Washington Law Review

Volume 8 | Number 1

5-1-1933

Injunction—Removal of Encroachments by an Adjoining Owner; Injunction—Successive Appeals as Nuisance; Landlord and Tenant—Action for Failure to Deliver Premises; Landlord and Tenant—Forfeiture Clause in Lease; Shipping—Limitation of Liability of Shipowners; Vendor and Purchasee—Misrepresentations by the Vendor or His Agent; Workmen's Compensation Act—Who Is Employer

H. H.

RECENT CASES

INJUNCTION—REMOVAL OF ENCROACHMENTS BY AN ADJOINING OWNER. The plaintiff seeks a mandatory injunction to compel the removal of that portion of defendant's concrete building which encroaches on plaintiff's lot not more than 3⅝ inches at the point of maximum encroachment. Upon a finding that the encroachment was neither wilful nor as a result of negligence and that the cost of removing it would be disproportionate to the benefit that would accrue to the plaintiff by its removal, the California Supreme Court refused to grant the mandatory injunction but awarded damages of $200. *Blackfield v. Thomas Allec Corp.*, 17 Pac. (2d) 165 (Calif. 1932).

The equity courts have generally recognized mandatory injunction as a proper remedy for a landowner to invoke against an adjoining owner to compel the removal of structures which encroach upon the plaintiff's land and generally grant it where the encroachment is either wilful or negligent, even though the expense of removing the encroachment is disproportionate to any actual benefit which might accrue to the person on whose property the building encroaches. *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534 (1909) *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402 (1911) *Szathmary v. Boston and A. R. Co.*, 214 Mass. 42, 100 N. E. 1107 (1913) *Trunnell et. ux v. Tonole et al.*, 104 Ore. 628, 208 Pac. 583 (1922) *Antillia Protective Assoc. of Chicago v. Wolfsohn*, 244 Ill. App. 71 (1927). See Annotation in 14 A. L. R. 831.

However, it is well recognized that the granting of this form of relief is discretionary with the equity court, *Harrington v. McCarty*, 169 Mass. 492, 48 N. E. 278 (1897) *Herman v. Hartwood Holding Co.*, 183 N. Y. Supp. 402, 193 App. Div. 115 (1920), and provided the encroachment is neither wilful nor negligent, equity may refuse, under the doctrine of balancing equities, to decree its removal. *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17 (1888) *Lynch v. Union Inst. for Savings*, 159 Mass. 306, 24 N. E. 364, 20 L. R. A. 842 (1893) *Coombs v. Lenox Realty Co.*, 111 Me. 178, 88 Atl. 477, 47 L. R. A. (N. S.) 1085 (1913) *Cave v. Henley*, 125 Kan. 214, 264 Pac. 25 (1928). But see to the contrary, *Pile v. Pedrick*, 167 Pa. 296, 31 Atl. 646 (1895). Although Washington authorities are limited, a few points involved are discussed in *First Methodist Church v. Barr* 123 Wash. 425, 212 Pac. 546 (1923).

In the nuisance cases the objectionable conduct is generally assumed to be wilful or negligent and the equity courts usually grant the mandatory injunction and refuse to balance the equities. *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 Pac. 928, 38 L. R. A. (N. S.) 436 (1911) *Whalen v. Union Bag Co.*, 208 N. Y. 1, 101 N. E. 805 (1913). A questionable modification of this rule is stated in *McCann v. Chasm Power Co.*, 211 N. Y. 301, 105 N. E. 416 (1914) in which the court refused the relief on the ground the plaintiff's right was merely technical or unsubstantial. Some courts adopt what appears to be a sounder position in allowing the balancing of equities when a clear public interest is involved. *Madison v. Ducktown Sulphur Copper and Iron Co.*, 113 Tenn. 331, 83 S. W 658 (1904) *Smith v. Staso Milling Co.*, 18 F (2d) 736 (1927) *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 282 Pac. 848 (1929). See 5 WASH. L. REV. 76. These cases indicate strongly that a favored local industry may involve a public interest. H. H.

INJUNCTION—SUCCESSIVE APPEALS AS NUISANCE. The plaintiffs originally started this suit in 1918 to wind up the affairs of the defendant company, and since that time this case has been appealed five times. On this hearing the court held that its further continuance would bring it within the rule that a lawsuit may become a public nuisance, thus dismissing the appeal. *McCleery et al. v. McCleery Lumber Company*, — Kan. —, 16 Pac. (2d) 517 (1932).

It is generally held that equity has jurisdiction to enjoin vexatious suits, not brought in good faith and instituted for the purpose of causing annoyance and oppression and unnecessary litigation. *Burdick v. Burdick*,

148 Wash. 15, 267 Pac. 767 (1928). The power of a court to so act may be invoked either by a bill of peace or by a petition asking for relief by way of injunction against such proceedings.

A very clear case must be made out to authorize a court of equity to enjoin suits on the ground that they are vexatious and oppressive. *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717 (1918). But actions are not necessarily vexatious because they are numerous. Even though the fact that suits are numerous may be evidence that they are vexatious, this presumption may be overcome by slight evidence. *Lake Agricultural Co. v. Brown*, 186 Ind. 30, 114 N. E. 755 (1911). The mere fact that a plaintiff's right has been established at law is not always sufficient to warrant an injunction, but the application must always be addressed in a measure to the discretion of the court. *Cragg v. Levinson*, 238 Ill. 69, 87 N. E. 121 (1908) One may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously to vex, annoy and injure another. *Kryptok v. Stead Lens Co.*, 190 Fed. 767 (C. C. A. 8th, Missouri, 1911).

The policy of the law is to prevent multiplicity of suits and needless litigation. *Johnson v. Jones*, 186 N. C. 235, 119 S. E. 231 (1923) A proper cause for injunctive relief is shown to prevent such a multiplicity. *Gray v. Foster* 46 Ind. App. 149, 92 N. E. 7 (1910). But in order to make such multiplicity of suits a ground for the interposition of a court of equity, more than one suit must have been commenced, and the court should not interfere unless it is clearly shown necessary to protect from continued and vexatious litigation. *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796 (1909) *General Film Co. v. Sampliner* 252 Fed. 443, (C. C. A. 8th, Ohio, 1918).

The instant case is somewhat extraordinary in placing the ground for its action on the nuisance basis. A case somewhat analogous is one in which a series of trespasses, no one of which would have been the basis for equitable relief in itself, may become a nuisance so that the aggrieved party has the right to a mandatory injunction to abate it. *Wells Amusement Co. v. Eros*, 204 Ala. 239, 85 So. 692 (1920) *Milton v. Puffer*, 207 Mass. 416, 93 N. E. 634, 32 L. R. A. (N. S.) 1010 (1911). In this case no single one of the appeals would have amounted to a nuisance, but taken as a group they represent such an annoyance and prejudice to the defendant that the court was justified in basing its decision on the ground that it did here. But no matter whether this reasoning is theoretically sound or not, yet the principle is the same as that which motivates courts generally in putting a halt to unnecessary litigation. It is submitted then that the court reached a desirable result, even though the basis of its decision may appear somewhat unusual. P M. G.

LANDLORD AND TENANT—ACTION FOR FAILURE TO DELIVER PREMISES. Plaintiff, a lessee under the terms of a written and duly executed lease, who had never been in possession of the premises, brought an action for specific performance of the lease. *Held* That the plaintiff having the right to possession may maintain the action. *Duckworth v. Michel et al.*, 72 Wash. Dec. 156 (1933).

Rem. Rev. Stat., Sec. 785, provides: "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county."

Where a party has a valid lease of real estate, and the right to take possession of the property under his lease, he has a valid subsisting interest in the real property. *Park v. Chung*, 123 Wash. 37, 211 Pac. 729 (1923) *Shepard v. Sullivan*, 94 Wash. 134, 162 Pac. 34 (1916) *Richards v. Redelsheimer* 36 Wash. 325, 78 Pac. 934 (1904) *Hoover v. Chambers*, 3 Wash. Terr. 26, 13 Pac. 547 (1887) *Mattingly's Ex'r v. Brents*, 159 S. W 1157, 155 Ky. 570 (1913) *Moore v. Bradenburg*, 28 S. W (2d) 477, 234 Ky 400 (1930) *Chittim v. Gossett*, 228 S. W 393, 148 Ark. 654 (1921).

A lessee, before entry, can maintain ejectment for the premises. *Blanc's Cafe v. Corey*, 110 Wash. 242, 188 Pac. 759 (1920) *Obermeir v. Mortggae Co. Holland America*, 224 Pac. 1089, 111 Or. 14 (1927) *Ewert v. Robinson*, 289 Fed. 740 (C. C. A. 8th) (1923) *Genardini v. Kline*, 173 Pac. 882, 19 Ariz. 558 (1918) *Tiffany, Landlord and Tenant*, Vol. 1, p. 293.

In the *Blanc's Cafe v. Corey* case, the court held that though the lessee has a remedy in damages if his lease contract has been breached, he is not obliged to pursue such remedy against his lessor, but also has a right to maintain ejectment to recover possession of the premises.

Admitting, that in the instant case, the plaintiff was entitled to relief, in view of the fact that the plaintiff either could have maintained his action for damages for breach of the lease contract, or brought ejectment to recover possession of the premises, it seems questionable whether specific performance should have been granted. Such a result in effect creates a new possessory action, and at the same time, adds to the already existing laxness in pleading.

The holding in our instant case necessarily involves the proposition that the court regards a lease as a bilateral contract and not as the executed conveyance of an interest in reality, for under the latter view specific performance would never be granted. L. A. C.

LANDLORD AND TENANT—FORFEITURE CLAUSE IN LEASE. E leased certain premises from R; in order to finance the construction of a building thereon, E negotiated a loan of $49,000.00, secured by a mortgage on the property. $14,000.00 of the loan proceeds went to pay off a prior mortgage. E and R then executed a written agreement under which E was to pay off the first $35,000.00 of the mortgage and R the last $14,000.00 thereof, each paying a pro rata part of accruing interest. This latter agreement further recited that if E did not so pay, "then and in that event, parties of the first part (E), 30 days after default by it on any such payment of either principal or interest, shall forfeit without notice all its right, title and interest in the aforesaid lease as liquidated damages in full, and this agreement and the lease above referred to shall be of no more force and effect than as if each had never been written, and first parties (E) relieved of any further liability."

E having defaulted in an interest payment, R paid it and sued for specific performance of the collateral agreement. E demurred to the complaint; sustained below. Reversed on appeal and case remanded for hearing on the merits. *Cochran v. Lakota Land & Water Co. et al.*, 71 Wash. Dec. 54, 17 Pac. (2d) 861 (1933).

This case is unusual; in the great bulk of litigation involving forfeitures the vendor or lessor is seeking to declare a forfeiture and the vendee or lessee is resisting it. Out of this litigation has grown the general rule that there shall be no forfeiture for breach of covenant or agreement in lease or contract of sale unless specifically therein provided. *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571 (6th Cir. 1902) *Hensman v. Marble Savings Bank*, 102 Vt. 217, 147 Atl. 270 (1929) *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W Va. 291, 112 S. E. 512 (1922).

The usual forfeiture clause, providing that upon default by vendee or lessee, vendor or lessor is relieved from further performance under the agreement and may or shall terminate it, is clearly for his benefit. It is a condition subsequent and not a limitation, and vests in the vendor or lessor the option of declaring a forfeiture or not. The provision for forfeiture and liquidated damages is deemed a security measure only and calculated to induce performance. *Asia Investment Co. v. Levin*, 118 Wash. 620, 204 Pac. 808, 32 A. L. R. 578 (1922) *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639 (1901) *Hanley Falls Creamery Co. v. Milton Dairy Co.*, 126 Minn. 226, 148 N. W. 46, 52 L. R. A. (N. S.) 718 (1914) *Cochran v. Anderson*, 111 Misc. 632, 182 N. Y. S. 265 (1920) *Edison Illuminating Co. v. Eastern Penn. Power Co.*, 253 Pa. 457, 98 Atl. 652 (1916). The same result attaches even though the clause provides that upon any default the agreement shall immediately become null and void. *Stewart v. Griffith*, 217 U. S. 323, 30 S. Ct. 528, 54 L. Ed. 782, 19 Ann. Cas. 639 (1910) *Mc-*

Cutcheon v. Brink, 129 Wash. 103, 225 Pac. 605 (1924) *U. S. Shipping Board Emergency Fleet Corp. v. Vivian*, 77 Pa. Super. Ct. 483 (1921).

It is recognized, however, that if the language of the agreement indicates the parties intended the vendee or lessee to have the option of performing as he promised or of paying liquidated damages, the forfeiture clause becomes more than a mere security measure. It operates as a waiver by the vendor or lessor of both his legal remedy for damages and of his equitable remedy of specific performance. *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940 (1913) *In re Tatnall*, 102 N. J. Err. & App. 445, 141 Atl. 174 (1928), affirmed on rehearing, 146 Atl. 918; *Dekowski v. Stachura*, 176 Wisc. 154, 185 N. W 549 (1921).

In *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239 (1913), the contract of sale provided that upon default previous payments should be retained by the vendor, "and neither party shall be under any further liability." By dictum at page 596 the court intimated that the effect of this provision was to cut off the vendor's right to specific performance, although not affecting the vendee's right to such relief. This dictum seems to have been overruled by subsequent cases in this jurisdiction.

It is submitted that the purpose of the forfeiture clause in a lease or contract for sale of real estate is not to create an optional performance on the part of the vendor or lessee, but on the contrary the intention is to create an option of remedies in the vendor or lessor. Should the lessor or vendor only be permitted to take advantage of it, or should the result of default be relief of both parties from further liability to perform? To allow the lessee or vendee to avail himself of the forfeiture clause as a defense gives him control of the situation, his promise to perform becomes illusory. This is particularly true of the usual lease or contract involving payments in installments. In any case very clear and positive language should be required to create an option to perform or pay the penalty prescribed. The intended end of every contract is the performance promised by each party thereto, not damages, either liquidated or otherwise.

To allow the vendee or lessee to recover either in law or equity after his default, in the presence of an express forfeiture clause, is clearly to defeat the purpose of that clause, it being designed to insure his performance and to permit the other party to elect after default either to terminate the contract or compel its performance. To permit the lessee or vendee to set up the forfeiture clause to defeat specific performance sought by the vendor or lessor is to allow him to use his own default as a defense and is a denial of the true intention back of the forfeiture provision. The vendor or lessor is not at fault, and failure of the other party to perform should not cut off any of the remedies of the vendor or lessor.

While there is no policy nor rule of law against optional performances, as, to perform a promise or pay a sum of money, such an option is so contrary to the purpose with which most contracts are drawn that it should not be read into the usual forfeiture clause. The law in this field has been chiefly developed with the idea of protecting the lessee or vendee against harsh treatment and loss of rights. Both law and equity are reluctant to find forfeitures, and in this respect the rule should apply equally to both parties.

The fallacy of regarding a forfeiture clause as really insuring performance lies in the fact that either vendee or vendor, to recover, in equity, would have to tender performance on his side, so that only ignoring the clause rather than enforcing it would in all cases insure performance. However, the parties having chosen to contract on the basis of a provision for forfeiture in case of default, that provision should be construed in the manner best calculated to achieve its true purpose, i. e., to stimulate the vendee or lessee into performing.

It would appear in the final analysis that it is not the words used, but the intent of the parties and the attendant circumstances which determine whether or not the vendor or lessor will be held to have relinquished his right to specific performance. See 32 A. L. R. 584 for a comprehensive note on this problem.

In the instant case, the language used seems specific enough to indicate liquidated damages as lessor's only remedy. Just what language is required to find waiver of lessor's remedy of specific performance is not determined. W L. S.

SHIPPING—LIMITATION OF LIABILITY OF SHIPOWNERS. The Princess Sophia, running at a negligent and excessive rate of speed through a blinding snow storm off the Alaskan coast, stranded on a reef on the night of October 24, 1918. Several rescue boats arrived on the scene the next day, but due to a mistake in judgment on the part of the master, permission for transfer of the passengers and crew was refused. During the night a sudden storm arose, transfer of those on board became impossible, and all of them, three hundred and fifty or more, went down with the ship in one of the worst sea disasters of recent times. Negligence on the part of the master in failing to keep a proper lookout and in running his vessel at an excessive speed in heavy weather was admitted to be the proximate cause of the accident. Suit was brought by the dependants and representatives of the victims within a few months, followed by a petition for limited liability on part of the defendant ship owners. After more than a dozen years of expensive litigation before the commissioner and lower court on various phases of the case, the defendants' petition for limitation of liability was recently upheld and approximately six hundred dollars remaining in the hands of the trustee turned over to the hundred or more who were left of the original claimants. *The Princess Sophia*, 61 Fed. (2d) 339 (C. C. A. 9th 1932). Petition for Writ of Certiorari denied. *M. Bruce, Admx. of Estate of James Allmark, deceased, et al., v. Canadian Pac. Ry. Co.*, 53 S. Ct. 396, 77 L. Ed. 511 (1933).

This case has come to a final settlement after a vain and expensive attempt to prevent the application of a harsh rule: that of limiting liability of ship owners to the amount of their interest in the vessel and the freight then pending. Secs. 4283, 4284 and 4285 of R. S. U. S. (46 U. S. C. A.). This rule originated and was adopted in this country in 1851 to encourage the building of sailing ships when the hazards of the sea were great and the means of communication poor. From that time down to the present the courts have interpreted the rule liberally in favor of the ship owners. *The Annie*, 261 Fed. 797 (U. S. C. C. A. Va. (1920) *The 84-H*, 296 Fed. 427 (U. S. C. C. A. N. Y. 1917)

The reason for the small recovery under the act in this case, as in other cases where vessels go down in deep water, lies in the fact that the value of the owner's interest in the ship is computed as she lies wrecked on the bottom. *Dyer v. National Steam-Nav. Co.*, 6 S. Ct. 1174, 118 U. S. 507, 30 L. Ed. 153 (1886) *Thommessen v. Whitwill*, 6 S. Ct. 1172, 118 U. S. 520, 30 L. Ed. 156 (1886). It has also been held that an owner's insurance on the vessel is no part of his interest and does not enter into the amount for which he is held liable. *Petition of Canadian Pac. Ry. Co.*, 278 Fed. 108 (U. S. D. C. Wash. 1921) *Palace v. Norwich & N. Y. Transp Co.*, 6 S. Ct. 1150, 118 U. S. 468, 30 L. Ed. 134 (1886) and that the owner is not liable for the amount of the freight pending where the ship is lost before completion of the voyage, as no freight has been earned. *The Abbie C. Stubbs*, 28 Fed. 719 (U. S. D. C. Mass. 1886) *Palace v. Norwich & N. Y. Transp. Co.*, 6 S. Ct. 1150, 118 U. S. 468, 30 L. Ed. 134 (1886)

Modern ocean vessels when properly handled are safe enough to make this rule seem unnecessary as well as harsh, but as is so often the case under our system of law, the courts bound by the doctrine of *stare decisis*, seem powerless in the face of this great mass of authority cited *supra* to give the act a different interpretation. On the other hand, there appears to be no good reason why Congress should not modify or do away with the rule and prevent further hardships such as were suffered in this case. If this were done there would be less negligent risking of life and property as in the instant case. P. L.

VENDOR AND PURCHASER—MISREPRESENTATIONS BY THE VENDOR OR HIS AGENT. A was authorized by V to find a purchaser for V's 60-acre farm. A interested P in the place, telling him it was all tillable soil, with no

alkali, but further advising him to inspect the property. P went over the farm, but evidently failed to make a thorough inspection. Neither V nor P were farmers and V made no direct representations to P regarding the character of the property. An exchange was completed, P turning in city property as part payment on the farm. P rented out the property during two seasons, then went on the place himself and put in a crop. It failed and then, 31 months after the exchange, P sued V for rescission and damages. It was shown that 10 acres were alkali soil and several acres were underlaid with hardpan so close to the surface as to render the land worthless for farming. *Held*: No recovery. P failed to proved justified reliance on any representations of V had a cause of action existed, it has been cut off by laches of P

There has been in this state considerable litigation growing out of alleged misrepresentations by the vendor of real property, or his agent, to the vendee. From the decisions in these cases several rules can be derived:

(1) Relief in both damages and rescission will be denied the vendee who goes on the land and inspects it subsequent to the misrepresentations, provided the defects are such that a reasonably diligent inspection will reveal them, and provided the vendee has the knowledge and experience required to detect them. *Wilson v. Mills*, 91 Wash. 71, 157 Pac. 467 (1916) *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746 (1913) *MacKay v. Peterson*, 122 Wash. 550, 211 Pac. 716 (1922) *Sims v. Robinson*, 142 Wash. 555, 253 Pac. 788 (1927) *Forsyth v. Davis*, 152 Wash. 595, 278 Pac. 676 (1929).

Relief will also be denied where reliance on the misrepresentations was not the course of a reasonably prudent buyer, as where the property was at hand, the truth readily ascertainable, no inspection made, and no fiduciary relationship existed between the parties. *West Central Improvement Co. v. Newland*, 11 Wash. 212, 39 Pac. 366 (1895) *Gudmundson v. Commercial Bank & Trust Co.*, 138 Wash. 355, 244 Pac. 676 (1926).

Where the misrepresentations were not of facts but were expressions of opinion only, no cause of action results. *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186 (1913) *Forrester v. Jostad*, 97 Wash. 633, 167 Pac. 55 (1917) *Lundgren v. Spencer* 154 Wash. 254, 283 Pac. 58 (1929).

(2) Where the true facts are known to the vendor or should be known to him, and he makes material misrepresentations thereof to the vendee, who relies thereon to his injury the vendee can rescind or get damages in the following situations:

a. Where the defects are hidden or the true facts not ascertainable by diligent search, and even though the vendee does inspect. *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102 (1909) *Yarnall v. Knickerbocker Co.*, 120 Wash. 205, 206 Pac. 936 (1922) *Wimmer v. Parsons*, 141 Wash. 422, 251 Pac. 868 (1926) *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965 (1916).

b. Where the vendee because of inexperience and lack of knowledge fails to ascertain the true facts, and even though the vendee does inspect. *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656 (1917) *West v. Hoffman*, 139 Wash. 13, 245 Pac. 419 (1926).

c. Where the vendor has peculiar means of knowing the facts, although not necessarily exclusive means of knowing them. *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559 (1905) *Fischer v. Hillman*, 68 Wash. 22, 122 Pac. 1016 (1912) *O'Daniel v. Streeby*, 77 Wash. 414, 137 Pac. 1025 (1914) *Wescott v. Wood*, 122 Wash. 596, 212 Pac. 144 (1922) *Lou v. Bethany Lutheran Church of Seattle*, 168 Wash. 595, 13 Pac. (2nd) 20 (1932).

d. Where the vendor has used artifice in preventing the vendee from inspecting or learning the true facts. *McMillan v. Hillman*, 66 Wash. 27, 118 Pac. 903 (1911)

e. Where the land was at a distance or inspection inconvenient for some other good reason and the vendee did not inspect, provided a reasonable person would have relied on the vendor's representations under the circumstances. *Jones v. Elliott*, 111 Wash. 138, 189 Pac. 1007 (1920) see *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186 (1913).

(3) The vendee who has contracted or bought in reliance on false representations of the vendor and has a cause of action for rescission or damages, must use due diligence in prosecuting same after learning the true situation. If he delays an unreasonable time, continuing to occupy the property, *Angel v. Columbia Canal Co.*, 69 Wash. 550, 125 Pac. 766 (1912) *Christiansen v. Parker* 152 Wash., 149, 277 Pac. 445 (1929) *Stubbe v. Stangler* 157 Wash. 283, 288 Pac. 916 (1930), or to accept the benefits thereof, *Sims v. Robinson*, 142 Wash. 555, 253 Pac. 788 (1927), or otherwise treat the property as his own, *Wetternach v. Jones-Thompson Inv. Co.*, 77 Wash. 144, 137 Pac. 422 (1913) *Pearson v. Gullans*, 81 Wash. 57, 142 Pac. 456 (1914) *Blake v. Merritt*, 101 Wash. 56, 171 Pac. 1013 (1918) *Pacific Fruit & Produce Co. v. Schons*, 169 Wash. 472, 14 Pac. (2nd) 17 (1932), he will be held to have waived the misrepresentations and his right of action is cut off. See notes, 2 Wash. L. Rev. 132 (laches generally) and 6 Wash. L. Rev. 91 (laches in real property cases).

(4) The cases involving actions against the vendor for misrepresentations of his agent make several distinctions:

a. An agent expressly authorized only to find a purchaser and nothing more has no implied authority to bind the vendor by representations as to the character and quality of the property. *Samson v. Beale*, 27 Wash. 557, 30 Pac. 377 (1902) *Johnson v. Williams*, 133 Wash. 613, 234 Pac. 449 (1925) *Lemarb v. Power* 151 Wash. 273, 275 Pac. 561 (1929) *Christiansen v. Parker*, 152 Wash. 149, 277 Pac. 445 (1929) *Lundgren v. Spencer*, 154 Wash. 254, 282 Pac. 58 (1929).

b. The agent whose express authority includes power to bind the vendor on a contract of sale or conveyance of the property has implied authority to make representations as to character and quality. *Wimmer v. Parsons*, 141 Wash. 422, 251 Pac. 868 (1926).

c. Both classes of agent have implied authority to point out the land and define its limits, *Yarnall v. Knickerbocker Co.*, 120 Wash. 205, 206 Pac. 936 (1922) *Lemarb v. Power* 151 Wash. 273, 275 Pac. 561 (1929), and to indicate the appurtenances, *O'Daniel v. Streeby*, 77 Wash. 414, 137 Pac. 1025 (1914).

Examination of the instant case in the light of the above mentioned decisions indicates the result to be clearly proper. While the presence of alkali and of hardpan were defects not readily ascertainable by inspection, they were matters of character and quality, whereas A's authority was limited to finding a purchaser. It was highly improbable that P did not learn of the defect shortly after the exchange, and his delay, with acceptance of rents and later occupation of the property himself, would appear to be properly held a waiver by him of any misrepresentations. W L. S.

WORKMEN'S COMPENSATION ACT—WHO IS EMPLOYER. Carsten, a carpenter, was employed to help a man build a chicken house on his property. After a few days, he was injured. Since the construction of buildings is classified in the Workmen's Compensation Act as an extrahazardous employment, he seeks to recover thereunder. The employer had paid no premiums. The court held that an employer did not come within the Act unless the work was conducted for profit. An additional ground was that it would be impracticable for the Department of Labor and Industries to collect premiums from employers of this type. There was a vigorous dissent, concurred in by four judges, on the ground that the Act should apply to all who are injured in work that has been classified as extrahazardous. *Carsten v. Dept. of Labor and Industries*, 72 Wash. Dec. 1, 19 Pac. (2d) 133 (1933)

In order to be entitled to recover under the Workmen's Compensation Act, the injured person must prove that his employer comes within the Act. Originally an employer was one engaged in extrahazardous work, but this was extended in 1921 to include one who contracted with another to engage in extrahazardous work. Wash. Rem. Comp. Stat., Sec. 7676. For a number of years the rule was that an employer came under the Act if any department of his business was extrahazardous. *Wendt v. Industrial Insurance Commission*, 80 Wash. 11, 141 Pac. 311 (1914) *Replogle v.*

Seattle School District No. 1, 84 Wash. 581, 147 Pac. 196 (1915) *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 334 (1915) *Gowey v. Seattle Lighting Co.*, 108 Wash. 479, 184 Pac. 339 (1919) Lately this rule has been modified so that the employer must be engaged in extrahazardous work in his principal occupation or one incidental thereto. *Edwards v. Dept. of Labor and Industries*, 146 Wash. 266, 262 Pac. 973 (1928) *Denny v. Dept. of Labor and Industries*, 72 Wash. Dec. 487 — Pac. (2d) — (1933) This change has operated to exclude some employers, in spite of the evident intention of the Legislature of 1921 to embrace more within the Act.

The precedent for the holding that the employer must be engaged in work for profit or gain is found in the holding that a charitable institution is not an employer within the meaning of the Act. *Thurston County Chapter American Red Cross v. Dept. of Labor and Industries*, 166 Wash. 488, 7 Pac. (2d) 577 (1932). But that decision was largely based on the fact that a charitable institution is not liable for the negligence of its employes. 1 WASH. LAW REVIEW 282.

In addition to proving that his employer comes within the Act, the employee must prove that he was injured in the extrahazardous portion of the business. *Amsbaugh v. Dept. of Labor and Industries*, 128 Wash. 692, 224 Pac. 18 (1924) *Everett v. Dept. of Labor and Industries*, 167 Wash. 619, 9 Pac. (2d) 1107 (1932) *Denny v. Dept. of Labor and Industries*, 72 Wash. Dec. 487 — Pac. (2d) — (1933).

Irrespective of the difficulty and expense involved in collecting premiums from all the people who hire someone to do a little carpentry work, the decision in the instant case seems to carry out the spirit of the Washington Workmen's Compensation Act. It is predicated on the theory that industry as a whole should pay for injuries to workmen, as one of the necessary costs of operation. It resolves one of the phases of the conflict between capital and labor. Obviously such an act should not apply to the man who hires only one workman, and him only for a day or two.

G. V P