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C. P. Z.

RECENT CASES

ADMINISTRATIVE OFFICER—RELIANCE UPON CONSTRUCTION OF STATUTE BY. Defendant, doing construction work upon a federal project, sought to come under the Workmen's Compensation Act, but was advised by that department that the work did not fall within the provisions of the Act, and the premiums were rejected upon the basis of an opinion by the Attorney General, altho defendant repeatedly maintained that the work fell within the Act. P, an employee, injured while engaged in extra hazardous occupation, brought action alleging that D had failed to comply with the provisions of the Act. *Held*, reliance upon the ruling of the administrative officers constituted no excuse to liability, *Long v. Thompson*, 77 Wash. Dec. 203, 31 Pac. (2d) 908 (1934).

It has been frequently stated that the construction of an ambiguous statute made by executive or administrative officers will be given weight by the courts. *Edward's Lessee v. Darby*, 12 Wheat. 206, 6 L. Ed. 603, (U. S. 1827) *Ryan v. School District* No. 25, 44 Wash. 523, 87 Pac. 828 (1906) *State v. Davies*, 76 Wash. Dec. 43, 28 Pac. (2d) 322 (1934) and, it will not be disturbed except for very cogent reasons, *State ex rel. Pub. Serv. Comm. v. Brannon*, 86 Mont. 200, 283 Pac. 202, 67 A. L. R. 1020 (1929) *re Powers*, 275 Mass. 515, 176 N. E. 621, 75 A. L. R. 1220 (1930). The weight to be given will, of course, depend upon the facts of each case; and, the courts have used a variety of language, from "great weight," *Wendt v. Industrial Inc. Comm.*, 80 Wash. 111, 141 Pac. 311 (1914), to "valuable," *Huntworth v. Tanner* 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D 676 (1915).

There has been many rationalizations for the rule, the most prominent being the "legislative intent," viz.. where such a construction has been of long standing, and the legislature does nothing to change the statute, it is an implied indication that such a construction expresses their intent. This, of course, does not apply to cases where it has not been acted upon over a period of time, in which the rule is followed, probably, upon a desire to have uniformity. The court will likewise be reluctant to give a different construction where vested property rights are involved, 59 C. J. 1029.

This rule, however, is not followed: (1) where not uniform; (2) where the statute is in the opinion of the court clear and free from ambiguity, so that the administrative construction would substantially alter the law· (3) where though the statute is somewhat doubtful, the rulings appear to the court as unreasonable; or (4) where the statute is in terms applicable to certain situations and the administrative has set itself up as a legislator to supply omissions and defect in the law by applying it elsewhere, 40 H. L. R. 469 (1927).

The court in the instant case bases its holding upon the 2nd classification, stating, "courts will construe statutes according to their true intent, where the meaning is plain and unequivocal, notwithstanding a contrary construction made, or practice indulged in, by executive or administrative officers." This view follows the great weight of authority *Allen v. Long*, 272 Mass. 502, 172 N. E. 643, 70 A. L. R. 1299 (1930) *Schoen v.*

Seattle, 117 Wash. 303, 201 Pac. 293 (1921) *State v. Davies, supra, Wendt v. Industrial Ins. Comm., supra.*

What, then, should the party do who believes that the construction given by the administrative officers is erroneous, and if he follows their construction it may lead to liability? The court in the instant case said that the defendant should have brought a Writ of Mandamus to compel the acceptance of the premiums. But, is this an adequate remedy? How many people in such a situation would go to the trouble and expense to bring such a suit, especially when the courts will try to uphold the construction of the administrative officers?

On the other hand to deny plaintiff recovery in the instant. and similar, cases would be to deprive him of a right which should not be denied. Thus, the tendency in criminal actions to allow reliance as a defense, 22 Cal. L. Rev. 569, could not follow in civil actions.

It is submitted that the answer to this problem rests with the legislature. C. P Z.

INSURANCE—FALSE STATEMENT IN APPLICATION—INTENT TO DECEIVE—EVIDENCE. The Washington court has recently been called upon to decide two cases interpreting Rem. Rev. Stat., sec. 7078 (1933), which provides that no misrepresentation "shall be deemed material or defeat or avoid the policy or prevent it from attaching, unless such misrepresentation or warranty is made with intent to deceive." In the one case, plaintiff called at the office of defendant insurance company's agent and signed an application for a policy of fire insurance to cover a dwelling house which she owned. The policy was issued and mailed to her with a copy of the written application attached. About one year later the house was destroyed by fire. In the subsequent action on the policy defendant denied liability on the ground of breach of warranty stated in the application and in the policy· to-wit, that plaintiff had never sustained a previous fire loss. Plaintiff admitted on trial that she had previously collected $4,500 insurance for the destruction by fire of a house in another county Plaintiff testified that she had disclosed this fact to defendant's agent, but he denied this. She further testified that she had read neither the application nor the policy A jury trial in the lower court resulted in a verdict for the plaintiff, but this was reversed on appeal. The court decided that the evidence raised an unrebutted presumption that there was an inent to deceive, thus satisfying the requirements of Rem. Rev. Stat. sec. 7078, *supra. Perry et al vs. Continental Insurance Company*, 78 Wash. Dec. 18, 33 Pac. (2d) 661 (1934).

Where material representations are made in the application known by the applicant to be false, a rebuttable presumption of intent to deceive is raised. *Day v. St. Paul Fire & Marine Ins. Co.*, 111 Wash. 49, 189 Pac. 95 (1920). In the instant case, the court held that the testimony of the plaintiff that she had not read the application and that she had told the agent the truth was insufficient to rebut this presumption. This case goes even further than the case of *Hayes v. Automobile Insurance Exchange.* 126 Wash. 487, 218 Pac. 252 (1923), reheard 129 Wash. 202, 224 Pac. 594 (1924), in which the plaintiff merely signed a blank application and left it to be filled in by the defendant insurance company's agent without

giving the agent any information whatsoever as to the answers to the queries in the application. In that case the agent did not know whether the representations were true or false; in the instant case the agent actually knew he was misstating a true answer made by the applicant. Yet the court, relying on the *Hayes* case, arrived at the same result, that the presumption of intent to deceive was unrebutted. This holding seems contrary to the position taken by the court in a number of earlier cases, deciding that a showing by the applicant that he had told the agent the truth was sufficient to rebut the presumption. *Devenny v. Auto. Owners Inter-Ins. Ass'n of Wash.*, 124 Wash. 453, 214 Pac. 833 (1923) *Lindstrom v. Employers Indemnity Corp.*, 146 Wash. 484, 263 Pac. 953 (1928) *Tison v. American National Ins. Co.*, 163 Wash. 522. 1 Pac. (2d) 859, 3 Pac. (2d) 998 (1931). Cf. *Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486 (1912) (based on estoppel).

Within a month, a similar problem was raised in another case. Here, in an action on an automobile liability policy, defendant denied liability on the ground of breach of warranty, in that in response to the question whether insured had had an accident within the past three years as the result of the ownership or operation of an auto vehicle, insured had answered that he had not. The evidence showed that within the three-year period about fourteen accidents had occurred, involving automobiles which either insured or a corporation in which insured was a principal stockholder owned or operated. Insured denied intent to deceive within the provisions of Rem. Rev. Stat., sec. 7078, *supra*, testifying that he thought the inquiry in the policy was in regard to accidents in which insured had been at fault. In all of these prior accidents no liability had been fastened on the insured or his corporation. The trial court, sitting without a jury, found for plaintiff. Reversed on appeal for defendant insurance company, the court finding an intent to deceive. *McCann v. Reeder et al. & Mercer Casualty Company*, 78 Wash. Dec. 111, 34 Pac. (2d) 461 (1934).

The court must have held in this case that the evidence was such that it was impossible for a jury or other trier of the facts reasonably to find that the insured had construed the inquiry as he claimed, that he must have construed it as applying to all accidents regardless of fault. On this basis, the court seems to be swinging away from its holding in the case of *Houston v. New York Life Ins. Co.*, 159 Wash. 162, 292 Pac. 445 (1930), reported on a second trial in 166 Wash. 611, 8 Pac. (2d) 434 (1932). In the latter case, the evidence showed that a month before insured's application for reinstatement of his insurance policy was submitted, insured had been informed by a doctor that his appendix should be removed, and had had the operation, in fact, a month after his application, and yet he had stated in his application that he had had no illness and consulted no physician during the previous six months, except one visit for grippe. The court held on the second trial that it was a matter of fact for the jury to decide whether the applicant had construed the inquiry as applying only to serious ailments and whether he thought at the time of the application that his appendicitis attack was serious. On the facts of the two cases, it would appear that the court had as much

reason to submit to the jury the issue of how the applicant had construed the inquiry in the application in the *McCann* case as in the *Houston* case.

It would thus seem from these two recent cases that the court is beginning to draw away from its liberal viewpoint expressed in the *Houston* case and the other older cases above cited. This point is stressed in strong dissenting opinions rendered by Tolman. J., and Holcomb, J., respectively. For a discussion of the earlier cases see Note 6, 6 Wash. L. Rev. 34 (1931).

—L. D. B.

LANDLORD AND TENANT—DUTY OF LANDLORD TO FURNISH HEAT, WATER, ELEVATOR SERVICE, ETC. P who was engaged in the clothing business, leased certain portions of a two-story building from 1907 to 1919 under certain written leases which did not specifically provide that the landlord was to furnish heat and water, but which nevertheless were furnished by him without any other consideration than the rental paid. From 1919 to 1926, P leased the entire two-story building. and during that time paid for his own heat and water. In 1926, P agreed to a cancellation of his lease which still had eight years to run, to enable the Liggett Co. to take a 99-year lease of the two-story structure. P received in consideration of his agreement to cancel his former lease, a 12 year lease from the Liggett Co., by the terms of which the Liggett Co. expressly agreed to furnish P with heat and elevator service in a new contemplated ten-story structure which was to be erected on the old two-story site. Nothing was said at that time about water, toilets or janitor service. Several months later, when the ten-story building was being erected, the same parties cancelled the former 12-year lease and entered into a new one of the entire second story for a 20-year period, nothing whatsoever being said in the last lease with reference to either heat, water, elevator, or janitor service. On the same day however, P sublet the premises back to the Liggett Co. for the entire term except one day under a written lease, which omitted any mention of the above services. The new ten-story building was constructed with a central water and heating system, four passenger and one freight elevators, and the building on all floors was equipped with hallways to the elevator systems. However the second story which was leased had a direct opening on to the street by means of a ramp. P never went into occupancy of the second floor, until about six years later, when the Liggett Co. went insolvent. P thereupon entered, and paid for his heat for about six months, until D, who was the assignee of Liggett Co., refused to furnish either heat, water, or elevator service. P now seeks to restrain D from discontinuing such services. *Held*: that D was under no duty to furnish either heat. water, elevator, or janitor service to P. *Tailored Ready Co., v. Fourth & Pike Street Corp.*, 78 Wash. Dec. 594. 35 Pac. (2d.) 508 (1934).

In general: The general rule supported by the overwhelming weight of authority is that a landlord is under no obligation to furnish heat, water (or hot water), steam for heat, or power, or a current of forced air to his tenant, in the absence of a statutory requirement, or an express agreement, or of circumstances raising an implied covenant to furnish such services. 36 C. J. p. 36. The same rule is applicable also to elevator service. *Cummings v. Perry*, 38 L. R. A. 149 (Mass. 1897). There is

usually no difficulty in determining the rights of the parties where there is an express agreement of a statute governing the situation, but the great bulk of litigation, which the courts are very often called upon to decide, is whether or not in the absence of express agreement or statutory duty, the circumstances are strong enough to raise an implied covenant to furnish such services. In considering the latter situation, the courts are aided with the general rule that a lease of a part of the building passes with it as an incident thereto, everything necessary with or reasonably necessary to the enjoyment of the part demised. 2 Thompson, Real Property, sec, 1107 *Runyon v. City of Los Angeles*, 180 Pac. 837 (Cal. 1919). Implied covenants of this kind run with the land and are binding upon the assignee of the landlord. 36 C. J. p. 637. However, it is *necessity* and not mere *convenience* which passes certain incidents as appurtenances in a lease or grant of real property. *Jemo v. Tourist Hotel Co.*, 35 Wash. 595, 104 Pac. 820 (1909) *Harrison v. Ziegler*, 196 Pac. 914 (Cal. 1912).

Water· At common law there was no duty or obligation on the part of the landlord to furnish water to his tenant. *Waldron v. International Water Co.*, 13 A. L. R. 340 (Vt. 1921) *Farmer v. City of Nashville*, 45 L. R. A. (N. S.) 240 (Tenn. 1913). This rule is recognized today in most jurisdictions. Thus a lease of a bedroom was held not to carry with it as a necessary incident thereto, a right to a supply of water in *Sturm v. Huck*, 71 Atl. 44 (N. J. 1908) the fact that a house was fitted with pipes and fixtures, obviously designed to receive and distribute water, does not bind the landlord to furnish water to a tenant in the absence of a special statute or stipulation to that effect. *Sheldon v. Hamilton*, 47 Atl. 316 (R. I. 1900) *Rockford Sav. & Loan Ass'n v. City of Rockford*, 185 N. E. 623 (Ill. 1933) *Coal Co. v. Zarirs*, 300 S. W. 615 (Ky. 1928). The fact that the first lease expressly requires the tenant to pay the water rates. and the second lease of the same premises is silent on that matter, does not raise an implied covenant by the landlord to furnish water free to the tenant, on the theory that the water was essential to the premises for the purpose for which they were leased. *Leigton v. Ricker*, 54 N. E. 254 (Mass. 1899).

Heat: It may safely be said that a landlord renting an apartment or room in a building heated by a central heating plant, control over which is retained by him, is bound to heat such apartment or room even when the lease is silent on the question of heat. This rule is supported by practically all of the authorities. *Jackson v. Paterno*, 112 N. Y. S. 924 (1908) *Cummings v. Parry*, 38 L. R. A. 149 (Mass. 1897) *Berlinger v. Macdonald*, 133 N. Y. S. 522 (1912) *Ryan v. Jones*, 20 N. Y. S. 842 (1892) *O'Hanlon v. Grubb*, 37 L. R. A. (N. S.) 1213 (D. C. 1911) *Havens v. Brown*, 237 S. W 126 (Mo. 1922), *Cushier v. Adams*, 134 N. Y. S. 561 (1912) but see *Coal Co. v. Zarirs, supra.*

Elevator service: In the case of an apartment house or office building in which rooms are rented, where there are elevators, there is an applied covenant that the tenant will be supplied with such services and facilities in the same manner as other tenants, if the use of elevators is reasonably

necessary for the beneficial occupation of the rooms let, and if from a construction of the elevators and of the passageways it is apparent that the elevators were intended for the use of the tenants. *Cummings v. Perry, supra, O'Hanlon v. Grubb, supra, Order Hall. v. Irvin*, 79 N. Y. S. 614 (1903). *Toilets*: The use of closets contiguous to rooms rented in an office building and of the wash basins therein is included in the lease, though not specifically mentioned. *Order Hall v. Irvin, supra.*

In the case noted above, there was no obligation to furnish any of the above named services arising either by virtue of a statute or by express covenant in the lease. P's chief contention being that such obligation arose from the circumstances implying a covenant to so furnish these conveniences. The court, however, negatived P's contention that such services were a *necessity* to P on the second floor of the building, so as to pass as appurtenances in the lease, and held that they were *conveniences* in the case. An entirely different situation, said the court, being presented where the occupancy of the tenant is on the sixth or seventh floors of an office building, where elevator service is very essential to the occupation of the premises for business purposes, or heat in a hotel or apartment building where the heating systems are under the sole control of the landlord. (It is not clear from the opinion just how the court arrived at the view that heat on the second floor is not just as necessary for a comfortable enjoyment thereof, as on the sixth or seventh floors.) Another very strong factor which was used by both P and D in urging their respective contentions was that there was an eloquent silence in the second lease entered into between P and the Liggett Co., in regard to such services, which were expressly covered in the first lease between the parties. P attempted to explain its absence, by urging that there was no necessity to make express mention of these services, since both parties would take it for granted that they would be continued under the new lease; D argued that the omission from the language of the twenty-year lease of such important matters on the part of such experienced business men as the managers of P was extremely significant to show such services were never intended to be furnished.

It is submitted that the court's holding in the present case is sustainable from both a legal and moral standpoint. The most significant point in the entire case is the fact that P did not intend to go into actual possession under the twenty-year lease, but intended to go out of business and sublet the second floor for virtually the entire term to the Liggett Co. P never dreamed that the Liggett Co. would become insolvent in six short years, and that it would once again go into occupancy of the second floor. It is easy to see then why the parties in the 20-year lease omitted all mention of such services, which were present in the 12-year-lease when P was intending to stay in business and occupy the premises itself. The fact that P paid for the heat after he took possession upon the insolvency of the Liggett Co. was an unmistakable admission that he did not think he was entitled to such services free.

This case presents just another situation where one of the parties to a contract which does not turn out as favorably as expected, attempts to eke from the other party every possible advantage. Whenever this

occurs, it is the policy of the courts to refuse to make a new contract grounded in the equities of subsequent events, where the parties who might have foreseen every incident and circumstance there relied on failed to guard against them in their written contract. *Robinson v. Wilson*, 102 Wash. 528, 173 Pac. 331 (1918). —J. J. L.

REAL ESTATE AGENTS—NECESSITY FOR AUTHORIZATION IN WRITING. X and Y bought waterfront lots on installment contract from B. The instruments did not show and neither purchaser knew that title to the land was in defendant M. All the required contract payments were made by the buyers. On discovering M's ownership they demanded conveyances from him, which were refused, M denied that B was his agent. It was shown that B had acted as M's agent in previous similar transactions. *Held*: That M be compelled to convey to X and Y. the evidence of prior principal-agent relations between B and M with respect to the sale of M's property justifies the finding that B was in fact authorized in this instance. *Dissent*: That in the absence of ratification or of circumstances creating an estoppel an agency to contract for the sale of real property can be established only by written authority of the owner. There was here no such authority. *Mason v. Matthews*, *Bean v. Matthews*, 78 Wash. Dec. 136 (1934).

Two problems are presented in the case: 1. Was B in fact the agent of M with authority to contract for the sale of the latter's land? 2. Can the authority be established and M charged on the contract in view of the statute of frauds?

1. It is elementary agency law that actual authority to do the act in question may be established by proof of prior similar instances in which the agent's acts have been acquiesced in by the principal. And when it is contended that an authority previously given has ceased or been limited before the act in question was done, the burden of proving that fact rests with the party alleging it, the principal, *Mechem, Outlines of Agency*, sec. 111. So here, the fact that B had sold lots for M over a considerable period by this or other similar methods is of considerable weight in establishing that B was authorized to sign the contracts under consideration.

2. But conceding proof to establish the agency and the extent of the authority in this instance is available, the question arises—May it be used to charge M on the contract as obligor, notwithstanding the fact that his name did not appear in the instrument?

Where an agent signs a contract which is required by the statute of frauds to be in writing, expressly stating therein that he signs as agent but failing to disclose his principal, it is held in most jurisdictions that the writing is insufficient to satisfy the statute. The theory is that since the agent has exempted himself from liability by signing as agent, only one of the contracting parties is mentioned in the instrument, which does not answer the requirements of the statute. Parol will not be admitted to identify the principal. *Breckinridge v. Crocker* 78 Cal. 529, 21 Pac. 179 (1889), *Abrogast v. Johnson*, 80 Wash. 537, 141 Pac. 1140 (1914) *Banta v. Newbold*, 108 Kas. 578, 196 Pac. 433 (1921). A few jurisdictions reach

the opposite result, permitting the principal to be identified by parol. *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W 123 (1892) *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340 (1903) cases collected in 23 A. L. R. 932.

If the writing does not disclose the fact of agency the undisclosed principal may be identified by parol and charged on the contract on proof of the signer's agency And this because such an instrument shows two competent contracting parties. *Flegal v. Dowling*, 54 Ore. 40, 102 Pac. 178 (1909) *Byrne v. McDonough*, 114 Misc. 529, 186 N. Y. S. 607. Aff. 188 N. Y. S. 913 (1921). There is dictum in an early Washington case apparently contra. *Murphy v. Clarkson*, 25 Wash. 585, 66 Pac. 51 (1901). In the principal case, however, the court assumes without discussion of the problem that parol evidence is admissible to identify M as B's principal on proof of the agency.

This brings us to a consideration of whether that proof may be oral or whether the statute of frauds requires a real estate agent's authority to be in writing. It is generally held that no writing is necessary to authorize an agent to contract for the sale of land unless the wording of the statute of frauds in the particular jurisdiction expressly states that a writing is necessary. Thus, where the statute requires the memorandum to be signed by the party to be charged or "by some person thereunto by him lawfully authorized," the agent's authority to sign need not be in writing. *Record v. Littlefield*, 218 Mass. 483, 106 N. E. 142 (1914) *Brune v. Von Lehn*, 112 Misc. 342, 183 N. Y. S. 360 (1920) *Brown v. Hogan*, 138 Md. 257, 113 A. 756 (1921). *Contra* where the statute reads "lawfully authorized by writing." *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360 (1891) *Roberts v. Leonard*, 78 Ore. 100, 152 Pac. 499 (1915) *Artz v. McCarthy*, 109 Kas. 355, 199 Pac. 99 (1921). Cases collected in 27 A. L. A. 606.

Wash. Rem. Rev. Stat, 10550 provides: "Every conveyance of real estate or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." Wash. Rem. Rev. Stat. 5825 reads: "In the following cases specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. That is to say: 5. An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

In a very early Washington case our Supreme Court made it plain that under our statutes the authority of an agent to sign a contract for the sale of realty need not be in writing. *Carstens v. McCreavy*, 1 Wash. 359 (1890). The point was not squarely decided there, since the issue was whether authority "to sell" included authority to contract—the court holding that the expression contemplated only the securing of a purchaser. In numerous subsequent cases, however, the court has had before it the validity of an oral authorization and has held it good. *Monfort v. McDonough*, 20 Wash. 710 (1898) *Peirce v. Wheeler* 44 Wash. 326, 87 Pac. 361 (1906) *Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674 (1907) In the *Peirce* case *supra*, the court pointed out that sec 5825 subsec. 5, *supra*, made a writing necessary only for the purpose of enabling the agent to

sue for commission, it had no effect on the validity of the vendor-purchaser contract.

The only requirement which is made regarding the agent's authority is that laid down in the *Degginger* case, *supra*, that such authority should be sustained by clear and convincing proof, and by the manifest preponderance of the evidence, especially where the alleged authority is denied by the vendor or the party to be charged. —M. W

REAL PROPERTY — RECORDING ACT — PRIORITIES — RECENT STATUTORY CHANGE. In an action to foreclose a real estate mortgage, defendant counter-claimed to have the mortgage canceled and title quieted in him. Plaintiff took the mortgage on the property in May 1927, through his agent, but the mortgage was not recorded. Defendant had been on the property prior to May, 1927, and on June 2 of the same year, at 2:00 p. m., he purchased the property under an unacknowledged executory sale contract. At 3:07 p. m. on the same day, plaintiff's mortgage was recorded. The executory sale contract was recorded on June 3, though it does not appear under what statutory provision this was done. Before the case came to trial, defendant tendered the balance due under his contract and demanded a deed. Defendant relied on R. C. S. sec. 10596 (now repealed) which reads in part, "All deeds, mortgages. and assignments of mortgages, shall be recorded and shall be valid as against bona fide purchasers from the date of their filing and when so filed shall be notice to all the world." The court found for the plaintiff. *Held*: The court should have given judgment for the defendant on the counter-claim. *Nichols v. DeBritz*, 78 Wash. Dec. 327 (1934).

Assuming the court to have been correct in their assumption that the defendant was a *bona fide* purchaser, the decision reached is undeniably correct. *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682 (1903) *Swanstrom v. Washington Trust Co.*, 41 Wash. 561, 83 Pac. 1112 (1906).

The fact that the contract was not acknowledged cannot affect defendant's standing as a *bona fide* purchaser, since it was binding on the parties to it. *Fallers v. Pring*, 144 Wash. 224, 257 Pac. 627 (1927). A somewhat more difficult problem arises under *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925), where in the majority opinion it was said. " that an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee " If such be true, it is difficult to see how the defendant could be a *bona fide* purchaser. However, considering the rather chaotic condition of the law as concerns the vendee under an executory contract, it would seem that each decision is its own best authority.

It seems important to note here that the decision reached in the instant case depends entirely on Rem. Comp. Stat., sec. 10596, which is now repealed. The new statute, Rem. Rev. Stat., sec. 10596-2, rads, " Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration *whose conveyance is first recorded* " The emphasis is now placed on which purchaser is the first to record. No decisions have been found where the new statute has controlled, but where it has been mentioned, the court

has apparently ascribed to it a literal meaning. *Ashton v. Buell.* 149 Wash. 494, 271 Pac. 591 (1928) *Rehm v. Reilly*, 161 Wash. 418, 297 Pac. 147 (1931) *Kroetch v. Hinnenkamp*, 171 Wash. 518, 18 Pac. (2d) 491 (1933). Thus, apart from any question of fraud or collusion, it follows that had the instant case been governed by the new statute, the plaintiff would have been entitled to judgment. —R. Y.

SPECIFIC PERFORMANCE—COMMUNITY PROPERTY. Plaintiff and defendant entered into a contract whereby the plaintiff was to build a house on his lot for the defendant for $11,250. The house was completed and the defendant moved in, but thereafter he refused to make the payments according to the terms of the contract, and the plaintiff-vendor sues for specific performance. The court, in holding for the defendant-vendee, stated that as the property contracted to be sold was the community property of the plaintiff and his wife, and as she was not joined as a party plaintiff nor was there any evidence to the effect that she was willing to join in a conveyance, a decree for specific performance would not be granted against one party when the contract could not be specifically enforced against the other, *Janssen v. Davis*, 29 Pac. (2d) 196 (Cal. 1934).

It appears that this rule, of lack of mutuality as being a reason for denying specific performance, is in keeping with the California Code, Civ. Code, sec. 3386, and with equitable principles of that state as laid down in *Pacific Electric Ry. Co. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623 (1908) *Jolliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544 (1908) and *Waldeck v. Hedden*, 89 Cal. App. 485, 265 Pac. 340 (1928)

This view is in accordance with the general rule in other states, specific performance being dependent upon the existence in the defendant of the right to similar relief; and although the older cases declare the time when such mutuality is to be measured, the inception of the contract, the later cases, portraying possibly a better view make the test as of the time when the decree is to be rendered. 25 R. C. L. 233-4. 65 A. L. R. 46.

Washington, in passing upon this question, has said that a contract not possessing mutuality will not be enforced specifically. *Virtue v. Stanley*, 87 Wash, 167, 151 Pac. 270 (1915) *Wagner v. Peshastin Lumber Co.*, 149 Wash. 328, 270 Pac. 1032 (1928) and in *Roche v. Madar* 104 Wash. 21, 175 Pac. 314 (1918), where attorneys were suing for specific delivery of shares of stock promised in return for services which had been rendered at the time of the institution of the action, the court on page 25 said.

> "But as we understand the doctrine of mutuality of remedies, it applies only where the contract is executory not to a contract which has been fully performed on one side and nothing remains to be done on the other but turn over the agreed compensation for the performance * * * The question is not, was there originally a lack of mutuality of remedy * * *"

However, in the co-operative marketing cases, Washington has not applied the rule of mutuality because of the undesirable social result that would otherwise be brought about, and has made provision spe-

cifically by statute, *Rem. Rev. Stat.*, sec. 2892. See 9 Wash. L. R. 56.

It seems to be the policy of our law not to deprive owners of their property without notice so that a husband can not alienate community property without the knowledge or consent of his wife. A husband would have the right to sell his wife's interest in the community upon the execution by her of a power of attorney, *Rem. Rev. Stat.*, sec. 10575, but a general power of attorney will not give him the right to make a dedication for street purposes, *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426 (1896). The wife, as well as the husband, must be joined in a condemnation proceeding, *Chehalis County v. Ellington*, 21 Wash. 638, 59 Pac. 485 (1899) where defendant's wife was not a party to either the contract or the action, a decree to convey community property will not be ordered, *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499 (1900) a plaintiff acquired no rights by virtue of a contract relative to the use of community property which the wife refused to sign, *Northwestern Lumber Co. v. Bloom*, 135 Wash. 195, 237 Pac. 295 (1925) and a trade of community property arranged for by the husband cannot be specifically enforced where the wife refused to consent to the transaction and did not ratify it, *Bush v. Quaiffe*, 138 Wash. 533, 244 Pac. 704 (1926).

There is no doubt, on principle, but that a wife should be given adequate protection as to her interest in the property of the community. And it should follow that if one who has contracted for the purchase of such real property can not force her to perform specifically then her husband should not be able to force the purchaser to perform specifically for if such a decree were given, it would not include the wife and would deny the purchaser the agreed exchange for his performance. Parties need not necessarily have identical remedies, but a defendant should be assured of the fact that he will not be compelled to perform specifically without good security that he will receive specifically the agreed equivalent in exchange. *Restatement of the Law of Contracts*, secs. 372 and 373. Perhaps the most enlightened rule on the subject was stated by Cardoza in *Epstein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922), in which he said in effect, that if the decree operates without injustice or oppression to either plaintiff or defendant. then specific performance will be granted, with mutuality of remedy important only so far as it goes to that end, mutuality being secondary to the principle that equity seeks to do justice.

On the other hand, suppose that the wife allows the husband to enter negotiations relative to the disposition of the community lands and for a period of time allows the transactions to proceed without evidencing any dissent thereto, having knowledge of the entire matter, then she will be considered as having consented to the proceedings, *Young v. Porter* 27 Wash. 551, 68 Pac. 362 (1902) or that the wife holds the husband out as her agent to manage her property and with knowledge accepts the benefits resulting therefrom, she will then be estopped to deny the authorization, *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565 (1898) or where the wife joins in the suit, claiming the benefits of the contract, she is held to have ratified the contract from its inception, *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026 (1903).

If therefore the state of facts were such that the wife could be said

to have acquiesced in the making of the contract by her husband so that she would be estopped from denying its validity as to her, then it would seem as though the defect existing at the inception of the contract would have been remedied, with the result that, inasmuch as the defendant could secure specific performance, it would insure his getting his agreed exchange so that there would be no hardship in granting a decree to the plaintiff. F T. R.

TAXATION—INHERITANCE TAXES—EXEMPTIONS—PROCEEDS OF LIFE INSURANCE POLICIES. Insured took out two policies of insurance upon his life in the total sum of $17,000, each payable in the event of his death, to his wife. Each policy contained a provision reserving to insured the right to change the beneficiary. Shortly before his death, insured caused the two policies to be made payable to a bank, reserving the right to change the designation of the beneficiary then made. On the same date, insured entered into a trust agreement with this same bank, whereby upon insured's death, the bank as trustee, agreed to collect the proceeds of the policies, and to invest the same in the manner therein provided, for the benefit of insured's three children. Upon insured's death, the amount due upon the insurance policies was duly paid to the bank as trustee under the above mentioned agreement. The bank who was also made executor of insured's estate, then filed a petition praying that the proceeds of the policies received by it as the beneficiary under the policies be adjudged exempt from inheritance tax. The lower court granted the petition. *Held*: Judgment affirmed. The proceeds of a life insurance policy payable to a designated beneficiary (not the estate) are not subject to an inheritance tax, by virtue of *Rem. Rev. Stat.* 11201-1. *In re Killien*, 78 Wash. Dec. 292 (1934).

The question whether the succession tax is payable in respect to insurance carried by the decedent upon his own life has been frequently presented, both in cases where the proceeds were payable to a designated beneficiary and cases where the proceeds were payable to the decedent's estate or to his executors or administrators.

As a general rule, except where specifically mentioned (as in Wisconsin statute and Federal Revenue Act 1918), the proceeds of a life insurance policy payable to a designated beneficiary are not subject to a succession tax. *Vogel's Estate*, 1 Pa. Co. Ct. 353 (1886) *Re Fay*, 55 N. Y. S. 759 (1898) *State Tax Comrs. v. Holliday*, 49 N. E. 14 (Ind. 1898) *Bullen's Estate*, 128 N. W 109 (Wis. 1910), affirmed in 60 L. Ed. 830 (1916) *Tyler v. Treasurer* 115 N. E. 300 (Mass. 1917) *Allis's Will*, 184 N. W 381 (Wis. 1921) *Geier's Succession*, 32 A. L. R. 353 (La. 1924) *In re Parson's Estate*, 102 N. Y. S. 168 (1907) *In re Elting's Estate*, 140 N. Y. S. 238 (1912) *In re Voorhees' Estate*, 193 N. Y. S. 168 (1922) *In re Haedrich's Estate*, 236 N. Y. S. 395. But if the policy is payable to the insured's estate, and is not assigned by him, so that at his death it becomes an asset of his estate, the proceeds of the policy are subject to a succession tax. *Re Knoedler* 35 N. E. 601 (N. Y. 1893) *Re Reed*, 47 A. L. R. 522 (N. Y. 1926). However, if the policy is assigned by the insured, under such circumstances as to indicate an intent to evade the succession tax,

within the meaning of statutes taxing transfers made in contemplation of death, the proceeds of such policies are subject to a succession tax. *In re Einstein*, 186 N. Y. S. 931 (1921).

The recent Washington case noted above is the first adjudication upon this subject by our supreme court, and follows the general rule mentioned above. In this state. the general inheritance tax statute provides for the imposition of an inheritance tax only on all property, or any interest therein, which passes (1) by will or by the statute of inheritance; or (2) by deed, grant, sale or gift (a) made in contemplation of the death of the grantor or donor, or (b) made or intended to take effect in possession or in enjoyment after the death of the grantor or donor. *Rem. Rev. Stat.* 11201. Another provision of the inheritance tax statute in this state, expressly exempts from the tax the proceeds of all life insurance policies, except thoes payable to the estate of the deceased insured. *Rem. Rev. Stat.* 11201-1.

The syllogistic reasoning of the court in arriving at the conclusion they did, was to the effect that the inheritance tax is an exaction by the state for permitting to be done that which can be done only with the state's permission. *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734 (1922). It can have no application therefore to that for which the state's permission is not required. As life insurance is a contract made by one person for the benefit of another, in which contract, the death of the insured is not a factor except as fixing the time for performance by the insurance company, and as the right to make the contract and the right to fix the time for performance do not depend upon permission from the state, the contract of insurance therefore, where the proceeds thereof are payable to a designated beneficiary, is not subject to the inheritance tax. Besides, it is the public policy of the state, as reflected by *Rem. Rev. Stat.* 11201-1, to exempt insurance from the burden of the inheritance tax, in order to encourage the development of insurance for the protection of dependents. The court also reasoned that the trust agreement entered into between the insured and the bank was not contrary to public policy, since it was in direct furtherance of the design to protect those for whom insurance protection was intended.

The reservation of the right to change the beneficiary of a policy of insurance does not render the proceeds of the policy subject to an inheritance tax. *In re Parsons' Estate, supra; in re Voorhees' Estate, supra, In re Haedrich's Estate, supra.* The reservation of the right of revocation in a deed of trust does not render the beneficiaries of the trust liable to an inheritance tax under a statute imposing such taxes where the deed, grant, or gift is to take effect in possession or enjoyment after death. *In re Dolan's Estate*, 49 A. L. R. 858 (Pa. 1924). A trust established by a man for the benefit of his children and their appointees does not become taxable as in contemplation of death merely because a power of revocation is reserved in it. *People v. Northern Trust Co.*, 7 A. L. R. 709 (Ill. 1919). The fact that the beneficiary named in the policy holds as trustee does not render the proceeds of the policy subject to an inheritance tax. *In re Elting's Estate, supra, In re Voorhees' Estate, supra; In re Haedrich's Estate, supra.*

The only authority supporting a contrary view is *Fagan v. Bugbee*, 143 Atl. 807 (N. J. 1928), which held upon facts like those in the Washington case just decided, that the beneficiaries took by deed of trust and not by contract of insurance, and hence were subject to pay the inheritance tax. The *Fagan case* stands solitary and alone and has been expressly repudiated by the New York courts. *In re Haedrich's Estate, supra.* Even in New Jersey the rule laid down by the *Fagan* case has been expressly changed by statute. *Ch.* 144, *sec.* 1, *Subd. B and C of the Laws of* 1929, p. 352. Our own legislature passed chapter 135. *Laws of 1929, p. 352*, which is now *Rem. Rev. Stat.* 11201-1, directly after the decision in the Fagan case.

The tendency in recent years in many states has been to exempt life insurance proceeds from taxation, by statute if payable to a beneficiary other than the estate, whether payable directly to or through a trustee. Among the states enacting such statutes in addition to Washington, are California, Colorado, Delaware, Indiana, New Jersey, Ohio, Oregon, Pennsylvania, and Wyoming. J. J. L.

WATERS AND WATERCOURSES—IRRIGATION DISTRICTS—NATURE AND STATUS AS MUNICIPAL CORPORATIONS—SPECIAL LEGISLATION. In the two recent decisions of *Washington National Investment Co. v. Grandview Irr Dist.*, 75 Wash. Dec. 557, 28 Pac. (2d) 114 (1933) and *Outlook Irr Dist. v. Fels*, 76 Wash. Dec. 139, 28 Pac. (2d) 996 (1934), which involved the power of the legislature to confer certain emergency powers upon the boards of directors of irrigation districts, it was held that irrigation districts were "municipal corporations" under section 12, article 1, of the state constitution which prohibits the passage of laws granting to citizens or corporations, *other than municipal*, privileges or immunities which, upon the same terms, do not equally belong to all citizens or corporations.

In the following Washington cases irrigation districts have been held to be municipal corporations: *Brown Bros. v. Columbia Irr Dist.*, 82 Wash. 274, 144 Pac. 74 (1914) *Holt v. Hamilton*, 118 Wash. 91, 202 Pac. 971 (1921) *State ex rel. Clancy v. Columbia Irr Dist.*, 121 Wash. 79, 208 Pac. 27 (1922) *Burbank Irr Dist. v. Douglass*, 143 Wash. 385, 255 Pac. 360 (1927) and *Roberts v. Richland Irr Dist.* 169 Wash. 156, 13 Pac. (2d) 437 (1932) while in the following cases irrigation districts were held not to be "municipal corporations" *Board of Directors v. Peterson*, 4 Wash. 147, 29 Pac. 995 (1892), *Peters v. Union Gap Irr Dist.*, 98 Wash. 412, 168 Pac. 1085, *In re Riverside Irr Dist.*, 129 Wash. 627, 225 Pac. 636 (1924) *Columbia Irr Dist. v. Benton County*, 149 Wash. 234, 270 Pac. 813 (1928), and *Doty v. Saddler* 151 Wash. 542, 276 Pac. 891 (1929).

In *Columbia Irr Dist. v. Benton County, supra*, all of the previous cases were reviewed and a distinction made between those cases which involved a constitutional provision and those which interpreted statutory provisions. It was there said that under the constitutional provisions irrigation districts were not municipal corporations, but under the statutory provisions they were municipal corporations because in this latter class of cases questions were involved which were necessary for their very existence. Later in *Doty v. Saddler supra*, it was decided that irri-

gation districts were not municipal corporations within the meaning of the statute which exempted municipal corporations from garnishments until judgment was given in a main action. In connection with the distinction laid down in the *Benton County* case, it would seem that the *Doty* case was out of line, but it might be distinguished from the other statutory cases in that in the *Doty* case the statute was one which conferred a special immunity which was not necessary for the existence of irrigation districts, while in the other statutory cases either obligations or privileges necessary to their existence were involved.

It is somewhat difficult to determine the effect of the two principal cases on the legal status of irrigation districts because in the *Grandview* case none of the previous cases on this question were mentioned or discussed, and in the *Outlook* case only a brief reference was made to *Columbia Irr Dist. v. Benton County* and *Doty v. Saddler*, without any mention of the distinction laid down in the *Benton County* case. It might be a fair assumption to make that the principle of the *Benton County* case is overruled by implication, and that the court now recognizes that irrigation districts are not organized merely for the private benefit of the land owners, but are organized for a public purpose which is essential for the existence of whole sections of the arid portions of our state. On the other hand it may be doubted that they stand for any such a proposition since the holding that irrigation districts were municipal corporations within the meaning of the constitutional provison was mere dictum because it is not clear that the two statutes under consideration were special laws at all, since they applied to all irrigation districts alike and such a holding was not necessary for the disposition of the cases. *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974 (1895) *Swanson v. School Dist. No.* 15, 109 Wash. 652, 187 Pac. 386 (1920) see generally Annotations Rem. Rev. Stat., Vol. 1, pp. 363-71, Remington Digest, Statutes, sec. 100; American Digests, Statutes, sec. 66-104, Dillon, Municipal Corporations (5th ed. 1911) ch. V sec. 141-175, pp. 240-335, Cooley, Constitutional Limitations (Carrington's 8th ed. 1927) p. 258, 8n. D. R.