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Property

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may address some motion, demurrer or denial." Consequently notice of appearance cannot be a pleading within Rule 1 (2) as it asserts no claim or defense.

Amendment to the General Rules of the Superior Courts—Rule 16—New Trial. Superior Court Rule 16, 34A Wn.2d 131, was amended to delete the "denying" part of the paragraph following subdivision 9. [144 Wash. Dec. No. 23 (effective July 1, 1954).] As the rule now stands, the trial court must give definite reasons of law and fact when it grants a motion for a new trial. If the court denies a motion for a new trial, there is no longer the requirement of stating its reasons in the denying order. The desirability of deleting the "denying" part was pointed out in 29 WASH. L. REV. 145-147 (1954).

Amendment to the Rules of Pleading, Practice and Procedure—Rule 44—Abrogation of Certain Statutes. A new rule was adopted to the Rules of Pleading, Practice and Procedure. Rule 44, 145 Wash. Dec. No. 9 (effective September 1, 1954). Rules of Pleading, Practice and Procedure 26 through 37, 34A Wn.2d 84 *et seq.*, adopting the federal rules governing discovery, involved a major change from the statutory discovery procedures. Notwithstanding RCW 2.04.200, which declares all laws in conflict with rules of court are of no further effect, there has been some confusion by continuing to apply the statutory discovery procedures. See 29 WASH. L. REV. 143 (1954). Rule 44 clarifies precisely which sections of RCW are rendered ineffective by the discovery procedures in Rules 26 through 37.

PROPERTY

Real Property — Easements — Easement by Implied Reservation. *Adams v. Cullen*[1] established for the first time the validity in Washington of easements by implied reservation. A driveway had been constructed to serve both a residence adjacent to the street and the residence behind. Both residences were upon the same tract of land, held by a single owner. The driveway had been used for both residences for many years. The quasi-servient tenement, adjacent to the street, was conveyed to the defendant prior to the plaintiff's acquisition of the rear property. Construction of another driveway for the plaintiff's premises would have entailed grading a 45 foot incline to the street below, a project of considerable expense. Plaintiff was held to possess an easement by implied reservation in the driveway across the defendant's land.

Following previous decisions on implied easements,[2] the court restated the three requirements: unity of title and subsequent separation; an apparent and continuous quasi-easement during unity of title; and a certain degree of necessity. The court then pointed out that "Unity of title and subsequent separation is an absolute requirement.

[1] 44 Wn.2d 502, 268 P.2d 451 (1954).

[2] Bailey v. Hennessey, 112 Wash. 45, 191 Pac. 863 (1920); Wreggit v. Porterfield, 36 Wn.2d 638, 219 P.2d 589 (1950); Silver v. Strohm, 39 Wn.2d 1, 234 P.2d 481 (1951).

The second and third characteristics are aids to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. . . . *The presence or absence of either or both of these requirements is not necessarily conclusive.*"[3] However that may be, no case in Washington has found an implied easement without the presence of both necessity and prior use in some degree. It is difficult to conceive a construction of the presumed intention of the parties without these factors. Such a situation would seemingly require evidence of express intention of the parties, and there would be no problem of *implied easements*. The possibility which might be inferred from the last sentence above quoted, that an implied easement might be established without the two latter characteristics, is clouded by the ever-present question in these cases of just how much necessity is required. This appears to be a variable factor dependent upon the facts of each individual case. Certain standards have been established, however. For an implied grant, the rule is certain: reasonable necessity must be proved.[4] It would appear that there is no practical reason for concern as to which estate was first conveyed; but it is traditional to construe implications in deeds in favor of the grantee, upon the presumption that a fee simple has passed. Since an implied reservation is in derogation of a fee, it must overcome this presumption. Implied grants benefit from such a presumption. Therefore, a greater degree of necessity is required for implied reservations. Courts have adopted at least three different views upon this matter. Probably a majority require strict necessity,[5] a position which was approved by dicta in previous Washington cases.[6] A few courts have simplified the matter by eliminating any distinction between implied grants and reservations, requiring reasonable necessity for either.[7] In the *Adams* case, Washington has adopted the middle ground which was established in a leading Kansas decision.[8] *"In the absence of other considerations,* a higher degree of

[3] Note 1 *supra* at 505, 268 P.2d at 453 (Italics added).

[4] Bailey v. Hennessey, note 2 *supra.*

[5] See Notes, 34 A.L.R. 233 (1925); 100 A.L.R. 1327 (1936); 164 A.L.R. 1007 (1946).

[6] Schumacher v. Brand, 72 Wash. 543, 130 Pac. 1145 (1913); Cogswell v. Cogswell, 81 Wash. 315, 142 Pac. 665 (1914); Davison v. Columbia Lodge, 90 Wash. 461, 154 Pac. 383 (1916).

[7] Jasper v. Worcester Spinning & Finishing Co., 318 Mass. 752, 64 N.E.2d 89 (1945); Jennings v. Lineberry, 180 Va. 44, 21 S.E.2d 769 (1942); Provident Mut. L. Ins. Co. v. Doughty, 126 N.J. Eq. 262, 8 A.2d 722 (1939).

[8] Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938).

necessity is needed. . . ."[9] The court has embraced the rule of the Restatement[10] in weighing several factors, principally that of prior use. Evidence of prior use, according to the Restatement, may supplement the necessity and also aid in establishing the presumed intention of the parties. The greater the prior use, the less extra necessity is required for an implied reservation. Following this rule in the *Adams* case, it was held that continuous prior use, combined with the necessity shown and the conveyee's knowledge of the prior use was sufficient proof to establish an easement by implied reservation.

So long as a differentiation is made between implied grants and reservations, the position taken by the court appears to be preferable to the older view that strict necessity is required for implied reservations. The rule of the Restatement is flexible and will embrace divers fact situations with an eye toward equity. But it would be reasonable speculation that failure to prove either necessity or prior use would be fatal to a party claiming an implied easement, whether by grant or reservation. The lack of conclusiveness probably applies to the degree of each characteristic, rather than to its presence or absence as was indicated by the court. Assuming that failure to prove prior use would be fatal, the claiming party might still avail himself of a statutory right-of-way by necessity,[11] with its accompanying disadvantage of requiring compensation.

The *Adams* case greatly clarifies *Wreggit v. Porterfield*,[12] which had been interpreted as possibly denying the validity of implied reservations in this state.[13] Their existence and validity is now recognized, and the rule appears to be that generally a higher degree of necessity is required for them than for implied grants. How the other statements of the court will be interpreted in a borderline case cannot safely be predicted, but there are indications that an equitable and flexible disposition will result in implied easement cases hereafter.

Real Property—Eminent Domain—Condemnation of Public Property. In *State* ex rel. *Eastvold v. Superior Court*,[14] the state sought

[9] Note 1 *supra* at 508, 268 P.2d at 454.
[10] 5 RESTATEMENT, PROPERTY § 476 (1944).
[11] RCW 8.24.020.
[12] Note 2 *supra*. The Wreggit case was an unsuccessful attempt to establish an easement by implied grant upon facts of reservation, counsel apparently believing that reservations were not valid in Washington. There was little showing of either necessity or prior use. The court held this failure of proof to be fatal to the claiming party.
[13] Note, *The Implied Easement and Way of Necessity in Washington*, 26 WASH. L. REV. 125 (1951).
[14] 44 Wn.2d 607, 269 P.2d 560 (1954).

to condemn a drainage district's right of way for limited access highway purposes. The state relied upon RCW 47.52.050, which provides that *private or public property* may be acquired for limited access facilities.[15] The court held that the term "public property" as used in the statute means property owned by some public body, not property in the public domain, as such, which is not devoted to public use. Accordingly, under the statute the state may condemn property owned by municipal corporations and in public use, and it was error to dismiss the state's petition.

Several distinct situations may arise involving the condemnation of public property. They involve at least four separate entities which possess a power of eminent domain: the privately owned public utility, the municipality or municipal corporation, the county and the state itself. At least eight different combinations of these competing parties have presented the problem to the Washington court. These situations are illustrated as follows. (1) It is well settled that a municipal corporation may condemn and take property of a privately owned public utility corporation, where the property is taken for the same public use.[16] (2) The state may condemn property of a privately owned public service corporation for the same or for a different public use.[17] (3) One public service corporation may condemn property of another such corporation where the property has not been put to the public use for which it is sought, and the new public use will not interfere with the existing use.[18] This situation may be distinguished by the fact that it is actually private condemnation of private property. (4) Presumably, a privately owned public service corporation deriving

[15] RCW 47.52.050 provides that ". . . the highway authorities of the state, counties, and incorporated cities and towns, respectively, or in cooperation with the other, may acquire private or public property and property rights for limited access facilities and service roads . . . in the same manner as such authorities are now or hereafter may be authorized by law to acquire property or property rights in connection with highways and streets within their respective jurisdictions." The authorized manner of condemnation is found in RCW 47.12.010.

[16] State *ex rel.* Peabody v. Superior Court, 77 Wash. 593, 139 Pac. 277 (1914) (electric railway); State *ex rel.* Washington Water Power Co. v. Superior Court, 8 Wn.2d 122, 11 P.2d 577 (1941) (franchises, plants, lines and facilities of electric power producer); State *ex rel.* Northwestern Electric Co. v. Superior Court, 28 Wn.2d 476, 183 P.2d 802 (1947) (electric power plant, on the theory that use of a public utility by a municipal corporation is larger in scope and of more general benefit to the public.); See Note, 2 WASH. L. REV. 201 (1927).

[17] State *ex rel.* Bremerton Bridge Co. v. Superior Court, 194 Wash. 7, 76 P.2d 990 (1938); WASH. CONST. Art. XII, § 10 provides that this power of eminent domain over corporations shall not be abridged.

[18] Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670 (1903); State *ex rel.* Washington Boom Co. v. Chehalis Boom Co., 82 Wash. 509, 144 Pac. 719 (1914); State *ex rel.* South Fork Log Driving Co. v. Superior Court, 102 Wash. 460, 173 Pac. 192 (1918); State *ex rel.* Mason County Power Co. v. Superior Court, 99 Wash. 496, 169 Pac. 994 (1918).

power of eminent domain from the state may condemn property of a municipality. However, a specific grant of such power may be necessary. This was the implication of one case,[19] where property had been granted to a city upon condition subsequent to be used only for park purposes. A railroad attempted to condemn a portion of the park. Condemnation was denied, the court holding that the land was deemed to be held in trust for park purposes, and the power to divert it to an inconsistent public use must be specially conferred. It was not made entirely clear whether the requirement covered both parties or only the city.[20] (5) Municipal corporations have been allowed to condemn state land which was not in public use.[21] (6) In two cases, state land which was in public use was condemned by a municipal corporation for another public use. The court held that such action was within the power of eminent domain of the municipal corporation, so long as the new public use would not interfere with the existing public use of the state.[22] (7) In *State* ex rel. *Cle Elum v. Kittitas County,*[23] the county sought to condemn, for road purposes, a right of way across property held and used by the city as a site for a reservoir. Condemnation was denied, the court holding that such a power must be expressly conferred by statute, and will not be inferred from a general power of eminent domain. (8) The state may condemn property of a municipal corporation for an inconsistent public use, where the power to acquire "public" property is conferred by statute. This was the holding in *State* ex rel. *Eastvold v. Superior Court.*[24]

Several questions remain unanswered by the foregoing cases. Must the *state* have specific statutory authority to condemn public property in public use? If so, it may be doubted if such property may be taken for *ordinary* highway purposes, due to different wording used in the regular highway statutes from that used in the limited access provisions.[25] Some federal cases suggest that the requirement of specific statutory authorization is restricted to the exercise of eminent domain

[19] State *ex rel.* Northern Pacific Ry. Co. v. Superior Court, 136 Wash. 87, 238 Pac. 985 (1925).

[20] In Powell v. Walla Walla, 64 Wash. 582, 117 Pac. 389 (1911), it was held that a city could not devote property purchased by it for use as a park to the improvement of an adjoining street. Such power must be specially conferred.

[21] Tacoma v. State, 121 Wash. 448, 209 Pac. 700 (1922).

[22] Tacoma v. State, note 21 *supra;* Roberts v. Seattle, 63 Wash. 573, 116 Pac. 25 (1911), where university property was taken by the city for street purposes. RCW 28.77.300 now prohibits exercise of eminent domain against certain university property.

[23] 107 Wash. 326, 173 Pac. 698 (1919).

[24] *Supra* note 14.

[25] RCW 47.12.010 provides for the acquisition of "any property . . . necessary" for highway purposes. Compare RCW 47.52.0.0: "private or public property."

by a municipality or other donee of the sovereign, and has no application to the sovereign itself.[26] This reasoning is also implied in the principal case.

Regardless of the source of its power, when the state is allowed to condemn public property in public use, must the state have a superior public use in store for the property sought? The court has often held that in eminent domain proceedings, selection of the land to be condemned by the proper administrative official is conclusive in the absence of bad faith, or arbitrary, capricious or fraudulent action.[27] This conclusiveness is codified in the highway statutes.[28] Is such bad faith, etc., the only test of the utility or preference of the new public use over the old? In *State* ex rel. *Puget Sound & Baker River R. Co. v Joiner*[29] appears this dicta: ". . . where property devoted to public use is sought for a superior public use, the right to condemn such property must be exercised as not to substantially interfere with the prior use." This doctrine has been followed only in situations (3) and (6) above. Some courts have held that property presently devoted to public use cannot be taken by eminent domain for another and wholly different public use unless the new use is necessary to the public welfare.[30] Even this test may be unsatisfactory where either use is necessary to the public welfare. It would require judicial determination of public welfare. On the other hand, planning and land allocation is properly a legislative function, since the broad scope of the problem can be treated where the courts must decide individual cases. Specific statutory authorization to condemn "public" property is a form of legislative determination of superior public uses, and perhaps is more definite in application than any judicial test of public welfare or convenience.

Conflict between public and private uses of property has long presented difficult problems to the courts. Conflict between different public uses of land appears to be an inevitable growing field of controversy accompanying the growth of public ownership of all types of public facilities. Where legislatures have not acted for allocation between

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[26] United States v. Sixty Acres, More or Less, 28 F.Supp. 718 (Ill. 1939); United States v. Parcel of Land, 32 F.Supp. 368 (Del. 1940).

[27] State *ex rel.* Puget Sound & Baker River R. Co. v. Joiner, 182 Wash. 301, 47 P.2d 14 (1935); State *ex rel.* St. Paul & Tacoma Lmbr. Co. v. Dawson, 25 Wn.2d 499, 171 P.2d 189 (1946); State *ex rel.* Hunter v. Superior Court, 34 Wn.2d 214, 208 P.2d 866 (1949); State *ex rel.* Church v. Superior Court, 40 Wn.2d 90, 240 P.2d 1208 (1952).

[28] RCW 47.12.010.

[29] *Supra* note 27 at 302, 47 P.2d at 15 (1935).

[30] Oklahoma City v. Local Federal Savings & Loan Assn., 192 Okla. 188, 134 P.2d 565 (1943); Denver v. Board of Commissioners, 113 Colo. 150, 156 P.2d 101 (1945).

public uses, the conceivable tasks of the courts in balancing public interests may be great.

Real Property—Adverse Possession—Proof of Intent to Claim Adversely. In *O'Brien v. Schultz*,[31] plaintiff and defendant were possessed of adjoining quarter sections of land. About 1900, a fence had been erected to divide the two quarters. This fence did not follow the true boundary line, and included some 3.7 acres of defendant's land with the quarter section belonging to plaintiff. Each party farmed up to the fence. The fence was removed about 1916, leaving a visible ridge which was treated as the boundary for the next ten years. During part of this latter period, a tenant farmed both parcels, dividing the crop at the ridge. In 1927 a new fence was built upon the ridge by the plaintiff's tenant. This remained until 1945, when a period of contention began as to the true boundary, defendant and plaintiff alternately destroying each other's crops and moving the fence. A similar dispute arose over part of an abandoned road which the plaintiff's tenant had fenced and farmed for at least ten years.

On cross-examination, the plaintiff's tenant testified that neither he nor the plaintiff wanted any land which was not the plaintiff's; that they only wanted the land which plaintiff actually owned. The trial court thereupon dismissed the action and the plaintiff appealed. The supreme court held that the plaintiff had established a prima facie case and reversed for a new trial, saying, "There is no magic formula by which a claim of title by adverse possession may be defeated by drawing from the claimant an admission that originally he did not intend to take any land beyond his boundaries."[32] The plaintiff's actions were held to have spoken louder than his words; his *acts* in exercising full domination and control over the disputed strip and taking crops from the land to the purported boundary evinced his intention to claim as owner, and his *declarations* that he did not intend to claim defendant's land did not prove lack of intention. There is no premium upon evil intent. *"An express declaration* of intention to claim adversely is not necessary to initiate the running of the statutory period nor to support an action . . .," the court pointed out, then stating that *"Nothing said in either Brown v. Hubbard, . . . nor in Beck v. Loveland, . . . changed, or was intended to change, the foregoing rule."*[33]

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[31] 145 Wash. Dec. 717, 278 P.2d 322 (1954).

[32] *Id.* at 726, 278 P.2d at 328.

[33] *Ibid.* (Italics added.)

Beck v. Loveland[34] was easily distinguished, since the claimant in that case had known that the fence in question was not the true boundary and had agreed to treat it as temporary, pending a survey. *Brown v. Hubbard*[35] presented a more difficult task of distinction. There, the claimant had planted a hedge and piled rocks haphazardly upon what she thought was the true boundary. Twelve years later, she had declared that she would vacate the strip. It was held that the claimant did not have sufficient intent to claim adversely. That decision had appeared to hold the declarations as controlling, and to imply a requirement of evil intent.[36] In the *O'Brien* case the court points out that "We did not, in that case [*Brown v. Hubbard*], consider as controlling the testimony of plaintiff and his predecessor that they did not intend to claim anything beyond the true boundary. Indeed, we could not have done so inasmuch as in three earlier decisions we had held that almost identical language did not, by itself, prove a lack of intention to claim title by adverse possession.[37] . . . The real basis of our opinion was that we could not find on the *whole record* that the evidence preponderated against the findings. . . ."[38]

This case then makes it clear that *Brown v. Hubbard* did not change the law of adverse possession in any respect. Intention to claim property adversely may still be proved by *acts and declarations,* with acts most frequently controlling. "If his *acts* clearly evince an intention to claim another's land as its owner, a general *declaration* by the user that he did not intend to claim another's land will not prove lack of intention. But a specific *declaration* by a user that he knew a fence was not the boundary and that he agreed to consider it as a temporary barrier will prove lack of intention. *Beck v. Loveland,* supra. And if his *acts* are equivocal or do not clearly evince his intention to claim as owner, his *declarations* that he did not intend to take another's land, though not conclusive proof of lack of intention, may be considered in determining his intention while using the land. *Brown v. Hubbard,* supra."[39]

The *O'Brien* case is a landmark in Washington law of adverse pos-

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[34] 37 Wn.2d 249, 222 P.2d 1066 (1950).

[35] 42 Wn.2d 867, 259 P.2d 391 (1953).

[36] See Note, 29 WASH. L. REV. 154 (1954).

[37] Citing Mittet v. Hansen, 178 Wash. 541, 35 P.2d 93 (1934); Johnson v. Ingram, 63 Wash. 554, 115 Pac. 1073 (1911); Schlossmacher v. Beacon Place Co., 52 Wash. 588, 100 Pac. 1013 (1909).

[38] 145 Wash. Dec. at 725, 278 P.2d at 328.

[39] *Id.* at 727, 278 P.2d at 329.

session. It would appear that all confusion as to required intention has ended, and that the future pattern will be one of precision.

WILLIAM J. POWELL

Community Property—Validity of Antenuptial Agreement Altering Status of Property Acquired after Marriage. In *Hamlin v. Merlino*,[40] husband and wife entered into an antenuptial agreement providing, among other things, that all property acquired after marriage should become the separate property of the one *in whose name the property was taken.* When the wife died, the husband, as administrator, filed an inventory of her estate showing the sole asset to be a bank account of $847. Shortly thereafter the plaintiff was appointed as administrator with will annexed. He sought to have all property acquired after marriage declared to be community property, subject to administration. Defendant contended that all such property was his separate property by operation of the antenuptial agreement. The trial court dismissed the suit, and the plaintiff appealed. On appeal, all property except that traceable to assets owned by the husband before marriage was declared to be community property. The agreement was held to be void for lack of fairness to the wife, since the husband's statutory[41] position as manager of the community would enable him, under this agreement, to put *all* of the property in his own name, thus making it his separate property.

The court adopted the rule as stated in *Juhasz v. Juhasz*,[42] where it was held that ". . . An engagement to marry creates a confidential relationship between the contracting parties and an antenuptial agreement entered into after the engagement and during its pendency must be attended by the utmost good faith. . . ." This corresponds to the general rule[43] and the Washington rule[44] regarding contracts between husband and wife *after* marriage. In applying this rule, the court has set a standard that must be met in order to sustain an antenuptial agreement altering the status of property that would ordinarily be commu-

[40] 44 Wn.2d 851, 272 P.2d 125 (1954).

[41] RCW 26.16.030, which gives husband power to dispose of community property the same as if it were separate property.

[42] 134 Ohio St. 257, 16 N.E.2d 328 (1938).

[43] POMEROY, EQUITY JURISPRUDENCE §§ 955, 956, 957, 962b (5th ed. 1941). The gist of these sections is that between husband and wife there is a confidential relationship and that in such relationships, courts will examine any transactions affecting property rights—the burden being on the party seeking to sustain the agreement to prove that it is *fair* and entered into with full knowledge of all relevant facts.

[44] See, for example, *In re* Madden's Estate, 176 Wash. 51, 28 P.2d 280 (1934), where the court cited POMEROY, *op. cit. supra* note 43.

nity property. Though this is the first direct holding by the court on the precise issue involved, it is not a surprising one. The rule applied in this case is the general rule in almost any case where there is a confidential relation between the parties,[45] and also follows the weight of authority as to antenuptial agreements in particular.[46]

LAYTON A. POWER

Landlord and Tenant—Lease with Covenant to Rebuild—Extent of Duty to Rebuild. In *McFerren v. Heroux*[47] the Washington Supreme Court awarded the lessor damages for the lessee and his assignee's breach of a covenant to rebuild, holding that a structure reasonably similar in kind and proportion to that destroyed was required. This is in accord with the accepted meaning of "rebuild"[48] and a prior Washington decision.[49] From the definition of a covenant to rebuild, the logical assumption of the measure of damages would be the cost of rebuilding the structure (in this case a grandstand approximately 20 years old) as it existed prior to its destruction. However, the court awarded damages based on the cost of a new grandstand, not one 20 years old.

Before looking at this feature of the case, several provisions of this unique lease should be examined closely. To begin with, the lessor owned nothing but the ground while the lessee owned the buildings and improvements, which consisted of a covered, wooden grandstand. No rental other than the payment of taxes was specified, but the lessor was given an option to purchase all buildings and improvements on the land at the end of the ten year term for $5,000.[50] The lessee was not required to keep the buildings in repair, carry fire insurance,[51] or make any improvements. In the event of a fire doing more than $500

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[45] POMEROY, *op. cit. supra* note 43.

[46] Juhasz v. Juhasz, *supra* note 42; *In re* Flannery's Estate, 315 Pa. 576, 173 Atl. 303 (1934); *In re* Waller's Estate, 116 Neb. 352, 217 N.W. 588 (1928); Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1928); Harlin v. Harlin, 261 Ky. 414, 87 S.W.2d 937 (1935); *In re* Enyart's Estate, 100 Neb. 337, 160 N.W. 120 (1916). Though these cases are not from community property states, the principle is the same; that a valid antenuptial agreement must be fair or entered into with full knowledge of the facts.

[47] 44 Wn.2d 631, 269 P.2d 815 (1954). See also *Evidence* at page 147.

[48] Webster's New International Dictionary (Unabridged), 2nd edition; 36 WORDS AND PHRASES 426; 75 C.J.S. 639 (1952).

[49] *Cf.* Seattle v. Northern Pacific Co., 12 Wn.2d 247, 254; 121 P.2d 382, 385 (1942).

[50] The court found this to be the real consideration for the lease, rejecting the lessee's contention that the consideration was the dismissal of his suit for specific performance of a contract to convey the same tract of land brought against the lessor's vendor.

[51] However, the lessee did carry $60,000 fire insurance.

damage, the lessee was given an option to either rebuild or surrender the lease.

After the grandstand was destroyed by fire, with exactly five years remaining on the lease, the lessee elected to rebuild and later assigned the lease,[52] the lease being assignable subject to its terms. His assignees erected two uncovered, portable grandstands costing approximately $25,000. The trial court held this to be a breach of the covenant to rebuild, but awarded only nominal damages on the ground damages were speculative since the lease did not require that the grandstand be kept in repair and there was, therefore, no assurance that it would be in existence at the end of the term. The Supreme Court reversed and at the same time granted damages[53] based on the present value of a new grandstand[54] at the end of the lease[55] less the option price of $5,000.[56]

No case or text has been found in which the lessor sued his lessee or his lessee's assignees for damages for breach of a "straight" covenant to rebuild (one in which the lessee covenants to rebuild in the event of destruction by fire or other casualty), as distinguished from an unconditional covenant to repair or to return the property in as good condition was in when received. The rule at common law and the rule in Washington today is that the latter covenants obligate the lessee to rebuild the buildings or improvements leased in the event of destruction by fire or other casualty during the term.[57] They represent the closest analogy that can be drawn to the "straight" covenant to rebuild as found in the instant case. There are numerous cases, both in this and other jurisdictions, that have considered the problems presented by the analogous covenants. In almost all of them the sole question has been whether there was an obligation to rebuild. Rarely

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[52] The assignees agreed to hold the assignor harmless.

[53] In a five to four decision the court granted a new trial on the question of damages where the trial court found the plaintiff suffered substantial damages as a result of defendant's breach of contract but awarded only nominal damages. Gilmartin v. Stevens Investment Co., 43 Wn.2d 289, 261 P.2d 73 (1953). However, in that case, plaintiff's witnesses gave conflicting estimates as to the amount of damages. Here, the cost of rebuilding was uncontradicted.

[54] Trial court's oral decision, p. 116 of the trial transcript: "old grandstand . . . was a structure worth $103,000—at the time of construction."

[55] The court, of its own accord, took judicial notice of the U.S. Treasury Department's Bulletin F-Schedule of Depreciation, and held the grandstand would have a useful life of 15 years.

[56] Thus, the court held the option had been exercised and at the end of the lease the lessor would be entitled to all buildings and improvements on the land except the grandstand.

[57] Publishers Building Co. v. Miller, 25 Wn.2d 927, 938; 172 P.2d 489, 495 (1946); Anderson v. Ferguson, 17 Wn.2d 262, 271; 135 P.2d 302, 306 (1943); 20 A.L.R.2d 1344, 1353 (1951).

has it been argued that the obligation is only to rebuild in the same condition as existed prior to destruction. The few courts[58] and text writers[59] who have considered the question have all held the measure of damages for breach of the covenant to be the cost of rebuilding the structure as it existed immediately prior to its destruction, and not the cost of a new building. An example will explain the distinction. Suppose a lessee rents a house worth $5,000 today, but which originally cost $10,000 to build. Under the terms of the lease, he would be obligated to rebuild in case of destruction by casualty. When the house is destroyed by fire and the lessee fails to rebuild, can one logically argue that the lessor has been damaged $10,000 when the house was only worth $5,000 at the time it was destroyed? Yet that is what the Washington court has done in *McFerren v. Heroux,* although, as will be seen, this distinction was not argued before the court.

It is submitted that the Washington court has never ruled directly on the question. There are numerous cases in which the obligation of the lessee or his assignee to repair or rebuild arising out of the particular covenant has been decided,[60] but all of them involved situations where the lessee covenanted to keep the buildings or improvements in repair. In the instant case the lessee was not required to keep the grandstand in repair since it was his personal property until the lessor exercised his option to purchase it. This suggests a possible distinction between the cases. It was on this ground that the trial court awarded only nominal damages, but the Supreme Court found that the obligation arose from the lessee's exercise of the option to rebuild. The assignees were bound since they assumed the covenants of the lease. Only once in the Washington cases has it been argued that the lessee or his assignee should be required to pay only part of the cost.[61] This was on the ground that the boiler would last longer than the lease, not that the lessee was required to pay for something new while what was destroyed was old. In another case the lessee and his assignee were

[58] Marcy v. City of Syracuse, 199 App. Div. 246, 192 N.Y.Supp. 674 (1921), noted in 45 A.L.R. 21, 35; Sweezy v. Collins Northern Ice Co., 171 Mich. 81, 137 N.W. 84 (1912).

[59] 3 SUTHERLAND, DAMAGES § 855 at 3150, § 858 at 3164 (4th ed. 1916); 3 SEDGWICK, DAMAGES § 999h at 2080 (9th ed. 1912).

[60] Puget Investment Co. v. Wenck, 36 Wn.2d 817, 221 P.2d 456 (1950), noted in 20 A.L.R.2d 1320 (1951); Publishers Building Co. v. Miller, *supra* note 11; Anderson v. Ferguson, *supra* note 57; Yakima Valley Motors v. Webb Tractor and Equipment Co., 14 Wn.2d 468, 128 P.2d 507 (1942); Delano v. Tennent, 138 Wash. 39, 244 Pac. 273 (1926); Arnold-Evans Co. v. Hardung, 132 Wash. 426, 232 Pac. 290 (1925); Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737 (1897).

[61] Arnold-Evans Co. v. Hardung, *supra* note 60.

required to pay damages to *repair* that which was destroyed.[62] In no case has it ever been contended that the measure of damages for failure to rebuild or repair was the cost of rebuilding or repairing that which was destroyed as it existed immediately prior to destruction.

The result of *McFerran v. Heroux* has been reached in Washington as well as almost all jurisdictions because the counsel for the lessee or his assignee argues only whether there is an obligation to rebuild at all as distinguished from what is required to be rebuilt. The issue, not having been raised at the trial level, naturally cannot be assigned as error on the appeal. Consequently, the case was correctly decided by the Supreme Court as it was presented to them, but analytically it is not sound and does not stand for the proposition that a covenant to rebuild requires a new structure rather than one in the same condition as that destroyed. The measure of damages should be the cost of rebuilding a grandstand in the same condition as the one destroyed.[63]

WILLIAM M. ROBINSON

Real Property—Future Interests—Restraints on Alienation. In *Richardson v. Danson*, 44 Wn.2d 760, 270 P.2d 802 (1954), testator devised certain land to his nephew Clarence, "Subject, however, to the following conditions: That [he] shall have the use and occupancy and right to farm such land and the income therefrom during the period of twenty years from the date of my death; Provided, however, that he pay all taxes and assessments levied thereon during such twenty year period, and *provided that such land shall not be sold or encumbered . . . during such period of twenty years.*" Heirs at law who were not named in the will brought a declaratory judgment proceeding for construction of the will. *Held:* the provision was a condition subsequent; such condition was void as an illegal restraint on alienation; nephew Clarence, the devisee, took a fee simple. The law favors early vesting of estates, and conditions subsequent are preferred in construction, especially when the form is that of condition subsequent. The court accepted the majority rule that *any restraint on alienation is void,* no matter how short, since it is repugnant to the nature of a fee and contrary to public policy. See also *Equity* at page 142.

Real Property—Boundaries—Conflicting Land Descriptions in Deeds. *Fowler v. Tarbet,* 145 Wash. Dec. 309, 274 P.2d 341 (1954) was an action to settle a boundary dispute caused by conflicting land descriptions in a deed. The land conveyed was described in the deed as being 8.95 acres lying in a described lot and "being 2 acres in width. . . ." The court held that since metes and bounds control over quantity description when there is disagreement between the two, the term "acre" had a clear and definite meaning only if construed to mean the distance along one side of a square

[62] Publishers Building Co. v. Miller, *supra* note 57.

[63] A unique factor in the instant case not found in cases involving covenants to repair or keep in "good condition" was the lack of any duty to rebuild unless the lessee decided voluntarily to do so *after the destruction.* The hardship that might exist where there is an absolute pre-arranged duty to rebuild—and to which a court may give a sympathetic ear in determining the damages—is not prevalent where one has such an election.

acre, or 208.7 feet. This construction made the area conveyed 7.97 acres, and the excess quantity described was treated as surplusage. Acre has always been known as a *quantity* description, originally the amount plowed by a yoke of oxen in a day; then under the statutes of Edward I, Edward III and Henry VIII, the area of a piece 40 poles long by 4 broad, or 160 square rods. See *Webster's New International Dictionary* (2d ed. 1948). Ancient cases at King's Bench held an acre to be 160 square rods of land in whatever shape. Co. Litt. 5b. Giving new meaning to words is sometimes part of the process by which courts achieve justice in their historic function of arbitrating personal disputes. In this instance the solution was to construe an acre as a unit of *lineal* measurement.

Real Property—Easements—Public Road by Prescription. In *Todd v. Sterling,* 145 Wash. Dec. 37, 273 P.2d 245 (1954), plaintiff sought to establish a public road by prescription across what was now defendant's field. The road had been used by various settlers from 1907 to 1919, and had then been across vacant, unenclosed and wild land. Hunters, sheepmen, etc., had occasionally used the road until 1945 when the area was resettled and defendant acquired the wild land and put it to cultivation. Plaintiff was unable to show who had been the owner of the wild land during the alleged prescriptive period of 1907 to 1919. Judgment for plaintiff was reversed. The court held that in the usual case of prescriptive public roads, adverse user will be implied from a showing that such user was open, notorious, continuous and over a uniform route. No such inference will be made where the servient land is vacant, open, unenclosed and unimproved. In such cases, adverse user must be specifically proved. This, plaintiff was unable to do since he could not show who was owner. The presumption remained that the use was permissive. It is not clear where the shift of presumption occurs, but it is somewhere between the situations where there is no use made of the land and where some use or improvement is made.

Real Property—Life Estates—Liability of Life Tenant for Repairs. In In re *Brooks' Estate,* 44 Wn.2d 96, 265 P.2d 833 (1954) an executrix repaired the roof and remodeled the interior of a building in which she had been granted a life estate by the will of her decedent. In her final report, the executrix attempted to charge the remainderman with half the cost of the repairs, this litigation resulting. The trial court allowed apportionment. This was reversed on appeal, the court stating that "The cost of repairs and voluntary improvements must be borne by the life tenant in the absence of consent by the remainderman to be liable therefor." *Stahl v. Schwartz,* 81 Wash. 293, 142 Pac. 651 (1914) is the only previous case involving the question of apportionment. The same rule was stated there. Practically universal authority supports the rule, with one general exception where improvements are compelled by governmental authority. The life tenant-executrix in the *Brooks* case was 72 years old, and the argument was advanced that there was reasonable probability that the remainderman would benefit from the improvements. This argument was rejected by the court in favor of the general rule. RESTATEMENT, PROPERTY § 127, comment *a* (1948 Supplement) suggests that this is an evolving area of the law and that some equitable arguments are gaining acceptance. But no case has yet allowed apportionment without greater mitigating circumstances than were proved in the *Brooks* case. The court indicated that it will not be readily inclined to make exceptions to the general rule of no apportionment.

Personal Property—Abandonment—Limitation of Actions. In *Jones v. Jacobson,* 145 Wash. Dec. 245, 273 P.2d 979 (1954), the plaintiff sued for the alleged conversion of a piece of machinery known as a "logging donkey." The defendant had found the donkey on his land when he purchased and took possession of the land in 1944; and

after eight years of unavailing inquiries as to the ownership of the donkey, he sold it for junk. In the meantime, through mesne conveyances, the plaintiff had acquired title to the machine. None of the transferees had ever attempted to take possession of the donkey, nor had any of their bills of sale been recorded. On trial of the case, the defendant pleaded the statute of limitations and also defended on the ground that the machine had been abandoned. Judgment was for the defendant and the plaintiff appealed. On appeal, the Supreme Court had some difficulty with the case. In addition to the majority opinion, there were three opinions concurring in the result and one dissent. The majority chose to decide the case on the statute of limitations argument, making no holding on the issue of abandonment. It was held that the statute began to run when plaintiff first became entitled to sue; that he became entitled to sue when the donkey came to rest on defendant's property; that adverse possession in the defendant was not necessary; and that no demand was necessary, since this would give the plaintiff the power to toll the statute by simply refraining from making a demand.

Personal Property—Necessity of Demand Prior to Replevin Action. In *Friendly Finance Corp. v. Koster,* 145 Wash. Dec. 348, 274 P.2d 586 (1954), the assignee of the vendor's interest in an automobile sold on a conditional sales contract brought a replevin action against the assignee of the vendee's interest. The defendant in this replevin action admitted plaintiff's right to the car, but defended on the ground that plaintiff had made no demand before instituting suit. Judgment for the plaintiff was affirmed. The court held that since the plaintiff's right to the car was admitted, that issue in this case was a moot question. The effect of a reversal, said the court, would simply require the plaintiff to make a demand and bring another action, against which the defendant admits he has no defense.

SALES

Avoidance of Disclaimer by Action For Fraudulent Misrepresentation. In *Nyquist v. Foster,* 44 Wn.2d 442, 268 P.2d 442 (1954), the plaintiff brought an action based upon fraudulent misrepresentations of the vendor of a trailer. Allegedly the vendor stated that the sides of the trailer would not warp when exposed to moisture. When the trailer sides did warp, and the vendor refused the return of the trailer, the vendee sued to rescind. The action was for misrepresentation due to the inclusion in the sale contract of a disclaimer clause which prevented any type of warranty action. The case turned upon the question of whether the statements made by the vendor were statements of existing facts, or mere matters of opinion. In holding for the vendee, the court announced the general rule that a statement concerning a quality which existed in the chattel at the time that the statement was made is a statement of an existing fact unless the statement relates to the ability of the chattel to serve a particular use of the vendee, or unless the satisfaction of the thing represented depends upon the performance of a future act or the occurance of a future event. See Comment, *Avoidance of Disclaimer by Action for Fraudulent Misrepresentation,* 30 WASH. L. REV. 54 (1955).

TAXATION

Employment Security Act—Applicability to Home Freezer Salesmen. In *McIntyre v. Bates,* 145 Wash. Dec. 41, 272 P.2d 618 (1954), the Court held that persons engaged in direct selling of home freezers under a so-called "food plan" fall within the scope of the Washington Employment Security Act. The Court found the taxpayer to be an "employer" within the meaning of RCW 50.04.080 and determined that the salesmen