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Real Property

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employer's cannery. The defendant cannery had taken a pre-trial deposition of the plaintiff in which she had stated that prior to the time of her injury she was aware of the slippery condition of the stairs. However, at trial, she rebutted the testimony given in the deposition and denied any previous knowledge of the dangerous condition of the stairs. The defendant then, during cross-examination, used the deposition of the plaintiff to impeach her testimony given upon direct examination. At the close of the plaintiff's evidence, the defendant moved for a non-suit, arguing that the plaintiff's admission in the deposition of prior knowledge of the dangerous condition of the stairs was binding upon her as a matter of law; that the plaintiff had "'sworn herself out of court." The trial court granted the motion for non-suit, but later, upon further consideration, granted plaintiff's motion for a new trial. From the order granting a new trial the defendant appealed.

The supreme court affirmed the order granting a new trial. After setting out Rule 26(f), Rules of Pleading, Practice and Procedure, 34A W.2d 86, the court held that where a party uses the deposition of an adverse party for purposes of impeachment only, the evidence contained therein affects only the credibility of the party as a witness, and that it was within the province of the jury to consider and weigh the plaintiff's testimony to determine therefrom whether or not her conduct constituted contributory negligence.

REAL PROPERTY

Limited-Access Highway Condemnation—Compensation for Loss of Easement of Access—Measure of Compensation. *State v. Calkins*,[1] which involved damages to be paid for condemned land used in the construction of a new limited-access highway, held that no compensation need be paid for the alleged taking of easement of access,[2] and that expert testimony relative to the value of commercial highway frontage property is not admissible. The court also defined the method of computation of the compensation which must be paid where the land taken separates the remaining property of the condemnee.[3]

The state condemned property for use as a new limited-access highway connecting Ephrata with highway 11-G, which runs between Soap

[1] 50 Wn.2d 716, 314 P.2d 449 (1957).

[2] State v. Ward, 41 Wn.2d 794, 252 P.2d 279 (1953), has dictum which is inconsistent with the holding of the instant case, but the court states that this dictum is not binding authority.

The court uses the terms "easement of access," "easement of ingress and egress," and "easements of access, air, light, and view" indiscriminately in the opinion, depending upon the authority cited. While the terms are not equally inclusive, for the purpose of new limited-access highway condemnation they should be treated the same. In a problem concerning an existing highway it may be necessary to distinguish the terms.

[3] By way of dictum the court points out that two cases involving limited-access highways have been nullified by legislation. State ex rel. Veys v. Superior Ct. 33 Wn.2d 638, 206 P.2d 1028 (1949), which held that the state does not have the power to condemn access rights when an existing highway is converted into a limited-access one, has been nullified by RCW 47.52.050, which gives the power to condemn access rights. State ex rel. Troy v. Superior Ct. 37 Wn.2d 660, 225 P.2d 890 (1950), which held that "existing highways" includes relocated portions of the old highway, has been

Lake and Moses Lake. The defendant's land, a twenty-acre rectangular farm bound on the north by a city street which is the city limit of Ephrata and on the west by a county road, was diagonally bisected by the condemned land, leaving 10.6 acres served by the county road. The defendant was given one twenty-foot approach to the new highway on either side for the purpose of crossing it with farm machinery. A judgment of $19,000.00 was given the defendant. The state appealed from a trial court ruling which allowed the jury to consider the supposed loss of an easement of access. The judgment was reversed and remanded.

In holding that no compensation need be paid for the alleged taking of the easement of access in new limited-access highway condemnations, the court based its decision on the ground that the easement had never come into existence,[4] and that the legislature must have intended to exclude such compensation in the statute under which the land was taken. While general authorization is made for the taking of easements of access, air, light and view,[5] the only statutory provision for giving compensation for loss of access relates solely to the conversion of existing highways into limited-access facilities.[6] Therefore, said

nullified by RCW 47.52.011, which excludes relocated highways from the definition of existing highways. These cases had made it nearly impossible for the state to convert an old highway into a limited-access one. 27 WASH. L. REV. 126 (1952).

State ex rel. Eastvold v. Superior Ct., 47 Wn.2d 335, 287 P.2d 494 (1955), held that the state can limit the access on existing highways to that which is normal for a one-family residence. The inconsistency of the case with State ex rel. Veys was not pointed out in the opinion.

[4] The limited authority on the point consistently adopts this view. 43 ALR2d 1068, 1079 (1955). Nearly all of the cases on this point, including this Washington case, cite and follow the lead of three law review articles that have been written on the subject. *The Limited-Access Highway,* 27 WASH. L. REV. 111 (1952); *The Limited-Access Highway From a Lawyer's Viewpoint,* 13 Mo. L. REV. 19 (1948); *Freeways,* 3 STANFORD L. REV. 298 (1950-51).

The court points out that, if the condemnation concerned an existing highway, the taking of the easement of ingress and egress would properly be an element of damage, Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956), and also the cases cited therein. Also, RCW 47.52.080 specifically states that "no existing public highway, road or street shall be constructed as a limited-access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto...."

It should be pointed out that the instant case is not analogous to a situation where only an easement for a right of way is taken by the state and where every diminution to the owner's rights in the fee should be separately paid for, since the state in the instant case is taking the fee in the condemned land and total compensation is paid for it. The fee has to be taken as the condemnation statute provides, RCW 47.52.050: "...All property rights acquired under the provision hereof shall be in fee simple..."

[5] RCW 47.52.050: "...highway authorities... may acquire... rights of access, air, light, and view by... condemnation...."

[6] "No existing public highway, road or street shall be constructed as a limited-access facility except upon waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business... the owner of such property shall be entitled to compensation for the adequate ingress to or egress from such property...." RCW 47.52.080.

the court, the legislature must have intended to exclude such compensation in other cases.

The theory behind the holding is that there can be no easements within the condemnee's land while it is an undivided tract with ownership common to all of its parts. Easements cannot exist until there is a dominant and a servient tenament. Thus the condemnee had no easement of access to lose by reason of the condemnation.

As a corollary to the holding that no access rights were taken in the condemnation, the court held that it was improper to admit expert testimony relative to the value of commercial highway frontage property located nearby. The unique feature of such frontage property is that it does have easements of access, light, air and view which give such property additional value. The condemnee's property in the instant case did not have such easements and thus was not comparable.

Although evidence of the value of commercial highway frontage property cannot be admitted, it is proper to show that the highway is to be a limited-access road to enable the jury to properly determine the damages to the remainder of the land. However, if it is admitted for the purpose of ascertaining the value of the supposed loss of access rights, there is error.

The determination of the amount of compensation in limited-access condemnations may in the future involve special problems in determining how specific items are to be considered. The court, speaking of a condemnation which separates the remaining land, mentions several items which should be considered: separation of a defendant's land into different tracts; added inconvenience in managing the property; added inconvenience in going from one tract to the other; the presence of the new highway; the modes of access provided; the presence of existing streets, roads, and highways; and the "reasonably probable" uses of the remaining property. The general manner in which these items are to be considered is set out in the statute,[7] which provides that in eminent domain proceedings by the state there shall be compensation for the land taken together with the injury, if any, to the remainder of the land after offsetting the special benefits accruing to the remainder due to the condemnation.

A problem might have been created when the court said that in determining compensation as provided for in the statute, the computation should be as follows: (a) compensation for the land taken, plus

[7] RCW 8.04.080.

(b) injury to the remainder defined as "the added inconvenience of moving from one part of the land to the other, the separation of the land into different tracts, and other management problems," minus (c) the special benefits accruing to the remainder defined as the "modes of access provided, the presence of existing streets or roads, the presence of the new highway and the 'reasonably probable' uses of remaining land."

No problem is presented by (a) and (b); however, it is submitted that if there is to be a strict formula, the items appearing in (c), with the exception of the modes of access provided, might better be considered elsewhere. The statute[8] limits the offset to "... special benefits, if any, accruing to such remainder by reason of the appropriation and the use by the state of the lands, real estate, premises and other property described in the petition...." It would not seem that the existing streets or roads would benefit the remainder "by reason of the appropriation and use" of the condemned land, so they might better be considered in connection with (a), the value of the land taken and (b), the injury to the remainder, as they would affect the inconvenience of crossing from one part to the other and the management problems. Also, since the abutting land cannot be used for commercial purposes requiring access to the new highway, the presence of the new highway generally would seem to be more of a detriment than a benefit to the remaining property when used for such purposes as subdivision or farming. The probable uses of the remaining land, due to the limitation of access, would rarely be enhanced by the new highway and might better be considered in determining the injury to the remainder.

Perhaps it would be better to consider each of the items as an injury or benefit to the remainder as the facts of any particular case would warrant. The opinion is sufficiently ambiguous on this point so that this could be done. After defining how to determine the compensation the court stated that one of the instructions given in the trial court on the issue of severence damages, which allowed each item to be considered as a benefit or an injury, did "substantially conform" to the formula and was held proper.

This case is a step forward in assuring the benefits of the use of limited-access highways to the people of the state at a reasonable cost,

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[8] *Supra*, note 7.

as was envisioned by the legislature. It does much to clarify the law of limited-access highway condemnation,[9] although it may cause some confusion as to how the specific elements of damage are to be treated.

Adverse User—Necessity of Claim of Right. The plaintiff in the case of *Malnati v Ramstead*[1] had purchased land in 1913 which abutted land owned by the predecessor of the defendant. In December, 1914, the plaintiff began using water from a spring situated on the land now owned by the defendant and continued to use the water until stopped by the defendant in 1955. The plaintiff then brought this action to quiet title in himself.

The defendant's main assertion was that one may not gain an easement by adverse user on raw, unimproved land. The court recognized that the character of the land may be considered in determining whether adverse user has been established, since reasonable notice must be given the landowner, but held that an easement could be created by adverse user on raw, unimproved land.

During the course of the opinion the court defined adverse user as:

> [S]uch use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and *using the property under a claim of right.* Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is possessing or using it as owner, in contradistinction to possessing or using the real property in recognition of or subordinate to the title of the true owner. (Emphasis added.)[2]

The court is careful to show that hostility in this context is a term with special meaning but makes no attempt to explain or qualify what is meant by "using the property under a claim of right." That language has a special meaning when used in defining adverse possession or adverse user.[3] In *Nixon v. Merchant*[4] the court held that "claim of right" is a restatement of the necessity that the claimant hold the land in hostility to the title of the true owner.[5] In this sense, "claim of

[9] It shows that two Washington cases, *supra* note 3, have been abrogated by the present statutes and that the dicta in another case, *supra* note 2, is not binding.

[1] 50 Wn.2d 105, 309 P.2d 754 (1957).

[2] 50 Wn.2d 105, 108, 309 P.2d 754, 756 (1957).

[3] Washington uses the same test for adverse possession as it uses for adverse user, *Long v. Leonard,* 191 Wash. 284, 71 P.2d 1 (1937).

[4] 19 Wn.2d 97, 141 P.2d 411 (1943).

[5] The same explanation of claim of right was made in *Bowden-Gazzam Co. v. Hogan,* 22 Wn.2d 27, 154 P.2d 285 (1944), in which the claimant began to occupy the land of the true owner without making any inquiry as to ownership. The claimant said,

right" can be explained as being a claim based on the rights given by the ten-year adverse possession statute.[6]

The definition offered in the *Malnati* case clearly indicates the claimant must hold the land adversely to the title of the true owner. Since the *Nixon* case held that the words "claim of right" refer to the requirement of holding adversely to the true owner's title there would seem to be no need to use the words "claim of right." They are merely redundant and add nothing to what has already been stated.

To add to the definition in the *Malnati* case, rather than just restate the need for a claim adverse to the true owner's title, "claim of right" would have to indicate that a claimant must reasonably believe he has a valid legal basis, other than his adverse user, upon which he can sustain his presence. In two cases decided thirty-four years prior to the *Nixon* case the Washington court required such a separate claim.[7] This requirement was emphasized by the fact that the court said the claimant must have a "claim of right in good faith."

In the first of the two cases, *Ramsey v. Wilson,*[8] the court said it could decide the case on the character of the possession but preferred to base the decision on the fact that the claimant knew that prior litigation had shown his title to be defective. The court said, "The effect of that litigation was to determine that the appellants had no claim of right to the land, and, of course, after that time could not assert such claim in good faith."[9]

In the second case, *McNaught Collins Land Co. v. May,*[10] the claimant entered the land believing it to be federal land and that occupation for the prescribed period would give him title. After the claimant discovered the land was not owned by the government, he continued in possession for a period longer than required for adverse possession. The claimant asserted that his adverse possession began when he found the government did not own the land. The court held that, to claim title by adverse possession, the claimant must believe he has a valid claim to the land. The court said:

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during the course of his occupation, that after ten years he would be the owner. The court held for the claimant. Accord: *Fisher v. Hagstrom,* 35 Wn.2d 632, 214 P.2d 654 (1950).

[6] RCW 4.16.020.

[7] *Ramsey v. Wilson,* 52 Wash. 111, 100 Pac. 177 (1909), and *McNaught-Collins Improvement Co. v. May,* 52 Wash. 632, 101 Pac. 237 (1909).

[8] 52 Wash. 111, 100 Pac. 177 (1909).

[9] 52 Wash. 111, 114, 100 Pac. 177, 178 (1909).

[10] 52 Wash. 632, 101 Pac. 177 (1909).

> The possession must be . . . under color of title or claim of right in good faith; otherwise the claimant would simply be a common trespasser. . . . Now, under the theory upon which this case was decided, the hostile and adverse possession commenced at the time when the respondents discovered that the title to the land was not in the government, but was in some private individual. If it was at that time the statute was set in motion by the commencement of the adverse possession by reason the disseisin of the true owner, then there certainly was no settlement under a claim of right, because the claimants knew that the title was not in the government but in someone else . . .

It is possible to read "claim of right" so that it refers to the claim by adverse possession, based on the rights created by the statute, but that analysis does not seem valid when the court interjects good faith into the criteria. Certainly the court did not have the same understanding of "claim of right" in the two earlier cases, *Ramsey v. Wilson* and *McNaught-Collins Land Co. v. May,* as was later expressed in *Nixon v. Merchant.* The two earlier cases have not been expressly overruled, but are basically inconsistent with the *Nixon* case and should be considered as overruled to the extent that they require a claim to the land based on anything beyond the rights conferred by the statute.[12]

The court's definition of adverse user in the *Malnati* case is helpful in formulating an accurate understanding of the requirements for adverse user, except for the language "claim of right." These words, as construed in *Nixon v. Merchant,* add nothing to the definition, as they only reiterate the necessity that the claim be in hostility to the title of the true owner.

The *Nixon* case clearly establishes the principle that one who seeks to claim land by adverse possession need have no claim beyond that claim given him by the ten year adverse possession statute. As there is no longer a requirement for a claim based on anything other than holding the land adversely to the true owner's title the words "claim of right" are of no value and should not be included in subsequent defiinitions of adverse user or adverse possession.

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[11] 52 Wash. 632, 635, 101 Pac. 177, 178 (1909).

[12] Since the *Nixon* case the court decided *Beck v. Loveland,* 37 Wn.2d 249, 222 P.2d 1066 (1950), in which the court said, "... it must appear that such possession was maintained under a claim of right in good faith." However the decision rests on the fact that the claimant's grantor never claimed the land included within the fence to be a part of his land.

Eminent Domain—Right of State to Appeal Award. In *State v. Laws,* 151 Wash. Dec. 310, 318 P.2d 321 (1957), the state appealed from a jury verdict awarding $19,556.90 to the respondent as the value of certain land condemned by the state. The state, in its letter of transmittal of the award, reserved the right to appeal. The state then took an appeal and, pending the decision, entered into possession of the condemned property. The court held that in a condemnation proceeding the state may not take possession of the realty and also appeal the amount of the award.

This result seems to be directly in conflict with RCW 8.04.150, cited by the court, which reads:

> Appeal. Either party may appeal from the judgment for damages.... *Provided further,* That no appeal shall operate so as to prevent the said state of Washington from taking possession of such property pending such appeal after the amount of said award shall have been paid into court.

The court also considered Art. I, § 16, of the state constitution which says, "No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner." In deciding whether or not the payment into court was payment "for the owner," the court said, "In this case, was just compensation paid into court *for the owner* before the property was taken? The state paid the money into court, but not as just compensation for the owner. It had already appealed."

The present case is inconsistent with dictum in *Washington v. Smithrock Quarry,* 49 Wn.2d 623, 304 P.2d 1043 (1956), wherein the state in its letter of transmittal said the payment was "in final satisfaction of the judgment..." The court paid the money to the condemnee and when, nine days later, the state tried to appeal the court refused to allow the appeal saying the question was moot. The court said the state must make clear its intent to appeal, and then said, "Any appropriate reservation attached to the payment that would accomplish this would preserve the right of appeal." In *State v. Laws, supra,* the court described this as dictum and denounced it as unnecessary to the decision.

Homestead—Right to Transfer to Bona Fide Purchaser. In 1952 Hoffman obtained a judgment against Halverson, who in 1953 declared his home a homestead under RCW 6.12.090. Lien purchased the land for value from Halverson and brought a quiet title action against Hoffman in *Lien v. Hoffman,* 49 Wn.2d 542, 306 P.2d 240 (1957). In that action the court held that when Halverson conveyed the land to Lien, the judgment lien created by the 1952 judgment against Halverson was no longer an encumbrance against the land.

Rem. Rev. Stat. § 532 read in part, "(N)o judgment, or other claim against the owner of a homestead, except by mortgage, shall be a lien against such homestead in the hands of a bona fide purchased for value." This language was omitted from the current statute, RCW 6.12.090. This omission might lead one to think the legislature intended to have the judgment lien against the former owner remain an encumbrance on the land when transferred to a purchaser for value.

In holding that the judgment lien did not encumber the realty in the hands of a bona fide purchaser, the court relied on the reasoning of *Becher v. Shaw,* 44 Wash. 166, 87 Pac. 71 (1906). In that case the court held that the proceeds of the sale of a homestead are exempt from garnishment for a reasonable time after the sale. The court reasoned if the proceeds of a sale of the homestead were subject to garnishment, the owner of the homestead would be deprived of his right, given by Rem. Rev. Stat. § 532, to substitute one homestead for another. The court concluded that this result was obviously not desired by the legislature, since it had declared that one who pur-

chased the homestead would have it free of encumbrances, other than mortgages. The court said this impliedly exempted the proceeds of the sale from garnishment for a reasonable time after sale.

Applying this rationale to the *Lien* case, the court reasoned that if the homestead were to be encumbered by a judgment lien after it had been sold to a purchaser for value, it would be virtually impossible for one who declares a homestead to sell his land. RCW 6.12.090 gives the holder of a homestead the right to: (1) sell the homestead; (2) hold the proceeds free from execution for a year after the sale; (3) purchase a new homestead which is free from execution. The court reasoned that these three rights would be "hollow and, for practical purposes, meaningless," unless there is a concurrent right in one who declares a homestead to "convey the homestead to a bona fide purchaser for a valuable consideration free of a judgment against the former owner of the homestead."

SALES

Recovery on Breach of Implied Warranty of Fitness—Necessity of Contractual Privity. In *Martin v. J. C. Penney Co.*[1] the plaintiff, an infant, was allowed recovery for the breach of an implied warranty of fitness on a cotton shirt that had been purchased as a birthday gift for him by his mother. The scope of this note is limited to the treatment of the requisite of contractual privity between the plaintiff and the warrantor-defendant.

It was stipulated by the parties[2] that the plaintiff's claim should be predicated solely upon an implied warranty of fitness under the Washington Uniform Sales Act.[3] This statutory provision establishes that when the buyer makes known to the seller, either expressly or by implication, the purpose for which the article is to be used, and the buyer relies upon the seller's skill and judgment as to fitness, there is an implied warranty that the goods shall be reasonably fit for such purpose. The court correctly found that these requisites were satisfied by virtue of the mother's notification to the seller that the shirt purchased was to be a birthday present for her fourteen-year-old son, and by the fact that she had no personal knowledge as to the quality of the material of the garment, especially its inflammable propensities.[4]

In addition to these elements of knowledge of purpose and reliance, Washington has adopted the general rule that if there is to be a recovery on an implied warranty based upon this statutory provision the

[1] 50 Wn.2d 560, 313 P.2d 689 (1957); *petition for rehearing denied,* 151 Wash. Dec. 182 (1957).

[2] Martin v. J. C. Penney Co., docket No. 482272, Superior Court for King County, Washington.

[3] RCW 63.04.160.

[4] See Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952), for a nearly identical fact situation in this respect.