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Evidence—Witnesses—Proof of Prior Inconsistent Statements

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(1902); *George v. Village of Chester,* 202 N.Y. 398, 95 N.E. 767 (1911); *State v. Morse,* 84 Vt. 387, 80 Atl. 189 (1911). This is also the rule set out in 1. WIEL, WATER RIGHTS IN THE WESTERN STATES 803 (3d ed. 1911).

The common law rules on riparian rights are the law in Washington, *Benton v. Johncox,* 17 Wash. 277, 49 Pac. 495 (1897), but this state has also long subscribed to the doctrine of appropriation. See Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington,* 7 WASH. L. REV. 197 (1932). The water code of 1917, REM. REV. STAT. § 7351 *et. seq.* [P.P.C. § 993-1 *et seq.*], provides that rights in publicly owned waters shall be acquired only by appropriation, and permits private persons to exercise the right of eminent domain to condemn inferior uses of water for a use that is declared by the statute to be public in nature. Since riparian rights are valuable property rights, *Litka v. Anacortes,* 167 Wash. 259, 9 P. 2d 88 (1932), just compensation must be made when they are taken in the appropriation through the exercise of eminent domain. WASH. CONST. ART. I, § 16.

One line of Washington decisions would seem, at first glance, to preclude the rule of the instant case. In 1923 the court held that riparian rights do not attach to surplus waters, *i.e.,* those in excess of the amount which can be beneficially used by the riparian owner for irrigation and domestic purposes, either directly or within a reasonable time. *Brown v. Chase,* 125 Wash. 542, 217 Pac. 23 (1923). This rule was applied to a nonnavigable lake in the case of *Proctor v. Sim,* 134 Wash. 606, 236 Pac. 114 (1925). The water involved in the instant case clearly fits this definition of "surplus," but the holdings are distinguishable. The earlier two cases held that riparian rights involving quantitative takings of water extended only to the volume which could beneficially be used for irrigation and domestic purposes, while the instant case dealt with riparian rights to use the body of water without removing any part of it.

In 1929 the court edged closer to the instant holding by deciding that when an appropriation would lower a lake level and expose riparian land previously submerged, the appropriator would have to proceed by eminent domain and compensate the owners for damage to a riparian right. *Martha Lake Water Co. v. Nelson,* 152 Wash. 53, 277 Pac. 382 (1929). While the court expressly stated the injury would result from lowering the lake level, it added the "owners purchased their property because of its access to the water for bathing, boating, swimming, fishing and for summer homes. . . . The riparian land is chiefly valuable for the purposes mentioned." *Martha Lake Water Co. v. Nelson, supra,* 152 Wash. at 54, 277 Pac. at 382. By inference these uses were recognized as riparian rights. The rule in the *Martha Lake* case was reaffirmed three years later by *Litka v. Anacortes, supra.*

Thus the instant case is the first direct holding in this state that bathing and boating are riparian rights. While the rule creates an acute problem for smaller water districts whose only feasible source of water is a nonnavigable lake or stream, it is nonetheless a realistic rule in view of the considerable effect these activities have on riparian land values.

G. KEITH GRIM

Evidence—Witnesses—Proof of Prior Inconsistent Statements. *D* was convicted of second degree assault. The prosecuting attorney, ostensibly for the purpose of laying a foundation for impeachment, asked *D* questions concerning *D*'s prior inconsistent statements, using a purported manuscript of a wire recording. *D* neither confirmed nor denied making the statements, answering, "I don't know" or "I don't deny it or confirm it." The prosecutor failed to follow this up on rebuttal by proving or attempting to prove that the prior statements were actually made. Appellant contended this was

error. *Held*: Conviction reversed. Such conduct was extremely prejudicial and constituted reversible error. *State v. Yoakum,* 137 Wash. Dec. 129, 222 P. 2d 181 (1950).

Where a witness *denies* having made the alleged contradictory statement, a failure subsequently to prove that it was made is obviously prejudicial. The prosecutor in effect vouches that the prior statements were made, and thus becomes an impressive witness to the jury, though the matter is hearsay. Hence such statements must be proved. *Hash v. State,* 48 Ariz. 43, 59 P. 2d 305 (1936); *Thurmond v. State,* 57 Okla. Crim. 388, 48 P. 2d 845 (1935); *Phila. & R. Ry. Co. v. Bartsch,* 9 F. 2d 858 (1925).

Where a witness *admits* making contradictory statements, the rule is that it is not error to exclude proof of the making of such statements by other evidence because such evidence is only cumulative. *Quayle v. Knox,* 175 Wash. 182, 27 P. 2d 115 (1933); *Black v. State,* 82 Tex. Cr. R. 358, 198 S.W. 959 (1917).

Where the witness neither *admits* nor *denies* making the prior statement, the rule is that proof of such statements *may* be introduced at the option of counsel, *Hancock v. Bevins,* 135 Kan. 195, 9 P. 2d 634 (1932); *People v. Preston,* 341 Ill. 407, 173 N.E. 383 (1930); *Humpolack v. State,* 175 Ark. 786, 300 S.W. 426 (1928), for the reason that such proof furthers the process of impeachment, and that only an unequivocal admission should serve as a basis for exclusion. *Chicago, M. & St. P. Ry. Co. v. Harrelson,* 14 F. 2d 893 (1926).

The Washington court is the first court to decide whether, when a witness gives an equivocal answer, a *failure* to offer proof is error. The decision is that proof *must* be offered. In support of this proposition the court cites only those cases in which the witness has denied making the statement. From this it appears that the court has taken the position that an equivocal answer is, in effect a denial. Other courts in permitting such proof have indicated that such an answer is more in the nature of an admission than a denial. It is submitted that the latter position has the sounder logical basis in view of the transparent falseness of such answers as "I don't remember," or "I don't deny it or confirm it," and that in the instant case the rule governing denials should not have been applied.

JAMES M. TAYLOR

Master and Servant—Liability of Master for Injuries Inflicted by Incompetent Servant—Respondeat Superior and Original Negligence. The owner of an apartment house employed a manager who, in the exercise of his duties, employed a janitor. Thereafter, the janitor became drunk and assaulted a tenant. The trial court expressly found that this fact was communicated to the manager who nevertheless continued to employ the janitor. There was no express finding that any information concerning the dangerous propensities of the janitor was communicated to the owner. However, the trial court found generally that both the owner and manager were negligent in retaining the janitor in "their employ." Shortly after the first assault the janitor assaulted *P*, also a tenant. This assault did not occur in the course of the janitor's employment. The trial court awarded *P* judgment against both the manager and the owner. On appeal, *Held*: Affirmed. Liability of both the owner and the manager is based on original negligence, not on the *respondeat superior* doctrine. *LaLone v. Smith et al.,* 139 Wash. Dec. 152, 234 P. 2d 893 (1951).

Inasmuch as the defendants did not assign as error the trial court's findings of fact, the decision is undoubtedly correct. Although the conclusion of fact that both defendants were negligent stood unchallenged on the appeal, there appears to be no justification for such a conclusion insofar as the owner was concerned. In order for the owner to be guilty of negligence in retaining a dangerous employee, personal