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Property

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is the state or any municipal corporation, or any public officer prosecuting on behalf of said municipal corporation, or the Federal government, or any of its agencies, the sum of twenty-six dollars. . . ."[65] The rule as amended reads, ". . . except when the petitioner is the state, or a *county, city, town,* or *school district* thereof, or any public officer prosecuting on behalf of the state or one of such municipal corporations. . . ."[66]

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Appellate Procedure—Appeal Bond—Cash Deposit in Lieu of. In *Salter v. Heiser,* 143 Wash. Dec. 182, 260 P.2d 882 (1953), a certificate was filed with the clerk stating that cash had been deposited with the clerk of the superior court in lieu of a bond on appeal. The cash referred to had been deposited on prior appeals, $1400 of which had not been withdrawn. The court held that even though money was on deposit with the clerk, the money had not been subjected to the conditions of an appeal bond in the instant appeal and thus did not constitute a deposit in lieu of a bond in conformance with Rule on Appeal 22, 34A Wn.2d (1951 amend.).

PROPERTY

Real Property—Mistake as to Boundary Line—Hostile Intent Requirement in Adverse Possession. *Brown v. Hubbard*[1] was an action to quiet title by adverse possession to a strip of land eight and one-half feet wide lying between the property of the plaintiff and that of the defendant, but wholly within the boundaries described by the defendant's deed. The plaintiff's predecessor in interest testified that, without the intention of taking any property belonging to another, she marked off what she thought to be the true boundary by a hedge and placed a rabbit pen and haphazardly piled rocks upon the land in dispute in the belief that this was in fact her property. The plaintiff and defendant testified that certain conversations with reference to the boundary took place at least twelve years following the definition of the boundary by the plaintiff's predecessor. In these conversations the plaintiff pointed out the true boundary as recently indicated to him by a third party and indicated that he would "have" to remove his hedge. Subsequent to this conversation and upon an attempted interference by the defendant this action was brought.

Upon appeal from a judgment for the defendant the court declared that the plaintiff's possession must be actual and uninterrupted, open and notorious, hostile and exclusive, and under a claim of right

[65] RULE ON APPEAL 57, 34A Wn.2d 62.
[66] RULE ON APPEAL 57, 34A Wn.2d Supp. 6 (1953 Amend.).
[1] 42 Wn. 2d 867, 259 P.2d 391 (1953).

made in good faith; and upheld the trial court's finding that the intention of the plaintiff was not to claim more than his title deed called for and therefor his holding was not adverse nor under a claim of right.

The court, in the leading Washington decision dealing with this problem, stated, ". . . the question of adverse possession is one of fact; and, though the fence may have been established originally by mistake, if it were followed by a claim to the land and such acts as clearly evinced a determination of permanent proprietorship, the claim is established. The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the *acts* and *declarations* of the parties."[2] In determining that the possession was adverse, the court looked to the *acts* of the claimant in improving the land as indicative of his intent to claim up to the mistakenly established boundary line. In other cases the *declarations* of the claimant have been looked upon by the court as indicative of the *lack* of hostile intent where, during the running of the statutory period, the claimant has made statements to the adjoining owner indicating acquiescence to a survey to determine the true boundary and the removal of any encroachments upon such determination.[3] Also possession under mistake as to the location of a boundary line has been held adverse in the face of testimony by the claimant that he intended to claim only what was rightfully his.[4] In these decisions the court has (1) sought the objective rather than the subjective intent, and (2) treated the intent objectively shown as controlling, without regard to the existence of an uncommunicated intention to claim only to the location of the true line, unless there is affirmative evidence that the true line is to be subsequently determined, and when determined, is to be recognized. Subjective intent in terms of frame of mind uncommunicated during the running of the statutory period has seemingly been treated as immaterial in final determination of the hostility of possession.

It is to be noted in the *Brown* case that the acts of the claimant in planting the hedge and building the pen were such as to evince an intention to claim a permanent proprietory interest. Also, the only statements of the claimant bearing upon the question were those made at least twelve years subsequent to the attempted definition of the boundary. These statements, although sufficient to infer acquiescence

[2] Bowers v. Ledgerwood, 25 Wash. 14, 19, 64 Pac. 936 (1901) (Italics added).
[3] Noyes v. Douglas, 39 Wash. 314, 81 Pac. 724 (1905); Lindberg v. Davis, 164 Wash. 680, 4 P.2d 501 (1931).
[4] Schlossmacher v. Beacon Place Co., 52 Wash. 588, 100 Pac. 1013 (1909).

to the removal of the hedge, should have no bearing upon the legal title which the running of the statutory period had placed in the plaintiff.[5] The court's determination in favor of the defendant must necessarily rest upon its finding that the plaintiff did not intend to claim to the visible boundary. Here the court treated the subjective intent of the claimant as controlling rather than the objective intent as shown by his acts with reference to the disputed area. Furthermore there was no showing that the claim of the plaintiff or his predecessor was conditioned upon the outcome of an intended subsequent survey or other determination of the location of the true boundary. Thus the intent required by the court was the categorical one to claim regardless of what might later develop.

Far better reason is displayed by the rule as it stood prior to the *Brown* case. It is generally recognized that the underlying principle of the doctrine of adverse possession is to force settlement of title disputes within a reasonable time following the initial occurrence of such dispute. Open and notorious possession is required to allow the legal owner notice of the interference with his right to exclusive possession. Hostile possession is required in contradistinction to possession with the permission of the legal owner. Under the rule as laid down by the leading Washington case where the adversity is determined by looking to the acts and declarations of the claimant as evincing the intent with which the claim is made, the purpose of the doctrine is carried out. All requirements of the doctrine are met and the "honest" claimant is not deprived of the operation of the doctrine merely because he does not hold the positive intention to claim something which has not been conveyed to him by his title deed. The rule of the *Brown* case, on the other hand, denies the benefit of this doctrine to all except those who hold the subjective intention to claim *regardless* of whether they have legal title.[6] The placing of such importance upon the subjective intent of the claimant is an open invitation to the use of well coached witnesses. Furthermore, the use of the subjective intent of the claimant to de-

[5] "We have on several occasions approved a statement which appears in Towles v. Hamilton, 94 Neb. 588, 143 N.W. 935, that: 'It is elementary that where the title has become fully vested by disseizin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed.'" Mugaas v. Smith, 33 Wn.2d 429, 431, 206 P.2d 332 (1949).

[6] ". . . the term 'hostile', as here used, does not import enmity or ill will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner." King v. Bassindale, 127 Wash. 189, 192, 220 Pac. 777 (1923).

termine the adversity of the claim will be little aid to the true owner. Upon being apprized of the interference with his right by the claimant he will not have benefit of knowledge of the claimant's subjective intent but can rely only upon what the claimant indicates his intention to be by his acts and declarations. It would indeed be a risky venture to postpone eviction or other proper action upon the hope that the claimant does not intend to claim regardless of whether the visible line is in fact the true line.

Adequate authority from other jurisdictions is found to support the rules of both the *Brown* case and those decisions handed down by the court prior to that case.[7] The fact remains that the court has apparently switched its position with respect to the requirements of adverse possession where there exists a mistake as to the location of a boundary line.

Real Property—Riparian Rights—Floodwaters and the Common Enemy Doctrine. In *Sund v. Keating*,[8] the defendant upper riparian owner to the plaintiff removed a portion of a natural ridge located approximately sixty feet from the main channel of a stream, such ridge constituting a barrier which protected the land of both the plaintiff and the defendant from innundation during the course of normal seasonal floods peculiar to the area. The earth obtained in the removal was used to raise a certain part of the defendants land in order that surface waters might flow off more readily. As a result of this removal the plaintiff's oyster beds were damaged by waters which broke through the weakened part of the ridge onto the defendant's land and thence onto the land of the plaintiff during a flood flow of normal proportion. Action was brought for damage resulting from the negligent diversion of the stream. The trial court recognized the contention of the defendant that floodwaters were surface waters to which a landowner might protect himself as to a common enemy, any resultant injury being *damnum absque injuria*,[9] but found for the plaintiff under the rule that

[7] There exist two definite lines of authority wtih respect to the adversity of a claim made under mistake: (1) The fact of the mistake is immaterial; the adversity of the claim is to be determined by the visible possession rather than from the invisible motives of the claimant's mind. French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680 (1831). (2) Possession under mistake, without the intention to claim unconditionally will not be adverse. "It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not." Preble v. Maine, 85 Me. 260, 27 Atl. 149, 150, 21 L.R.A. 829, 35 Am. St. Rep. 366 (1893). The subjective intent of the claimant has been held immaterial. Vade v. Sickler, 118 Colo. 236, 195 P.2d 390 (1948).

[8] 143 Wash. Dec. 32, 259 P.2d 1113 (1953).

[9] Cass v. Dicks, 14 Wash. 75, 44 Pac. 113 (1896).

one may not artificially divert surface waters collected upon his land within the confines of natural barriers to the detriment of his adjoining landowner.[10]

Upon appeal, the court affirmed the judgment but held that floodwaters contained within the normal flood banks are not surface waters to which the common enemy doctrine applies but are part of the watercourse which a riparian owner may not divert, in the words of the court, "negligently or wilfully."

Although negligence upon the part of the defendant was found, it is not completely clear from the decision in the *Sund* case that liability for diversion must be predicated upon negligence where the stream is not intentionally diverted. There is language in the opinion which would support the contention that the diverter would be liable for any injury incurred as a result of the diversion regardless of whether the reasonable man would foresee the possibility of such diversion as a result of his acts. Liability for negligent diversion or obstruction of a watercourse has been recognized in other jurisdictions."[11]

The courts of the various jurisdictions are far from uniform in their treatment of overflow waters of a stream. By the decision in this case the Washington Court has joined the majority in a recognition that overflow waters under certain conditions are to be treated as part of the watercourse and subject to riparian rights and liabilities.[12] Many, upon finding that the overflow is not part of the watercourse, treat such water as surface water to which the common enemy doctrine applies, allowing the landowner to protect his property without liability for any injury occurring to adjoining land.[13] Prior to the decision of the *Sund* case, the Washington court had held that all floodwaters were to be treated as surface waters. Still other courts distinguish these overflow waters from surface waters but apply the common enemy doctrine nevertheless.[14]

The problem, and an apparent conflict of authority, arises in the

[10] Nuyes v. Cossellman, 29 Wash. 635, 70 Pac. 61 (1902).

[11] Moore Spinning Co. v. Boston Ice Co., 210 Mass. 364, 97 N.E. 62 (1912) (diversion); Jones v. Seaboard Airline Ry., 67 S.C. 181, 45 S.E. 188 (1903) (obstruction); Uhl v. Ohio River Ry., 56 W.Va. 494, 49 S.E. 378 (1904) (obstruction).

[12] O'Connell v. East Tenn. V. & G. Ry., 87 Ga. 246, 13 S.E. 489 (1891); Fordham v. N.P. Ry., 30 Mont. 421, 76 Pac. 1040 (1904); Morris v. City of Council Bluffs, 67 Iowa 343, 25 N.W. 274 (1885); Horton v. Goodenough, 184 Cal. 451, 194 Pac. 34 (1920).

[13] Cass v. Dicks, 14 Wash. 75, 44 Pac. 113 (1896); Harvey v. Northern Pac. Ry., 63 Wash. 669, 116 Pac. 464 (1911).

[14] Horton v. Goodenough, 184 Cal. 451, 194 Pac. 34 (1920); see also discussion in Mogle v. Moore, 16 Cal.2d 1, 96 P.2d 147 (1939).

determination of the point at which the overflow ceases to be part of the watercourse. The case cited as authority by the Washington Court in arriving at the decision of the *Sund* case laid down the rule that an overflow flowing in a current contiguous to the main body of the stream, or which spreads out over the surrounding land only to return when the stream subsides, could not be termed surface water but remains part of the watercourse.[15] In the formulation of this rule little emphasis was placed upon the fact that the flood under determination did not exceed in size those floods which ordinarily occurred in that region. This factor was noted, however, in a later decision in which the court applied the rule in their determination. Therein it was stated, "With reasonable near approximation to accuracy, it may be laid down as a general rule that all waters of a river which form one body, when flowing within the boundaries within which they have been immemorially acustomed to flow in times of ordinary floods, constitute waters of the river, and are not surface waters."[16] This rule seems to be well founded in reason, allowing a landowner to protect improvements erected upon the land from floods of unusually large proportions which, at the time of erection, he had little reason to expect to be within the flood path. Accordingly it has been applied in many jurisdictions, both as to cases involving the protection from floodwaters[17] and those involving beneficial use of the water.[18]

Certain courts, through their definition of an 'ordinary flow,' have so changed this rule as virtually to introduce a new one. The Texas court attaches liability for diversion only where the overflow does not exceed "the line of highest ordinary flow." This in turn is defined as ". . . the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, *uninfluenced by recent rainfall or surface run-off.*"[19] As a great proportion of the high waters of a stream are caused by recent rainfall and surface run-off it would seem that the rule as applied by the Texas court would limit the extent of the watercourse to those waters which flow in the stream dur-

[15] O'Connell v. East Tenn. V. & G. Ry., 87 Ga. 246, 13 S.E. 489 (1891).
[16] Cairo V. C. Ry. v. Brevoort, 62 Fed. 129, 135 (C.C.D. Ind. 1894).
[17] Chicago B. & Q. Ry. v. Emment, 53 Neb. 237, 73 N.W. 540 (1897); Byrne v. Minneapolis & St. Louis Ry., 38 Minn. 212, 36 N.W. 339 (1888); Jones v. Seaboard Airline Ry., 67 S.C. 181, 45 S.E. 188 (1903); Uhl v. Ohio River Ry., 56 W.Va. 494, 49 S.E. 378 (1904); Dowlen v. Crowley, 170 Okla. 59, 37 P.2d 933 (1934).
[18] Miller v. Madera Canal & Irrig Co., 155 Cal. 59, 99 Pac. 502 (1909); Eastern Ore. Land Co. v. Willow River L. & I. Co., 201 Fed. 203 (C.C.A. 9th 1912).
[19] Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 468 (1926) (Italics added).

ing a major part of the year, leaving normal seasonal overflows to the classification of surface waters. The text of the decision in the above noted case indicates a feeling upon the part of the court that the application of the broader rule adopted in most jurisdictions is incompatible with their geographic area.

In some jurisdictions the distinction between an ordinary and an extraordinary flood has been used only insofar as it bears upon the forseeability of the volume of the flow.[20] If the flow continues in one body with the main current of the stream and is foreseeable by the use of reasonable skill and judgment, liability for diversion will attach although the flood may in fact be unusual or extraordinary.[21]

The courts have shown a decided reluctance to apply any of the above tests where the area innundated is a broad alluvial valley. In one such case, although finding for the defendant upon another ground, the court indicated that a valley varying in width from one mile to one mile and a half could not properly be called a watercourse.[22] Another recognized the rule allowing a landowner to protect himself without liability as to extraordinary floods but indicated it was highly unreasonable to reach the result that the whole Mississippi valley was a part of the watercourse.[23]

The cases do not indicate that overflow waters in times of ordinary flood must meet the general definition of a watercourse[24] to be termed part of the watercourse and subject to riparian rights and liabilities. It has been held that such waters need not be contained within visible banks[25] and that no current is necessary.[26]

The facts of the case herein reported would support the contention that the overflow involved was part of the watercourse under any of the above stated rules with exception, perhaps, of the Texas rule. It might also be contended that it was within the general definition of a

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[20] Zollman v. Baltimore & O.S.W. Ry., 70 Ind. App. 395, 121 N.E. 135 (1918). See also Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. 79 (1909), wherein the court adopted the following definition set forth in 13 ENCY. OF LAW 686 (2d ed. 1939): "An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated."

[21] Mendelson v. State, 218 App. Div. 210, 218 N.Y.S. 223 (1926).

[22] Kansas City M. & B. Ry. v. Smith, 72 Miss. 677, 17 S. 78 (1895).

[23] Cubbins v. Miss. River Comm., 241 U.S. 351, 36 Sup. Ct. 671 (1916).

[24] A watercourse is a stream of water flowing in a definite channel, having a bed and sides or bank, and discharging itself in some other stream or body of water. Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059 (1909); also see GOULD, WATERS, § 41, p. 9 (3d ed. 1900).

[25] Miller v. Madera Canal & Irrig. Co., 155 Cal. 59, 99 Pac. 502 (1909).

[26] Uhl v. Ohio River Ry. Co., 56 W.Va. 494, 49 S.E. 378 (1904).

watercourse. This leaves an open question as to the course to be taken by the Washington Court when faced with the diversion of an unusual overflow, one which is unusual but forseeable, or one which could not be brought within the confines of the general definition of a watercourse.

Real Property—Contract to Convey "Free from Encumbrance"—Duty to Inquire as to Easements. In *Somers v. Leiser*,[27] the plaintiff sought to recover unpaid installments due from the defendant vendee pursuant to the terms of a contract of sale for certain realty. The defendant sought by way of affirmative relief rescission of the contract and asked for the return of moneys paid by him under the contract. The contract of sale provided for the conveyance of the realty "free from encumbrance, except" a certain stipulated mortgage and it was claimed by the defendant that the plaintiff could not convey in accordance with this provision. The defendant, in his appellate brief, set forth two encumbrances, either of which was claimed by him to be sufficient to prevent the conveyance of the realty in accordance with the contract. There existed a granted easement sixty feet in width running through the property and held by the city for public street and utility purposes. The property was further encumbered by the existence of a garage almost wholly within this easement.

The trial court gave judgment for the plaintiff in the amount of the installments due, finding as a matter of fact that the defendant had actual knowledge of the existence of a gravel road twelve feet wide which ran through the property upon the location of the easement. The court concluded that this knowledge would cause a reasonable man to make inquiry from which he would have discovered the prior recorded grant of easement to the city in the width of sixty feet and that the garage rested substantially within the bounds of this easement.

Upon appeal the court affirmed the judgment for the plaintiff holding that the evidence supported the findings and conclusions of the lower court and stated, "The applicable rule of law to the factual situation presented is that a provision in a contract to convey real estate 'free of encumbrances' does not refer to granted easements, permanent in character, which are either known to a vendee, or the existence of which he should have known or ascertained had he made a reasonable investigation."[28]

[27] 143 Wash. Dec. 60, 259 P.2d 843 (1953).
[28] *Id.* at 62, 259 P.2d at 844.

Rescission may be had in equity upon grounds of misrepresentation, fraud, or where it is apparent that the vendor will be unable, at the time when his performance is due, to substantially comply with the terms of the contract.[29]

Generally, upon entering a contract for the sale of realty, the vendor assumes the burden of conveying a good and merchantible title free from encumbrances even though no such specific provision is contained within the contract.[30] The Washington court has accepted the general definition of an encumbrance: "A burden upon land depreciative of its value, such as a lien, easement, or servitude, which though adverse to the interest of the land owner, does not conflict with his conveyance of the land in fee."[31] Both easements granted to third persons[32] and buildings encroaching upon public streets and alleys[33] have been held to prevent the conveyance of a title free from encumbrance. Although such encumbrances prevent the conveyance of the merchantible title required even in absence of the specific provision against encumbrances, it is generally held that a provision for conveyance "free of encumbrances" does not refer to all encumbrances. With but few exceptions[34] it is the rule that such a provision does not refer to easements of a permanent character *of which the vendee has actual knowledge* at the time of entering the contract.[35] The basis of this rule seems sound and simple. It is that the vendee, having actual knowledge of the existence of certain easements of a type which the vendor cannot cause to be removed, presumably accepts the promise of the vendor to convey subject to these encumbrances.[36] There is little reason to presume other-

[29] Becker v. Clark, 83 Wash. 37, 145 Pac. 65 (1914); French v. C. D. & E. Inv. Co., 114 Wash. 416, 195 Pac. 521 (1921). For a general discussion of the remedy of rescission based upon fraud see Note, 5 WASH. L. REV. 135 (1930); of misrepresentation, see Note, 8 WASH. L. REV. 47 (1933); of the remedy of rescission based upon failure to remove encumbrances, see Note, 9 WASH. L. REV. 121 (1934).

[30] Davis v. Lee, 52 Wash. 330, 100 Pac. 752 (1909).

[31] 16 *Am. & Eng. Enc. Law* 158 (2d ed. 1896) as quoted in Green v. Tidball, 26 Wash. 338, 343 (1901) and Linne v. Bredes, 43 Wash. 540, 86 Pac. 858 (1906). It is important to note that before a burden may be termed an "encumbrance" it must detract from the value of the land. Although it has been held that a provision to convey free of encumbrance does not apply to easements for public highways it has been indicated that the underlying reason for such a holding lies in the fact that the highway in question does not detract from the value of the land and thus is not an encumbrance. *See* Sandum v. Johnson, 142 Minn. 368, 142 N.W. 878 (1913).

[32] Wingard v. Copeland, 64 Wash. 214, 116 Pac. 670 (1911); Fagan v. Walters, 115 Wash. 454, 197 Pac. 635 (1921).

[33] Acme Realty Co. v. Schinasi, 215 N.Y. 495, 109 N.E. 577 (1915); Vassar Holding Co. v. Wuensch, 100 N.J.Eq. 147, 135 Atl. 88 (1926).

[34] Evans v. Taylor, 177 Pa. St. Rep. 286, 35 Atl. 635 (1896).

[35] Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061 (1918); Suter v. Mason, 147 Ark. 505, 227 S.W. 782 (1921); M'Whorter v. Forney, 69 Wash. 414, 125 Pac. 164 (1912).

[36] Ferguson v. Edgar, *supra* note 35; Suter v. Mason, *supra* note 35. It is also perti-

wise since to do so would be to presume that the vendee intended to enter a contract which he knew could never be performed by the vendor. If the easements are of a type which may be removed, or if the vendee does not have knowledge of their existence, there remains no valid basis for the presumption that he intended to accept the encumbered land.

The rule of the *Somers* case, however, is a considerable extension of the majority rule. The rule of the instant case is that a provision in the contract of sale for conveyance "free from encumbrance" does not refer to any easement the existence of which is ascertainable by a reasonable inspection. The effect of the rule is to charge the vendee with knowledge of all such easements *whether or not he makes the inspection* and *regardless of whether he has or has not actual knowledge* of their existence.

Although there is a lack of Washington case authority directly in point, the majority rule has been applied in Washington. In an early case the court held that knowledge upon the part of a vendee of the existence of two roads located upon the property did not preclude the vendee from obtaining a rescission in the absence of actual knowledge upon his part that the roads had become public highways by prescription.[37] A recent case, however, announced the rule as applied in the *Somers* case.[38]

It is apparent that all purchasers of realty must use an increased amount of care either in making pre-contractual investigations of the land which they intend to purchase or in drafting the provisions of the contract. Probably increased precautionary measures should be taken in both procedures in view of the fact that somewhat stronger terminology than "free from encumbrance" is required to adequately protect the vendee and that, as yet, exactly what terminology will satisfy the need is unknown. The hazard for the purchaser of small homes is

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nent to note that if the encumbrance is of a permanent nature and the vendee has knowledge of its existence, he undoubtedly considered the value of the land with reference to the existence of th encumbrance and thereby suffers no injury.

[37] M'Whorter v. Forney, *supra* note 35. Also see Fagan v. Walters, 115 Wash. 454, 197 Pac 635 (1921) and Moore v. Clark, 157 Wash. 573, 289 Pac. 520 (1930) wherein the holdings are consistent with the view that lack of actual knowledge of ascertainable encumbrances will allow the vendee to rescind.

[38] Bruckart v. Cook, 30 Wn.2d 4, 190 P.2d 725 (1948). The action for rescission in this case was based upon misrepresentation and although the court cited 55 AM. JUR. VENDOR & PURCHASER § 258 (1946) which discusses warranties in the contract, it seems possible that the court in stating the rule as applied in the Somers case had in mind an action based upon misrepresentation rather than an action for breach of contractual warranty to convey merchantable title.

made greater by the common practice of realtors who use standard contract blanks containing the fatal terminology. The entire situation is truly one of *caveat emptor.*

LAURENCE S. MOORE

Personal Property—Bailments—Agreement to Return Goods in Same Condition. In *Metropolitan Park District v. Olympia Athletic Club,*[39] plaintiff rented bleacher seats to defendant for an exhibition. These were destroyed by fire through no negligence on defendant's part. Embodied in the rental contract was the phrase "agree to use every possible care in handling them and to replace any parts damaged while in our possession and to *return them in the same condition* in which we received them." Defendant was held responsible in damages for their loss.

Where the bailment transaction is mutually beneficial to both parties, it is well settled that the bailee is required to use ordinary diligence in protecting the subject-matter of the bailment from damage or loss.[40] There is a split of authority on the use of the words "and to return them in the same condition . . . ," with the majority of courts holding such words impose no additional liability; while a minority construe the effect of such words as to impose the liability of an absolute insurer on the bailee.[41]

Apparently this case was one of first impression in Washington, as the Court discussed the conflicting views above and by adopting the minority view made the bailee in this case an absolute insurer. This holding seems unnecessary as the contract in the instant case embodied the additional phrases "agree to use every possible care in handling them, and to replace any parts damaged while in our possession. . . ." Clearly these go beyond the ordinary obligation implied by law in a mutually beneficial bailment. Where such additional phrases are used, a majority of jurisdictions hold such a bailee liable irrespective of his negligence or fault.[42] Hence it can now be argued that Washington has adopted the view that a bailee may enlarge his common law liability with a contract provision promising return of the property in as good condition as when bailed.

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[39] 42 Wn.2d 179, 254 P.2d 475 (1953).
[40] Thompson v. Seattle Park Co., 94 Wash. 539, 162 Pac. 994 (1917); Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 Pac. 55 (1922).
[41] 6 AM. JUR. BAILMENTS, § 182 (1950).
[42] 6 AM. JUR. BAILMENTS, § 183 (1950).

Community Property—Tort Liability. In *Laframboise v. Schmidt,* 42 Wn.2d 198 (1953), plaintiff, mother of a six year old girl, arranged for defendant and his wife to care for the child while she was in Alaska. Defendant took indecent liberties with the child. Plaintiff, as guardian *ad litem,* asks damages against defendant's community property. *Held:* The husband was managing community property at the time he committed the act; the community is liable. The holding is in line with the Court's enunciated policy of giving wide range in community property cases to the scope of the husband's statutory managerial powers in tort actions. See Comment, 23 WASH. L. REV. 259 (1948).

Real Property—Adverse Possession—Segregation of Mineral and Surface Rights for Tax Purposes. In *McCoy v Lowrie,* 42.2d 24, 252 P.2d 415 (1953), the plaintiff sought to obtain title to certain mineral rights under the provisions of RCW 7.28.080, which permits any person having color of title to vacant and unoccupied land to obtain title by paying taxes upon such land for a period of seven successive years. There had been a prior severance of title to the mineral rights and title to the surface rights, but no segregation for taxation purposes. The deed of conveyance to the plaintiff contained no indication of the prior severance. Judgment for plaintiff was reversed. Since, where there has been no segregation for taxation purposes, payment of the taxes on the land does not constitute payment of the taxes on the mineral rights.

Torrens Act—Execution Creditor Under Own Levy not Purchaser "for Value in Good Faith." *Finley v. Finley,* 143 Wash. Dec. 696, 264 P.2d 246 (1953), was a divorce action in which the wife joined, as defendant, the husband's execution creditor for purpose of quieting title to certain real property. The property, purchased from the separate funds of the plaintiff during marriage, had been erroneously registered as community property under RCW 65.12 (Torrens Act). The defendant execution creditor had purchased the property at an execution sale resulting from his own levy. In reversing judgment for defendant, the court held that an execution creditor who purchases land at an execution sale of his own levy is not a purchaser "for value and in good faith" under RCW 65.12.195, and is not entitled to its protection. Hence, the wife was entitled to show that although the property was registered in the name of the community, it was her separate property, and not subject to execution to satisfy a judgment against the husband.

SALES

The cases handed down in 1953 added little to the law of sales. In some instances appeals were taken that seem, in retrospect, to have been ill-advised. It is elementary, of course, that the primary responsibility of the Supreme Court is to resolve issues of law, not to review findings of fact. Nevertheless, in at least three of the cases in the field of sales,[1] the court is found in the unfortunate position of having to base its discussion almost solely upon factual issues. In none did the appeal

[1] Madden v. Herzog, 42 Wn.2d 666, 257 P.2d 779 (1953); Lacey Plywood Co. v. Wienker, 42 Wn.2d 719, 258 P.2d 477 (1953); Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953).