosure and sale, it seems quite clear that the giving of rents and profits before this time is equally invalid as being equivalent to possession. It should be equally clear that the policy of the law may not be evaded either by express terms in the mortgage covering rents and profits, or indirectly by an assignment of rents and profits to the mortgagee.

As an original proposition, it might well have been urged that Sec. 804 of Wash. Comp. Stat. was intended to cover only those cases where there was no stipulation as to rents and profits. It is to be noted that the statutes in some states are so worded. While it is possible to distinguish the cases of *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715 (1898) and *Western*

Loan & Bldg. Co. v. Mifflin, 62 Wash. Dec. 18, 297 Pac. 743 (1931) from the present case yet the court in each instance expressed itself and cited with approval from cases to the effect that a stipulation that the mortgagee should have possession prior to foreclosure was void as against the policy of the statute. These cases relied on *Teal v. Walker* 111 U. S. 242, 28 L. Ed. 415 (1884 which was a case involving an Oregon statute, which at that time was identical to our present act. It is interesting to note, however, that the Oregon statute has since been amended so as to permit an assignment of rents and profits. See Or. Laws 5-112.

In view of the expression in the earlier decisions it would seem that Justice Millard's dissent was well taken. On the other hand the statute might well be construed to be applicable only to those cases where there is a mortgage of real property, not including rents and profits. In this connection it is well to note the case of *The Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625 (1905), which holds that where a mortgagee acquires possession under a void foreclosure sale he may retain such against the mortgagor. It is somewhat difficult to harmonize a view that possession in the mortgagee is contra to public policy with the doctrine that where the mortgagee gets possession with the consent of the mortgagor or by void foreclosure sale in good faith he may retain it against said mortgagor. On this point see TIFFANY ON REAL PROPERTY, 2nd p. 2433.

On an examination of the whole case, it seems quite clear that the court was squarely faced with the problem of the policy of the statute, *supra*. In view of this it is rather unfortunate that the court said " under the facts here present, we hold that this section of the code is not applicable," rather than meeting the question unqualifiedly

H. S.

BOUNDARIES—DEEDS—RIGHTS OF RIPARIAN OWNER. Plaintiff acquired by deed certain described land "excepting that portion lying easterly of a line parallel to and ten (10) feet west of the present course of Black Jack Creek." Plaintiff brings trespass to enjoin defendant, a later grantee of the identical portion excepted in the plaintiff's deed, from building a fence ten feet west of the west bank of the stream. The court in giving judgment to the plaintiff *held that* "course" was equivalent to "watercourse" and meant simply a "stream usually flowing in a definite channel, having a bed and banks." As a conveyance of land bounded by a stream extends to the middle of the stream, so the conveyance to ten feet west of a stream means ten feet west of the middle of the stream. *Rossi v. Sophia*, 63 Wash. Dec. 105, 300 Pac. 522 (1931).

Although the general view is that deeds conveying land to a non-navigable stream convey to the thread of the stream, *State ex rel. Davis v. Superior Court*, 84 Wash. 252, 146 Pac. 609 (1915) *Wardell v. Commercial Watercourse District No.* 1, 80 Wash. 495, 141 Pac. 1045 (1914) *Western Electric Co. v. Jersey Shore Realty Co.*, 93 N. J. Eq. 587, 117 Atl. 398 (1922) *Allott v. Wilmington Light & Power Co.*, 288 Ill. 541, 123 N. E. 731 (1919) yet this is only a presumption and yields to a clearly expressed intent to exclude it, *Commissioners Commercial Waterway Dist. No.* 2 *v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042 (1913) *Jennings v. Marston*, 121 Va. 79, 92 S. E. 821 (1917) and see *Wardell v. Commercial Watercourse Dist. No.* 1, *supra*, *State ex rel. Davis v. Superior Court, supra*, *Stewart v. Turney*, 237 N. Y. 117, 142 N. E. 437, 31 A. L. R. 960 (1923)

On analysis, it would appear that the rule is predicated upon two conditions. First, the deed must convey the land up to the stream so that it is abutting; the words used are generally "to," "on," "by" or "bounded by" the stream. Second, a clearly expressed intent by the grantor to exclude the underlying portion of the stream must be lacking. Practically all the cases involve the second condition alone, for the land is usually abutting; thus, "to the bank," *Commissioners Commercial Waterway Dist. No.* 2 *v. Seattle Factory Sites Co., supra*, *Moore v. Provost*, 205 Mich. 687, 172 N. W 410 (1919) "to a stake on the bank," "to a tree on a bank," *Ham-*

mond v. Ridgeway, 5 Harr. and J. 256, 9 Am. Dec. 522 (1821) *Lapish v. Bangor Bank*, 8 Me. 85 (1831).

The underlying theory is that once having parted with his land abutting the stream, the grantor has no use for that portion underlying the stream and so must have intended to convey it to the grantee, *In re Opening of West Farms' Road in New York City*, 212 N. Y. 325, 106 N. E. 102 (1914) and see 10 L. R. A. 208, note, 42 L. R. A. 502, note.

In the main case, however, the deed doesn't purport to convey up to the stream; on the contrary, it expressly uses the words "excepting" that portion lying easterly of a line parallel to and ten feet west of the stream. Instead of being the terminus of a line running to it, the stream is the starting point of a line ten feet long running from it. Moreover, this case is to be distinguished from cases where the stream is the starting point and the line running from the stream includes the land coveyed itself, *Whiteside v. Oasis Club*, 187 S. W 27 (1916) for here the line is run from the stream to determine the western boundary of the land conveyed—the grantor retaining the land inside of the line next to the stream.

Clearly, if the court had defined "course" as meaning the thread of the "course" was equivalent to "watercourse," see *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314 (1889) *Rigney v. Tacoma Light and Power Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425 (1894) and that "watercourse" was a sream there would have been no question; however, the court held see *Att'y Gen. v. Hudson R. R. R. Co.*, 9 N. J. Eq. (1 Stockt) 526, 550 (1853)

It would seem that the parties would be presumed to have meant the starting point to be the edge of the stream and not the thread. See *Dodd v. Witt*, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700 (1885) JONES ON CONVEYANCING, Sec. 465. The physical difficulties encountered in measuring from the center would generally be such that the parties would be presumed to have taken the edge as the starting point. Especially in a case like the instant one, where the stream averages twenty feet in width and any variation would have the effect of placing the boundary partly on land and partly on water, would the parties seem to intend the edge as the starting point.

Even though no such presumption would be raised, it would seem that the word "course" being defined as it was, would give rise to a latent ambiguity and parol evidence would be admissible, see *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891 (1890) 1 GREENLEAF ON EVIDENCE, Secs. 286, 287 288; 22 CORPUS JURIS, 1199, 1182.

In conclusion, it would appear that these preceding factors are determinative of the question, and the logic embodied in the statement "as a conveyance of land bounded by a stream conveys to the center, so a conveyance to ten feet of the stream means to ten feet from the middle of the stream" would seem to be fallacious insomuch as it assumes the very point in controversy. E. W J.