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No. 70500-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDERICK A. KASEBURG, a single man,

Respondents,

vs.

KING COUNTY, a political Subdivision of the State of Washington, And CITY OF SEATTLE, a municipal corporation,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondents' predecessors purchased lots adjoining a platted street right-of-way shortly after the plat was established in 1926. The King County Commissioners vacated the street right-of-way in 1932. Since Territorial times, first by common law and then by statute, title to a vacated street vests in the owners of the adjacent lots. *See* ***Burmeister v. Howard***, 1 Wash. Terr. 207, 211-12 (1867); RCW 35.79.040. Appellants King County and the City of Seattle seek title to the vacated street right-of-way based upon the discredited notion that, because respondents' predecessors purchased their properties under real estate contracts, they had no ownership interest in their land until issuance of fulfillment deeds in 1933 and 1935. But a backdated deed to King County, signed and recorded in 1935, could not defeat or have priority over respondents whose predecessors not only purchased under real estate contracts in 1926, but also recorded a warranty fulfillment deed before the 1935 deed to King County.

The trial court correctly held that title vested in the adjoining landowners upon vacation of the street right-of-way in 1932, and did not err in quieting title in the vacated street right-of-way in the respondents, successors to the original purchasers of the abutting

lots, free and clear of any interest of King County or the City of Seattle, which annexed the area in 1954. This court should affirm.

II. RESTATEMENT OF THE ISSUES

The issues presented are properly restated as follows:

1. Is the purchaser under a real estate contract an "owner" within the meaning of former Rem. Rev. Stat. § 9303, which provides that a vacated street "shall vest in the person or persons owning the property on each side thereof?" (App. B)

2. Did purchasers in good faith under real estate contracts obtain an interest in a vacated street adjacent to their lots superior to that of the County where the County had both actual and record notice of their purchase of the adjacent lots before the street was vacated and before the County received a backdated quit claim deed to the vacated street from the contract vendor?

3. May the County or the City, as the County's successor, claim an equitable right to a vacated street right-of-way contrary to the plain language of both former Rem, Rev. Stat § 9303, governing disposition of vacated streets, and RCW 65.08.070, governing priority of recorded instruments?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

1. Puget Mill platted Cedar Park and sold the lots adjoining a street right-of-way to respondents' predecessors in 1926.

Respondents Holmquist and Kaseburg are successors-in-interest to Mona Muller and J.I. Shotwell – the original 1926 purchasers of lots on the shores of Lake Washington from developer Puget Mill Company. The October 26, 1926 "Cedar Park" plat (revised on December 7, 1926, to more specifically define the shorelands) included lands lying between a railroad right-of-way and the shoreline of Lake Washington. (CP 257, 263)[1] Muller and Shotwell purchased lots adjacent to the NE 130th street right-of-way that was also established in the Cedar Park plat and that provided access to the public highways to adjoining landowners.

Shotwell and Puget Mill entered into a November 1, 1926, contract of sale for tract 1, block 2 and tract 1, block 4, Cedar Park Lake Front Addition, King County Washington. The Shotwell

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[1] Both King County and the City of Seattle designated clerk's papers, which were numbered separately. Unless otherwise noted, the citations here refer to the City's designation indexed on July 17, 2013 and numbered 1-518.

contract was recorded September 29, 1927 (CP 259-60), shortly after the Legislature amended Washington's recording act to authorize the recording of real estate installment contracts. Laws 1927, ch. 278, § 2.

The August 17, 1926 contract of sale from Puget Mill to Muller for tract 12, blocks 1 and 3 of Cedar Lake Front addition was apparently not recorded. The County and the City have not contested that the Muller contract was executed on August 17, 1926, the date expressly referenced in the subsequent 1933 warranty deed from Puget Mill Co. to Muller. (CP 270) (County Br. 2, City Br. 6) The transaction history is summarized in Appendix A.

2. King County vacated the Cedar Park street right-of-way easement in 1932.

In 1901, the Washington Legislature codified the common law rule that upon vacation of streets in plats, ownership of the vacated street vests in the persons owning the adjoining lots. Laws 1901 ch. 84 § 3, codified at *Remington's Compiled Statutes of Washington*, §§ 9299, 9301 and 9303 (Appendix B); *see* ***Burmeister***, 1 Wash. Terr. at 211-12 (1867). Shotwell, Muller, and others filed a petition for vacation of NE 130th street with King County on April 26, 1932. (CP 265)

The City asserts that "the Cedar Park Community" filed the petition to vacate, but there is no evidence that any of the signors other than Shotwell and Muller owned property in the Plat of Cedar Park Lake Front, or that any legal entity known as "Cedar Park Community" existed in 1932. (City Br. 3) The County similarly claims, without any supporting record evidence, that the petition was filed by "neighbors." (County Br. 3) But the other petition signors could have lived anywhere, as the statute did not require petitioners to be abutting owners, to live in the neighborhood, to be natural persons, or to be freeholders.

The King County Board of Commissioners granted the Shotwell/Muller petition for vacation of the NE 130th street right-of-way on June 7, 1932. (CP 268) The County and City concede that the Board of Commissioner's order vacated the street right-of-way. (County Br. 4; City Br. 3)

3. The King County Attorney believed that the County did not have an interest in the vacated street right-of-way, and that by statute Puget Mill became the owner.

After voting to vacate the NE 130th Street right-of-way, the King County Board of Commissioners asked the King County Prosecuting Attorney for assistance in preparing a deed to "Cedar

Park Community Club." (CP 314) In a July 5, 1932 letter, the Prosecuting Attorney responded that King County had no conveyable interest, because under Rem. Rev. Stat. § 9303, the vacation vested title in the owners of the adjoining property. While acknowledging that Muller and Shotwell were purchasers under real estate contracts from Puget Mill, the Prosecuting Attorney stated that as contract purchasers, Muller and Shotwell had "no equitable interest in the lot" and that Puget Mill became the owner. (CP 314)

Shotwell and Muller may have planned to convey the vacated NE 130th street right-of-way to a community club, but they failed to do so. The County's files contained a 1932 quit claim deed to Cedar Park Community Club signed by Muller and Shotwell. (CP 114-15) It is undisputed that the deed was never delivered or recorded, and there is no evidence that the Cedar Park Community Club was ever incorporated or otherwise established as a legal entity. *See* 4 Tiffany, *Real Prop.* § 1053 (3d ed.) ("a conveyance to a nonexistent corporation is ordinarily invalid").

4. Puget Mill executed fulfillment deeds to Muller and Shotwell before executing a back dated deed of the vacated right-of-way to King County.

On September 20, 1933, Puget Mill executed a deed to Muller in fulfillment of their 1926 real estate contract. (CP 270-71) The fulfillment deed was recorded on September 27, 1933. (CP 271) On March 8, 1935, Puget Mill executed a deed to Shotwell in fulfillment of their recorded November 30, 1926, real estate contract. (CP 273) The deed shows a recording number but does not bear a recording date.

On March 30, 1935, *after* execution of the fulfillment deeds to Muller and Shotwell, Puget Mill executed a quit claim deed to King County, back-dated to 1932, for any interest it had had in the vacated NE 130th street right-of-way. (CP 295) The Puget Mill deed was signed and notarized on March 30, 1935. The recorded document has a barely legible recorder's stamp of "1935 Apr 10 AM 10:22." (CP 295)

5. The Holmquists performed the only known maintenance in the last 15 years.

By 1997, when the Holmquists purchased the property, the vacated NE 130th street right-of-way was heavily overgrown with blackberries, bamboo, brush and cane. Holmquist cleared and

maintained the vacated street right-of-way, eliminating the heavy overgrowth and preventing occasional late night parties and underage drinking. (CP 90-91) Holmquist has since continuously maintained the vacated street right-of-way, cutting brush and grass, raking leaves, and picking up trash and generally policing the property. (CP 91)

Holmquist was not aware of any public agency performing any clearing or maintenance activity since he moved into his property in 1997. (CP 91-92) Neither the County nor the City offered any contradictory evidence. The City did not perform any activity on the vacated NE 130th street right-of-way until November 2012, approximately five months after the litigation was commenced, when a City crew erected a sign indicating its intent to establish a park on the vacated right-of-way. (CP 338)

B. Procedural History

Respondents Holmquist and Kaseburg filed this action against King County on June 20, 2012 to quiet title to the vacated street right-of-way. (CP 1) King County did not request any affirmative relief in its answer. (CP 12-14) After completion of discovery, the trial court granted the City of Seattle's motion to

intervene as the County's successor in interest. (CP 98, 203) The City sought a decree quieting title in its name. (CP 208)

Holmquist and Kaseburg moved for summary judgment, arguing that after the NE 130th street right-of-way was vacated by the order of the King County Board of Commissioners on June 7, 1932, title vested in Muller and Shotwell and not King County, and that Holmquist and Kaseburg, as their successors in interest, now held title to the vacated street right-of-way. (CP 209) Neither the County nor the City filed a cross motion for summary judgment, and neither contested that the 1932 order vacated street right-of-way or that Holmquist and Kaseburg were successors in interest to Shotwell and Muller.

The trial court granted summary judgment quieting title to Holmquist and Kaseburg free and clear of any interest of King County and the City of Seattle in the vacated street right-of-way. (CP 427-39) This court consolidated the City's and County's appeals. (CP 440, 456)

IV. ARGUMENT

Neither the County nor the City contest that the NE 130th street right-of-way was vacated by the order of the Board of Commissioners on June 7, 1932; that by law, the vacated street attaches to the adjacent lots and its ownership vests in the owners of the adjacent lots; or that Holmquist and Kaseburg are successors in interest to Muller and Shotwell, who acquired their interest in the lots adjoining the vacated street right-of-way under real estate contracts in 1926. Relying on the notion that a purchaser does not "own" property purchased under a real estate installment contract – an artifice that was not even the law in 1926, when respondents' predecessors purchased their properties – appellants argue that respondents' predecessors were not "owners" of the adjoining lots when NE 130th was vacated, six years after they purchased the property under their real estate contracts. That was not the law when Muller and Shotwell purchased their properties, not the law when they obtained fulfillment deeds to their properties, and it is not the law now.

Even were there some merit to the County's and the City's historical assessment of the rights of purchasers under real estate contracts, bona fide purchasers Muller and Shotwell, whose real

estate contracts and subsequent fulfillment deeds all precede the 1935 backdated Puget Mill quit claim deed to King County, have superior interests to any claim by the County. The County took the backdated deed with actual or record notice of Muller's and Shotwell's prior real estate contracts, their fulfillment deeds, or both. Their successors, Holmquist and Kaseburg, have priority over the County and over the City as a matter of law.

A. Respondents' predecessors obtained ownership of the vacated street right-of-way in 1932 under Rem. Rev. Stat. § 9303 because as contract purchasers they owned the adjoining lots.

Because respondents' predecessors Muller and Shotwell owned the lots adjoining the NE 130 street right-of-way by virtue of their real estate contracts from Puget Mill Company, they owned the street right-of-way when it was vacated in 1932 under Rem. Rev. Stat. § 9303. The County's claim to title from Puget Mill Company fails because once it sold the adjoining lots, Puget Mill was no longer free to convey the adjoining right-of-way to the County.

Both the County and the City concede that the owners of the adjoining lots became the owners of the NE 130th Street right-of-way when it was vacated by order of the County Commissioners in

1932. (City Br. 13: "owner of the adjacent parcels . . . became the owner . . . when the street vacation occurred."; County Br. 6: "Ownership of vacated right-of-way turns on who owns the lots abutting the vacated right-of-way the time of vacation.") By statute in 1932, the vacated portion of "a street or alley, . . . shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the person or persons owning the property on each side thereof, in equal proportions." Rem. Rev. Stat. § 9303 (App. B). *See* RCW 35.79.040 ("If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting property owners, one-half to each.").

The County concedes that if the street right-of-way had been vacated when "Shotwell and Miss Miller [sic] owned the abutting lots in fee, as their successors the respondents' cause of action would be well taken." (County Br. 10) The County's argument that Shotwell and Muller did not "own" the adjoining lots fails because the parties' choice in 1926 of real estate installment contracts, rather than another financing vehicle, for the sale of the abutting lots did not diminish in any way Muller's and Shotwell's rights of "ownership" under Rem Rev. Comp. Stat. § 9303. Muller and

Shotwell were "the person or persons owning the property on each side" of the vacated NE 130th St. in 1932. Rem Rev. Stat. § 9303.

The County's and City's contrary argument, which is the sole basis for their claim to title, rests on a misstatement or misunderstanding of the law of conveyances not just now, but as of 1932 when the County vacated the street right-of-way. A real estate contract purchaser in 1932 had a well-recognized ownership interest in real property that was the functional equivalent of the modern notion of legal title. By the 1920's, the Supreme Court had held that the purchaser's 'bundle of sticks' included most of the attributes of ownership, including, most importantly, the right not to be disturbed in possession, and that a contract purchaser's interest was "real estate," exercisable with reference to the land being purchased. *See* ***Pratt v. Rhodes***, 142 Wash. 411, 416, 253 P. 640 (1927); ***State v. ex rel Oatey Orchard Co. v. Superior Court***, 154 Wash. 10, 12, 280 P. 350 (1929). Properly viewed, the cases from the early 20th century reflect only that the "attributes of ownership that *have* been transferred to the buyer *may* be lost if the seller exercises the contractual right to terminate them under the forfeiture clause." Hume, *Dispelling the Ashford Cloud*, 7 U.P.S. Law. Rev. 233, 238 (1984) (emphasis in original).

The County and City both concede that under current law, and at least since 1977, there is no distinction between the title obtained by a purchaser under a seller financed real estate contract and that acquired by deed with third party financing. It is a mischaracterization of the law in 1932 to claim, as do appellants, that the vendor was then considered the "'owner" of the property. To the contrary, "one of the most important attributes of that [seller's] ownership has been transferred to someone else." Hume, 7 UPS L. Rev. at 238. *See* ***Culmback v. Stevens***, 158 Wash. 675, 680, 291 P. 705 (1930) (purchaser's interest "creates a right enforceable against the land which is the subject of the contract.").

In particular, the County's and City's reliance on ***Ashford v. Reese***, 132 Wash. 649, 233 P. 29 (1925), to support their argument that Muller and Shotwell as real estate installment contract purchasers were not "owners," is as wrong now as it was in 1932. In holding that "a vendee's interest is real estate" under the judgment lien statute, the Supreme Court in ***Cascade Sec. Bank v. Butler***, 88 Wn.2d 777, 784, 567 P.2d 631 (1977), relied on its cases from earlier in the 20th century that held that a real estate contract purchaser has broad rights in the land being purchased,

characterizing those earlier cases as "patently at odds with the ***Ashford*** language," relied upon by both the County and City here:

> We have identified the vendee's interest as "substantial rights", as a "valid and subsisting interest in property", as a "claim or lien" on the land and as rights "annexed to and are exercisable with reference to the land." ***Oliver v. McEachran***, 149 Wash. 433, 438, 271 P. 93 (1928); ***Griffith v. Whittier***, 37 Wn.2d 351, 353, 223 P.2d 1062 (1950); ***Daniels v. Fossas***, 152 Wash. 516, 518, 278 P. 412 (1929); ***State ex rel. Oatey Orchard Co. v. Superior Court***, 154 Wash. 10, 12, 280 P. 350 (1929).
>
> Additionally, we have held the vendee to have certain rights totally inconsistent with the concept that a vendee has no title or interest, legal or equitable. For example, we have held that: a vendee may contest a suit to quiet title, ***Turpen v. Johnson***, 26 Wn.2d 716, 175 P.2d 495 (1946); under the traditional land sale contract, the vendee has the right to possession of the land, the right to control the land, and the right to grow and harvest crops thereon, ***State ex rel. Oatey Orchard Co. v. Superior Court***, *supra*; a vendee has the right to sue for trespass, ***Lawson v. Helmich***, 20 Wn.2d 167, 146 P.2d 537 (1944); a vendee has the right to sue to enjoin construction of a fence, ***Kateiva v. Snyder***, 143 Wash. 172, 254 P. 857 (1927); a vendee's interest constitutes a mortgagable interest, ***Kendrick v. Davis***, 75 Wn.2d 456, 452 P.2d 222 (1969); a vendee is a necessary and proper party for purposes of a condemnation proceeding, ***Pierce County v. King***, 47 Wn.2d 328, 287 P.2d 316 (1955); a vendor's interest for inheritance tax purposes is personal property, ***In re Estate of Eilermann***, 179 Wash. 15, 35 P.2d 763 (1934); a vendor's interest for purposes of succession and administration is personal property, ***In re Estate of Fields***, 141 Wash. 526, 252 P. 534 (1927); a vendee may claim a homestead in real property, ***Desmond v. Shotwell***,

> 142 Wash. 187, 252 P. 692 (1927); a vendee is a real property owner for attachment purposes, ***State ex rel. Oatey Orchard Co. v. Superior Court***, *supra*, 154 Wash. at 11-12, 280 P. 350.

Cascade Sec. Bank v. Butler, 88 Wn.2d at 781-82.

Ashford itself, save for its dicta, provides no support for the County's argument that "vendees to an executory contract of sale have no title or interest in the property" until receipt of their fulfillment deed (County Br. 8), or for the City's argument that the "Puget Mill Company remained the owner of the two parcels of land" even after selling them to respondents' predecessors. (City Br. 13) ***Ashford*** held only that where buildings on the property under contract were destroyed by fire, the purchaser would be permitted to rescind the contract and recover the purchase price and the contract seller, who held formal legal title, would bear the risk of loss. 132 Wash at 649.

During its short (and much-criticized) lifetime, ***Ashford*** never stood for the broad proposition advanced by the City and County here – that the contract purchaser's right to possess and occupy did not include the possessory rights of one who held the property under a deed. The broad principle espoused by the City and County "was never applied in the decisions, and the rights

recognized in the purchaser steadily grew," Hume, 7 U.P.S. L. Rev at 241, until ***Ashford*** was expressly overruled in ***Cascade Security Bank***. 88 Wn. 2d at 784.

Because respondents' predecessors Muller and Shotwell had ownership rights to both adjacent lots under their installment contracts in 1926, ***Hagen v. Bolcom Mills***, 74 Wash. 462, 133 Pac. 1000, *reh'g denied,* 134 P. 1051 (1913), (County Br. 7), is inapposite. In ***Hagen***, the original owner/developer had not sold *any* of the abutting lots at the time of the street vacation – not by deed, not by real estate contract, nor by any other financing vehicle. The plaintiff purchased a lot subsequent to vacation, and then claimed he was entitled to a portion of the vacated street under the predecessor to § 9303. The ***Hagen*** Court held that the statute was inapplicable to a purchaser who acquires the adjoining lot *after* a street has been vacated. In contrast, where an adjoining lot is purchased *before* a street is vacated, the law presumes the purchaser of a lot has paid for the use of the adjoining street:

> The proprietor of premises platted as a town site, by reason of dedicating a part for use as streets, enhances the value of the lots to which access may be had by means of such streets. His grantees pay this enhanced value, and the proprietor thus receives a consideration, not only for the precise amount of land described in each lot, but, also, that embraced in

> the streets upon which the lots abut; and he who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor

Hagen, 74 Wash. at 466-67 (internal quotation omitted). The law presumes a seller or original developer has no further use for the vacated street once the seller has sold the adjacent lots:

> The owner of the land platted usually becomes entirely disassociated with the title to the land sold and has neither a proximate interest in nor a practical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. . . . But upon vacation of the street these rights would be legally destroyed unless the vendee had the fee. It is much more reasonable to vest that fee in him than in the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property which it consists with public policy to favor. . . .

Hagen, 74 Wash. at 468 (quoting ***White v. Jefferson***, 110 Minn. 276, 124 N.W. 373, 375, *reargument denied*, 125 N.W. 262 (1910).

Kentucky's highest court addressed this very situation in ***Henkenberns v. Hauck***, 314 Ky. 631, 236 S.W.2d 703 (1951). Recognizing that the purchasers, upon entering into their real estate contracts, became the "real owner," and that the seller held nothing but the bare legal title in trust for them, as security for the

purchase price, the Kentucky Court held that the purchasers acquired title to the center line of the adjacent street. 236 S.W.2d at 704. As here, the seller's subsequent deed of that street to another after it had been vacated to the appellant was void against the contract purchaser's superior title:

> It is evident that appellee Hay at no time had title to the land in Helen Street apart from his ownership of the abutting lot 404; and, therefore, when he contracted to sell, and did convey that lot, the abutting portion of the street followed the title thereto as the tail goes with the hide.

236 S.W.2d at 705.

Puget Mill's 1926 sales to Muller and Shotwell by real estate contracts gave them an ownership interest in their lots abutting the platted NE 130th street right of way. When the County vacated the street right-of-way in 1932, the "lots or ground bordering on such street or alley ha[d] been sold" within the meaning of Rem. Stat. § 9303. Ownership of the vacated street right-of-way followed ownership of the adjacent lots "as the tail goes with the hide." ***Henkenberns***, 236 S.W.2d at 705.

Puget Mill's interest after 1926 was limited to the right to receive payments under the real estate contracts, and to forfeit the contracts in the event of breach Muller and Shotwell. The fact that

Muller and Shotwell owned the property by virtue of a real estate installment contract from 1926, rather than under a deed coupled with a mortgage, is of no consequence now and was of no consequence in 1932. As owners of adjoining lots, respondents' predecessors acquired title to the vacated street right-of-way.

B. Muller and Shotwell had superior interests over King County, which claimed under a 1935 backdated quit claim deed.

Even if Puget Mill, as the contract vendor, remained free to convey the vacated 130th street right-of-way, Puget Mill ultimately conveyed the right of way to Muller and Shotwell under warranty deeds that have priority over any interest of King County. Muller's and Shotwell's rights to the vacated street right-of-way were superior to any claim by King County under its 1935 backdated quit claim deed for at least three reasons: First, Muller and Shotwell had priority over King County because they received warranty deeds that necessarily included the vacated street right-of-way before the County received its backdated deed. Second, King County had actual and constructive notice of Muller's and Shotwell's purchase before the County recorded its 1935 backdated deed. Third, Muller and Shotwell were bona fide

purchasers for value who took title without notice of any claim by King County.

In arguing that title to vacated NE 130th St. remained in Puget Mill Co., the City and County both concede that King County acquired no interest in any portion of the Cedar Park Addition, and in particular, its streets, when Puget Mill Co. platted the property in 1926, or vacated the street right-of-way in 1932. Instead, they trace their title to Puget Mill's 1935 backdated deed. Because the County recorded its deed with both record and actual knowledge of Muller and Shotwell's prior interests, the County's claim to title fails, even if this Court accepts the tenuous distinction between an owner's rights under a real estate contract and a deed.

Puget Mill conveyed all interests in the vacated NE 130th Street right-of-way, including any interest it may have acquired by virtue of the 1932 street vacation, to Muller and Shotwell by deed before the 1935 backdated deed to King County. (*See* App. A) The City argues that because the legal description in fulfillment deeds to Muller and Shotwell (CP 270, 273) did not specifically recite the north and south halves of the vacated NE 130th street right of way, they were insufficient to convey any interest of Puget Mill therein. (City Br. 7, 16-17) The City ignores, however, that by

1926, the law was well established that a sale of real property described according to a plat is carried with it ownership to the center of the platted street:

> All of these conveyances were according to the plat, and it is our opinion that, when these conveyances were made without words of exception or reservation, or any language expressing a contrary intention, they fell within the general rule that a conveyance of land abutting upon a public highway carries with it the fee to the center of the highway as part and parcel of the grant. No language is required to express such an intent on the part of a grantor in whom the title to the lot and highway vests. It follows as an inference or presumption of law that, in selling the land abutting upon the highway, he intended to sell to the center line of the adjoining highway.

Bradley v. Spokane & I.E.R. Co., 79 Wash. 455, 456, 140 P. 688 (1914), *error dismissed by* 241 U.S. 639 (1916).

Bradley, decided approximately 20 years before Muller and Shotwell received their deeds, requires that a developer clearly and unambiguously express an intent to withhold title to the vacated right-of-way in the deed to the adjoining lots in the deed itself:

> While the intention to pass such a title is always presumed, and requires no special words to create it, the contrary intention will never be presumed, and, before it will be held that it was the intention of the grantor to withhold his interest in the highway after parting with his title to the adjoining land, such declaration of intent must clearly appear. Deeds may expressly exclude the streets, but, unless they do, the implication is that the street is included.

Bradley, 79 Wash. at 460 (citations omitted).

Bradley was decided the year after ***Hagen,*** upon which the City erroneously relies to argue that a developer who did not sell any adjoining lots prior to vacation may sell the vacated street as a lot separate and apart from the adjoining lots. The City's argument fails under ***Bradley*** because neither the City nor the County could cite to *any* evidence, let alone a clear and unambiguous declaration of intent by Puget Mill in its warranty fulfillment deeds to Muller and Shotwell, to withhold title to the center line of the street. The fulfillment deeds included the vacated NE 130th Street right-of-way and establish Muller's and Shotwell's priority over the 1935 backdated deed to King County.

The County's claim to priority fails for a second reason: The County had actual and constructive notice of Muller's and Shotwell's superior interest *before* the County recorded its 1935 backdated deed. Under Washington's race-notice recording statute, the first document recorded in time is first in right, and notice of another's interest defeats priority. RCW 65.08.070; *see, e.g.,* Stoebuck & Weaver, 18 *Washington Practice: Real Estate: Transactions* § 14.10 at 150 (2nd Ed. 2004). Effective June 8, 1927, the Legislature amended the recording statute to expressly

allow real estate contracts to be recorded, thus giving "notice to all persons of the rights of the vendee under the contract." Laws 1927 ch. 278 § 2; *see* ***Tomlinson v. Clarke***, 118 Wn.2d 498, 505-06, 825 P.2d 706 (1992). The race-notice recording statute does not give any weight to a backdated deed.

King County's deed from Puget Mill Co. was not signed and notarized until March 30, 1935, and according to the barely legible recorder's stamp, appears to have been recorded on "1935 Apr 10 AM 10:22." (CP 295) By then the County had both record and actual notice of Muller's and Shotwell's purchase of their respective lots.

King County had record or constructive notice of Shotwell's real estate contract, which was recorded on September 29, 1927, after the amendment to the recording statute became effective, and it had notice of the warranty deed to Shotwell, executed on March 8, 1935, in fulfillment of the parties November 30, 1926, real estate contract. (CP 273) The County also had record notice of Muller's fulfillment deed recorded September 27, 1933, which referenced the real estate contract recorded September 29, 1927. (CP 271)

While the recorded Shotwell deed (CP 273) does not bear a recording date, the recording of the underlying 1926 real estate

contract in 1927 gave the County notice that Shotwell as contract vendee/purchaser had "the right to acquire title in accordance with the terms of his contract" – that were substantial, and which King County "as one having notice and knowledge is bound to respect." ***Oliver v. McEachran,*** 149 Wash. 433, 438, 271 Pac. 93 (1928) (distinguishing ***Ashford***).

By 1927, when it authorized the recording of real estate contracts, the Legislature recognized that anyone taking with knowledge of the purchaser's interest under a real estate contract takes subject to that interest and cannot get priority. Here, the County knew that Puget Mill was contractually bound to convey full legal title to the lots to Muller and Shotwell by deed, and also knew that Muller and Shotwell possessed the adjoining lots, prior to vacation. By the time it received its deed in 1935, the County knew that Muller and Shotwell had received their deeds. Under ***Bradley***, the County necessarily had notice of Muller and Shotwell's prior interest not just in their lots, but also in the adjoining street right-of-way that by operation of law was included in their purchase.

In addition to record or constructive notice, King County also had actual notice that Puget Mill had sold the property to Shotwell and Muller, as evidenced by the July 5, 1932, letter from the King

County Prosecuting Attorney's Office, (CP 314), and the 1932 undelivered deed to the Cedar Park Community Club from Muller and Shotwell as abutting owners, which was found in the County's files. (CP 317) Actual possession of property by Muller and Shotwell at the time the County's deed was filed for record constituted actual notice, and the County as a subsequent purchaser could only take title subject to every right of the occupant that a reasonable inquiry would have disclosed. ***Nichols v. De Britz***, 178 Wash. 375, 382, 35 P.2d 29 (1934); ***Karlsten v. Hamel***, 123 Wash. 333, 334-35, 212 P. 153, 154 (1923).

King County had actual and constructive notice in 1932 of the fact that the property adjoining the vacated street right-of-way was owned by Muller and Shotwell. Any interest that King County might have acquired in the vacated street right-of-way in 1932 was subordinate to Muller's and Shotwell's 1926 real estate contracts with Puget Mill.

The County's claim fails for a third reason: Muller and Shotwell were bona fide purchasers for value without notice of any claim by King County and before the recording of the 1935 backdated deed. "A bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property

prior to his acquisition of title, has paid the vender a valuable consideration." ***Glaser v. Holdorf***, 56 Wn.2d 204, 209, 352 P.2d 212 (1960). Muller and Shotwell were bona fide purchasers because each took title as a "good faith purchaser for value who is without actual or constructive notice of another's interest. . ." ***South Tacoma Way, LLC v. State***, 169 Wn.2d 118, 127, 233 P.3d 871 (2010). As bona fide purchasers for value, Muller and Shotwell had a superior interest in the vacated street right of way over King County.

King County did not receive any interest in the vacated street right of way under the 1935 backdated deed from Puget Mill that could defeat the superior interests of Shotwell and Muller as owners of the adjoining lots. Thus, even if Puget Mill owned or acquired an unencumbered fee in the vacated street right as the County erroneously assumed in 1932, the respective conveyances from Puget Mill to Muller and Shotwell describing the real property by reference to the platted lots have priority over Puget Mill's 1935 backdated quit claim deed. The trial court correctly quieted title in Holmquist and Kaseburg.

C. There is nothing inequitable in quieting title in favor of Kaseburg and Holmquist.

The County and the City fail to articulate any legal principles, or cite any case law, that allows a court to disregard the law governing ownership and conveyances of vacated street rights of way. The County cites Muller and Shotwell's claimed intention to create a community beach, but it ignores that they never delivered a deed, in part because its Prosecuting Attorney, under a mistaken interpretation of Rem. Stat. § 9303, told Muller and Shotwell after the vacation that they could not create a community beach because Puget Mill owned it. (CP 114-15, 314) If the intentions of Muller and Shotwell failed, it was due to the County's mistaken advice.

One seeking equity must come with clean hands. The courts "are careful to deny to any man the advantage of his own wrong." ***Langley v. Devin***, 95 Wash. 171, 187, 163 P. 395 (1917). Further, equity includes the doctrine that where one of two innocent parties must suffer, the one who caused the problem loses. ***Miebach v. Colasurdo***, 35 Wn. App. 803, 817, 670 P.2d 276 (1983), *rev'd on other grounds,* 685 P.2d 1074 (1984); ***Paganelli v. Swendsen***, 50 Wn.2d 304, 310-11, 311 P.2d 676 (1957) (applying "the rule of comparative innocence" to deny plaintiff equitable

relief). Having mistakenly told Muller and Shotwell they had no interest to convey, King County cannot now gain advantage and claim title by equity in derogation of Muller and Shotwell, who were bona fide purchasers.

The City's equitable arguments ignore that the City is a stranger to the title in the vacated street right-of-way, and has no interest capable of ripening into a title or even a right-of-way. The City claims an interest in the vacated NE 130th street right-of-way by virtue of its annexation of the King County Lake District on January 4, 1954. But when the Board of Commissioners' 1932 order vacated the street right-of-way, there was no shoreline street end, no right-of-way, no easement, or anything else to transfer to the City because the platted street right-of-way ceased to exist with the vacation in 1932.

The record is utterly devoid of any facts that could support the City's equitable argument. The City cites only its counsel's own oral argument to support its claim it has maintained the vacated street right-of-way since 1954, and that the City and the County have maintained it for 80 years. (City Br. 18, *citing* RP 35). Counsel's argument is not a "fact" and is certainly not "evidence called to the attention of the trial court." RAP 9.12. Because the

City's factual statements are unsupported by the record, this Court should not consider them. ***Sherry v. Financial Indem. Co.***, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (A court "decline[s] to consider facts recited in the briefs but not supported by the record"); RAP 10.3(a)(5).

The City's contention that it has longstanding "plans" to develop the vacated street right-of-way is also not supported by the record. (City Br. 8) Maps published and made available to the public by the City show NE 130th as a vacated street end, referring specficially to the June 27, 1932 County Commissioner's order. (CP 283-84 (Seattle Public Utilities map), 292-93 (zoning map)).

Finally, the City's contention that the adjacent homeowners are somehow estopped from challenging the City's claim to the vacated street right-of-way by not commenting on a recent draft resolution is also without merit. (City Br. 9) The City's list of alternative proposals included another, nearby street end at NE 135th that never was vacated, and which has public street access. (CP 409)

The City and the County's appeal to equity ignores that the County could have protected its rights by acquiring the vacated street end and recording its deed *before* Puget Mill conveyed the

property to respondents' predecessors in 1926. No principle of equity can overcome the statutory priorities established by former Rem Rev. Stat. § 9303 and the recording act to divest respondents of their title. *See* ***Tomlinson v. Clarke***, 60 Wn. App. 344, 352, 803 P.2d 828 (1991) ("The Whitsells failed to avail themselves of this opportunity to protect their interest in the disputed parcel of land" by recording), *aff'd* 118 Wn.2d 498, 825 P.2d 706 (1992).

V. CONCLUSION

Muller and Shotwell, respondents' predecessors, were the "owners" of adjoining lots who obtained title to the vacated street right-of-way. The County and, through it the City, claim title based on a back dated deed that was obtained with record and actual knowledge of the preexisting interests of respondents' predecessors. No principle of equity supports their claim. This court should affirm the trial court's order granting summary judgment quieting title in Holmquist and Kaseburg.

Dated this 2nd day of December, 2013.

ROBERT E. ORDAL, PLLC

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SMITH GOODFRIEND, P.S.

By:_____
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 2, 2013, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
Kelly N. Stone Seattle City Attorney's Office 600 4th Avenue, 4th Floor Seattle, WA 98124-4769	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
John Briggs Office of the Prosecuting Attorney 516 3rd Avenue, Room W400 Seattle, WA 98104	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 2nd day of December, 2013.

V. Vigoren

Victoria K. Vigoren

Kaseburg Exhibit No.	Date executed & recording number	Parties	Description
	No document found, date estimated as August 17, 1926, from fulfillment deed of September 20, 1933	Puget Mill to Mona Muller	Contract of sale for track 12, block 1 [Holmquist predecessor] See warranty deed to Muller dated September 20, 1933, reciting the contract of sale
1 [CP 257]	October 26, 1926	Puget Mill	Plat of Cedar Park Lake Front
2 [CP 259]	November 30, 1926, 2412636	Puget Mill to J. I. Shotwell	Contract of sale for tract 1, block 2 [Kaseburg predecessor]
3 [CP 263]	December 7, 1926	Puget Mill	Revised Plat of Cedar Part (revised to more specifically define limits of shore lands)
4 [CP 265]	April 26, 1932	J. I. Shotwell, Mona (Muller) Sechser, et al.	Freeholder's petition filed for vacation of street
5 [CP 268]	June 27, 1932	King County Bd. Commissioners	Order of vacation of E. 130th lying east of railroad right of way easement
6 [CP 270]	September 20, 1933, 2771944	Puget Mill to Mona Muller	Fulfillment deed/warranty deed for track 12, block 1 [Holmquist predecessor]
7 [CP 273]	March 8, 1935 2901503	Puget Mill to J.I. Shotwell	Fulfillment deed/warranty deed for tract 1, block 2 [Kaseburg predecessor]
14 [CP 295]	March 30, 1935, 2847890	Puget Mill to King County	Quit claim deed for vacated E. 130th lying east of railroad right of way.

APPENDIX A

REMINGTON'S

CP 236

COMPILED STATUTES

APPENDIX B

OF WASHINGTON

§ 9301. [7844.] Lots, etc., in Unincorporated Towns, Proceedings to Vacate.

Any person or body corporate interested in any town in this state not incorporated, who may desire to vacate any lot, street, alley, common, or any part thereof, or may desire to vacate any public square, or part thereof, in any such town, it shall be lawful for any such person or corporation to petition the board of county commissioners for the proper county, setting forth the particular circumstances of the case, and giving a distinct description of the property to be vacated, which petition shall be filed with the county auditor twenty days previous to the sitting of said court, and notice of the pendency of said petition shall be given for the same space of time, by written or printed notices set up in three of the most public places in said town, containing a description of the property to be vacated. [L. '58, p. 27, § 1; L. '59, p. 409, § 1; L. '63, p. 432, § 1; Cd. '81, § 2333; 1 H. C., § 749.]

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SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1922

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§ 9303. [7846.] Effect of Vacation.

The part so vacated, if it be a lot or lots, shall vest in the rightful owner, who may have the title thereof according to law; and if the same be a street or alley, the same shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the person or persons owning the property on each side thereof, in equal proportions: Provided, the lots or grounds so bordering on such street or alley have been sold by the original owner or owners of the soil; if, however, said original owner or owners possess such title to the lots or ground bordering said street or alley on one side only, the title to the same shall vest in the said owner or owners if the said court shall judge the same to be just and proper. [L. '58, p. 27, § 3; L. '63, p. 433, § 3; L. '69, p. 410, § 3; Cd. '81, § 2335; 1 H. C., § 751.]