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Real Property

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action. Once a rejected claim is established in the proper court, it then becomes subject to the rules of estate administration. Following Rule of Pleading, Practice and Procedure 1, 34A Wn.2d 68, the action (against the corporate defendant) was properly commenced in Spokane County wherein the corporate executor "transacts business."

Heirs and Next of Kin—Stepchildren. In the case of *In re Smith's Estate,* 149 Wash. Dec. 217, 299 P.2d 550 (1956) the supreme court affirmed the trial court's decision that stepchildren cannot take as "issue" or "children" under the Washington statute of descent. The statute, RCW 11.04.020, provides in so far as here relevent: "If the decedent leaves no husband or wife the estate goes in equal shares to his children, and to the issue of any deceased child by right of representation" . . . "the words 'issue,' 'child' and 'children' whenever used in this section shall be construed to include lawfully adopted children." RCW 11.04.100 prohibits distinctions between kindred of the whole blood and of the half blood who are entitled to inherit under the statutes of descent and distribution. As between a stepchild and stepparent there is no blood relationship, but only the relationship of affinity which is the relationship one spouse has to blood relatives of the other spouse. Here there was no showing that the decedent adopted plaintiffs and since there was no blood relationship between decedent and plaintiffs, they cannot inherit as heirs at law.

Unsuccessful Bidders at Realty Sale—Right to Appeal. *In re Scholes' Estate,* 149 Wash. Dec. 319, 301 P.2d 172 (1956) held that the unsuccessful bidder at a probate sale was not an "interested party" entitled to appeal to the supreme court. Plaintiffs put in a bid for the real estate, then withdrew it and entered a new bid. Before learning of the new bid, the administratrix had accepted a bid which was for ten dollars less than plaintiffs' final bid. Not knowing of plaintiffs' new bid, a return of sale on the lower bid was made by the administratix. Plaintiffs appealed from an order confirming an amended return of sale to the lower bidder. In affirming, the court first held that it was within the discretion of the trial court to approve the lower price when the difference was only ten dollars. As a second independent ground for the decision, the court held that the appellant was not an "interested" party. In support of this the court cited the case of *Terry v. Clothier,* 1 Wash. 475, 25 Pac. 673 (1890). The case held that unsuccessful bidders are not interested parties and have no right to object to a confirmation of sale. Under RCW 11.16.040 the plaintiffs were not interested parties as their only concern was to purchase property from the estate. An "interested" party is one such as a personal representative, who represents the estate, or an heir, legatee, devisee or creditor who can claim a right to receive something from the estate. The statute does not give the plaintiffs, situated as they are, the right to appeal.

REAL PROPERTY

Conveyance of After-Acquired Title by Quitclaim Deed; Effect of Habendum Clause. The court, in *Brenner v. Brenner Oyster Co.*[1] held the presence of an habendum clause in a quitclaim deed does not show an intention to convey after-acquired title within the provisions of RCW 64.04.070. In so holding, the court expressly overruled *West Seattle Land and Improvement Co. v. Novelty Mill Co.,*[2] and *Bradley*

[1] 48 Wn.2d 264, 292 P.2d 1052 (1956).
[2] 31 Wash. 435, 72 Pac. 69 (1903).

v. Fackler.[3]

The *Brenner* case involved two causes consolidated for trial and appeal. The first cause was brought by the Oyster Co. against respondents Brenner, Shugarts and Murphy for trespass upon the company's land. The second cause of action was brought by Annie Brenner against the company to have title to the disputed land quieted in her favor.

In 1902, Annie Brenner and her husband (now deceased) quitclaimed certain second class tide lands to the Brenner Oyster Company. The original conveyance of the property to Mr. and Mrs. Brenner contained an erroneous description, purporting to include land above the ordinary high tide line. This description was incorporated in the quitclaim deed at issue. In 1924 Annie Brenner acquired title to the uplands described in her quitclaim deed of 1902. The Company, in its trespass action, asserted that the habendum in the 1902 deed expressed an intention to convey after-acquired title, and that title to so much of Annie Brenner's 1924 purchase as had been described in the 1902 deed should be quieted in its favor. The company relied on the *West Seattle Land Co.* case and the *Bradley* case.

The court, construing RCW 64.04.050 and RCW 64.04.070 together,[4] held that after-acquired title is conveyed (1) by warranty deeds, and (2) by quitclaim deeds which express an intention to convey after-acquired title, but not by quitclaim deeds without such express intention. The court, in discussing the rule of the *West Seattle Land Co.* case, stated,

> This rule makes a distinction between the effect of quitclaim deeds which have habendum clauses and those which do not. Such a distinction is not sound. *The addition of an habendum clause does not change the effect of a quitclaim deed in any way.* (italics supplied)

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[3] 13 Wn.2d 614, 126 P.2d 190 (1942).

[4] RCW 64.04.050 Provides: "Quitclaim deeds may be in substance in the following form: The grantor (here insert the name or names and place of residence), for and in consideration of (here insert the consideration) *conveys and quitclaims* to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the County of_____, State of Washington."

"Dated this _____day of _____, 19____."

"Every deed in substance in the above form, when executed is a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns, in fee of all the then existing legal and equitable rights of the grantor in the premises therein described, *but shall not extend to the after acquired title unless words are added expressing such intention.*" (Italics supplied)

RCW 64.04.070 provides: "If a person, without title to a tract of land, sells and conveys it by deed, and thereafter acquires title thereto, the title so acquired shall pass to and vest in the grantee in the deed, and to his heirs and assigns forever, and shall thereafter run with such land.

In the cases overruled, the court had held that an habendum added to a quitclaim deed estopped the grantor from asserting after-acquired title against his grantee. The rule of the *West Seattle Land Co.* case and of the *Bradley* case[5] was based upon dicta in the Washington Territory case of *Ankeny v. Clark.*[6] Upon a consideration of the principles of the *West Seattle Land Co.* case and of the pertinent statutes, it seems clear that the court in the *Brenner* case arrived at the more logical and valid construction of the law.

In the *Ankeny* case the question was whether or not the giving of a quitclaim deed was sufficient performance of a contract to convey land. In a statement of pure dicta, the court said that the operative words of a quitclaim deed probably precluded the idea of its conveying after-acquired title, but that a deed which purported on its face to convey the real estate itself, as distinguished from only the grantor's interest in that real estate, would operate to convey even after-acquired title. The statement was based upon the judge's belief that the quitclaim deed would be converted into a bargain and sale deed. Such a result, assuming that it was accurate at the time the case was decided, would be unlikely today because of the statutory distinctions between a bargain and sale deed and a quitclaim deed.[7] Another factor indicating the weakness of the *Ankeny* decision lies in the court's statement that in a quitclaim transaction in which the grantor purports to convey the real estate it will be implied that the grantor intended to grant after-acquired title. It is submitted that an expression of purpose, however ineptly phrased, might reasonably be found to satisfy the statutory requirement for passage of after-acquired title in a quitclaim deed[8] where that expression relates to a grant of after-acquired title. But a grant of real estate, as distinguished from only the grantor's interest therein, appears to this writer to bear no relation to an

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[5] The *Bradley case* adopted the principle of the *West Seattle Land Co.* case without discussion, and the case will not be further discussed herein.

[6] 1 Wash. 549, 20 Pac. 583 (1889).

[7] Quit Claim Deed Statute—RCW 64.04.050, Note 4, *supra.*

Bargain and Sale Deed Statute—RCW 64.04.040 provides, *inter alia:* "Bargain and sale deeds for the conveyance of land may be substantially in the following form, without express covenants: The grantor (insert name and place of residence), for and in consideration of (insert consideration) in hand paid, *bargains, sells, and conveys* to (insert the grantee's name) the following described real estate (insert description) situated in the County of_____, State of Washington. . . .. "

. . . Since the only statutory distinction between a bargain and sale deed and a quitclaim deed depends upon the grantor's use of the words "conveys and quitclaims" or "bargains, sells, and conveys," it would appear that a deed in which the words "Conveys and quitclaims" were used would be difficult to construe as a bargain and sale deed.

[8] Note 4, *Supra.*

expression of a grant of after-acquired title.

In 1903, the year in which the *West Seattle Land Co.* case was decided, the statute setting out a suggested quitclaim deed was substantially the same as RCW 64.04.040.[9] Yet in the *West Seattle Land Co.* case the court said that a quitclaim deed with an habendum added conveys after-acquired title because it conveys the land itself (thus relying on the *Ankeny* case), for it recites that the grantor quitclaims to the grantee "to have and to hold all and singular the described premises, together with the appurtenances unto said party of the second part and to his heirs and assigns forever." This clause is an habendum nearly identical to the one contained in the deed from Annie Brenner to the Brenner Oyster Co.[10]

To give the habendum any effect modernly, and more particularly to allow it to indicate an intention that after-acquired title shall pass to the grantee in a quitclaim deed seems a questionable result. Modernly habendum clauses are seldom used and even if present in a deed have little utility.[11]

Research into the law of other jurisdictions finds no court bound to the proposition set forth in the *West Seattle Land Co.* case. Texas long ago had such a rule, but has since repudiated it.[12]

The decision in the *West Seattle Land Co.* case can be explained as a necessary result of the powerful equities in favor of the grantee.[13] The court unfortunately gave the respondent a decision upon the basis of an estoppel by deed. The result could have been reached in the case by basing the decision upon the appellant's breach of an express agreement (collateral to the deed) to acquire good title and to convey it to the respondent.

The *Brenner* decision, in the light of the Washington statutes applic-

[9] Bal. Code, Sec. 4521. This section is identical to RCW 64.04.050 (note 4, supra) with the exception of the wording used at the beginning of the paragraph defining the interest passed when a quit claim deed is given. It provides, *inter alia:* " . . . Every deed in substance in form prescribed in the section, shall be deemed and held a good and sufficient conveyance . . . "

[10] "TO HAVE AND TO HOLD all and singular the premises, together with the appurtenances, unto said parties of the second part and to his heirs and assigns forever." Brief for Respondents, p. 12, Brenner v. Brenner Oyster Co. Note 4, *Supra.*

[11] "In formal deeds the habendum clause is that part of the deed following the premises which sets forth the estate to be held and enjoyed by the grantee. Words of inheritance, however, may be, and now commonly are expressed in the premises. Under statutes in most states (in Washington, see RCW 64.04.060) no words of inheritance, either in the premises or habendum are necessary to pass a fee simple. In modern conveyancing the habendum clause in deeds has degenerated into a mere useless form . . . " 16 Am. Jur. *Deeds,* Sec. 53 (1936).

[12] Hunter v. Eastham, 95 Tex. 653, 6 S.W. (1902).

[13] The respondent, in relying on the appellant's quit claim deed, expended $50,000 in the construction of a flour mill upon the premises.

able, and in relation to majority authority, appears as an unquestionably sound result. Clearly it has changed the law in this area. Quitclaim deeds can now be expected to convey after-acquired title only when the grantor's intention is clearly expressed. This decision alters contingent property rights of those holding interests in land under a quitclaim deed with an habendum clause. However, that in itself is little reason to challenge the *Brenner* decision, for the court's new interpretation appears more adequately to reflect the true intentions of the parties in the typical quitclaim transaction.

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Right of owner of property abutting a highway to have the flow of traffic continue past his property. In *Walker v. State*, 48 Wn.2d 587, 295 P.2d 328 (1956), the owner of a motel which abuts Washington primary highway No. 2 sought to enjoin the State Highway Commission from installing a concrete center-line curb until (1) the highway commission followed procedures set forth in RCW 47.52 (limited access facilities statute) and (2) until fair compensation be paid to him for the diminution of his right of ingress and egress. The trial court sustained the state's demurrer and the Supreme Court affirmed.

The court indicated that this was a problem of first impression in this jurisdiction and stated: (1) that the plaintiff's allegations were insufficient to establish the highway as a limited access facility under the statute (RCW 47.52), (2) that the installation of the center-line curb involved no actionable impairment of ingress and egress, (3) the owners of property abutting a highway have no property right in the continuation or maintenance of the flow of traffic past their property, (4) the action of the state was an exercise of police power in the maintenance of traffic control and that damages resulting from an exercise of police power are non-compensable.

Right of riparian owner on non-navigable lake to use of the lake surface. In *Snively v. Jaber*, 48 Wn.2d 815, 296 P.2d 1015 (1956), the plaintiffs, riparian owners of a non-navigable lake, sued to enjoin the defendants, owners of a summer resort on the lake, from renting rowboats and from certain other activities. The plaintiffs alleged, *inter alia*, that the defendant's rowboats trespassed upon their exclusive ownership of certain portions of the lake surface. The theory of the plaintiffs was that since it had been decided in *Snively v. State*, 167 Wash. 385, 9 P.2d 773 (1932), that abutting owners of a non-navigable lake own the lake bed, they should be entitled to exclusive ownership of that portion of the lake surface located over the portion of the lake bed which they own. Held; (1) With the respect to the boating, swimming, fishing and other similar rights of riparian proprietors upon a non-navigable lake, these rights or privileges are owned in common, and any proprietor or his licensee may use the *entire* surface of the lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners, and (2) although abutting owners on a non-navigable lake own the bed of the lake, to determine the boundaries of each riparian owner's ownership in the lake bed would probably require all riparian owners to be joined in an action to have the lake bed apportioned.