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Recent Cases

H. S.

RECENT CASES

LANDLORD AND TENANT—DUTY TO REPAIR. The plaintiffs orally leased a furnished apartment from defendant paying one month's rent in advance. The apartment house was a modern one cared for by a resident manager and engineer. Altho upon inspection by plaintiffs at the time of leasing the bathroom plaster seemed in good repair, during the month it developed a crack. Plaintiffs phoned the manager who promised to fix it immediately. On the second day following, the plaster, not having been attended to, fell upon and injured the plaintiff's wife. She was denied the right to recover, the court holding, (1) That no implied warranty of fitness could be raised (2) That the landlord was under no duty to repair and that such a duty could not be implied from a custom to that effect (3) That the subsequent promise was without consideration (4) That there was no tort liability because the defect was not one existing at the time of letting. Tolman, C. J., dissented, asserting that the rule of lodging house keepers or hotel keepers should apply. *Miller v. Vance Lumber Co.*, 67 Wash. Dec. 168 (1931).

As long as the premise is accepted that a lease of a modern furnished apartment is legally the same as a lease of any other property, the decision is clearly in line with the common law apportionment of duties between landlord and tenant. The rule that, in the absence of a covenant to the contrary, the tenant must make all repairs hardly finds exception at common law. *Johnson v. Tacoma Cedar Lbr. Co.*, 3 Wash. 722 (1892) *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. (1905) 16 R. C. L. 1031 Sec. Sec. 552; 36 C. J. 125 Sec. 766. This basic conception is so strong that no covenant to the contrary will be implied, even from well established custom. *Sheets v. Selden*, 74 U. S. (7 Wall.) 416, 423, 19 L. ed. 166, 168, (1868) *Rundell v. Rogers*, 144 Ark. 293, 222 S. W 19 (1920) *Larson v. Eldridge*, 153 Wash. 23, 279 Pac. 120 (1929). However, it should be noted that under the civil law, in case of tenancies for short-terms, the landlord is under the implied obligation, without special agreement, to keep the premises in repair. *Viterbo v. Friedlander* 120 U. S. 707, 7 S. Ct. 962, 30 U. S. (L. ed.) 776 (1886) 16 R. C. L. 1030. Also correct seems to be the holding in the instant case, following *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917 (1913), that there is no implied warranty of fitness in a lease even of an apartment. *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389 (1892) notes 4 A. L. R. 1453, 13 A. L. R. 818, 29 A. L. R. 52; notes 22 Col. L. R. 595, 37 Har. L. R. 896. No ground for recovery was left after the application of these rules to the present case except on a subsequent contract or on some tort committed by the landlord. The court found neither of these present.

But however consonant with legal principles the case may be, the decision is clearly at variance with the opinion and belief on this subject held generally by the public throughout the state and would be considered by them as unjust. One might venture to say that very few of the thousands of tenants holding such apartments, almost universally under oral lease making no mention of repairs, ever dreamed that it was their duty to keep the premises in repair. As was stated by the California Commisisoner in his note to Sec. 1941 of Kerr's Civil Code of California (1908) Part Two (said statute putting the duty or repair of leased premises on the landlord), "This section changes rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to adverse doctrine, is generally believed by unprofessional public to be the law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year 1861, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not arise again and again for adjudication were it not that the community at large revolt at every application of the rule."

Indeed a modern lease of a furnished apartment is a strange bedfellow to the early agriculture tenure relationship from which grew our law of landlord and tenant. Our city dweller leases, not land and the right to eke out existence, but comfort and convenience. Relief from the burden

of repairs and other duties is his very reason for living in a furnished apartment. The landlord gives an extended service in maintaining a livable abode for the tenant and it is this service that the tenant leases rather than merely a right to the use of land.

In such a situation it is regrettable that the Washington court applied the ancient and catalogued tenure rules to this new manner of housing which has become so widespread in urban centers. The court might well have held that it was not bound by the common law on the subject because of the wording of the Washington statute (Sec. 143, Remington's Complied Statutes) saying,

> "The common law, so far as it is not inconsistent with the constitution and laws of the United States or of the State of Washington, nor incompatible with the institutions and condition of society in this State, shall be the rule of decision in all the courts of this state."

No great stretch of reasoning would be required to hold that the common law duty of repair, insofar as it is applied to a modern, furnished apartment, is "incompatible with the institutions and condition of society in this state."

Now that the Washington court has definitely committed itself on this subject, it is likely that the public will seek relief through the legislature. In enacting laws to modernize the outgrown rules relating to landlord and tenant, Washington will have the benefit of the experience of many other states which have legislated on the subject. All such laws put the burden of repair on the landlord in apartment houses and some place it upon him in all leases of property for habitation.

MUNICIPAL CORPORATIONS—POWERS—SALE OF EXCESS ELECTRICAL ENERGY. The cities of Tacoma, Seattle, and Centralia own electric plants which normally produce surplus current over and above the needs of the respectie cities and their inhabitants. Tacoma and Seattle have contracts for sale to each other of their surplus current. The cities of Tacoma and Centralia propose like contracts and Puyallup and Bremerton propose to purchase surplus current from Tacoma. The plaintiffs seek to enjoin sales and proposed sales of electrical energy outside the corporate limits of each city.

The lower court sustained demurrers to the complaint, which ruling was affirmed by the Supreme Court, holding that the cities had corporate power to sell surplus electric energy of their plants outside their territorial limits. *Municipal League of Bremerton, Inc. v. City of Tacoma, et al.*, 66 Wash. Dec. 14, 6 Pac. 2d) 587 (1931).

Cities generally can exercise only those powers expressly granted those necessarily or fairly implied in or incident to granted power, and those essential to the declared objects and purposes of the corporation. *Tacoma Gas & Elec. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655 (1896) *Puyallup v. Lacy*, DC *Wash.* 110 86 Pac. 215 (1906) *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827 (1909) DILLON, 1 Municipal Corporations (5th ed.), Sec. 237. Where it is doubtful that such power has been conferred, the doubt should be resolved against the grant. *Richards v. Portland*, 121 Or. 304, 255 Pac. 326 (1927).

In the present case it might seem that there was express authority to sell outside the city by reason of Rem. Comp. Sta. Supp. 1927, Sec. 9488;

> "Any incorporated city or town within the state be and hereby is authorized to maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes, public and private "

However, in *Farwell v. Seattle*, 43 Wash. 141, 186 Pac. 217, 10 Ann. Cas. 130 (1906) the court held that "any other persons" used in a similar grant of power, meant only those persons in a similar class as inhabitants, such as transients within the city.

Generally in the abence of statutory authority, a municipality operating a public utility has no power to furnish service beyond its limits. *Hyre v. Brown*, 102 W Va. 505, 135 S. E. 656, 49 A. L. R. 1239 (1926) *City of Gainesville v. Dunlap*, 147 Ga. 344, 94 S. E. 247 (1917). See contra *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316 (1908). But an examination of these cases reveals that the specific question of surplus product was not determined, for it was not shown that only surplus product was being sold.

The *Farwell* case, *supra*, might seem to indicate that a city cannot even dispose of surplus product beyond its limits, but it will be noted that there the municipality of Seattle attempted to take over the entire water system of another municipaliy, and not merely to sell its surplus water, while the problem in the main case is the narrow one of the power to sell surplus energy or product outside the city limits. On this specific and limited question, it is perhaps not going too far to say that decisions permitting the sale of surplus product outside the corporate limits are not in the minority, but merely express a qualification of the general rule. At least the main case can be reconciled with the *Farwell* case, *supra*, and with prior Washington cases, and was, in fact, by them presaged.

In *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331 (1914), it was held that a grant of power to authorize erection and maintenance of a plant to light a city, permits supply of inhabitants in their private homes. In *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825 (1916), the court, although denying the right of a municipal corporation to take over the entire system of another city, did permit the selling of surplus water. Although there was statutory authority for the holding, the reasoning of the court is in accord with that of the main case. But the city's power to sell surplus product must not be so exercised as to impair the city's primary obligation to its own inhabitants. *Henderson v. Young*, 119 Ky. 224, 83 S. W 583 (1904). See also *Omaha v. Omaha Water Co.*, 218 U. S. 180, 48 L. R. A. (ns) 1084 (1909).

There is a further limitation on the right of a city to sell surplus product, expressed in *State ex rel Hill v. Port of Seattle*, 104 Wash. 634, 177 Pac. 671 (1919). The court there held that a city could not deliberately build beyond its present demands. It can only reasonably anticipate future needs of the city, and cannot build to meet a demand outside the city limits. However, in the main case there was no showing that this limitation had been violated.

H. S.

WITNESSES—IMPEACHMENT—CONVICTION OF CRIME—NATURE OF OFFENSE. In a prosecution for grand larceny committed by receiving property known to have been stolen, the State called as a witness the person who had stolen the property, who testified that defendant had full knowledge that the property was stolen at the time he purchased it. On cross-examination it was brought out that this witness had been four times convicted of felonies, and he was further interrogated as to the nature of the crimes of which he had been convicted. The trial court sustained an objection to this cross-examination, but on appeal, this ruling was reversed, the court holding that under Rem. C. S. 2290 (P C. 8725), providing that a conviction of any crime may be proved, either by the record or by cross-examination of the witness, for the purpose of affecting the weight of his testimony, the State's witness, who had been convicted of crime, might be cross-examined as to the nature of the offense for the purpose of discrediting his testimony on direct examination. *State v. Green*, 67 Wash. Dec. 197 9 Pac. (2d) 62 (1932).

Although at common law persons who had been convicted of infamous crimes were incompetent to be witnesses at all, this disqualification has been removed by statute in most jurisdictions. Rem. C. S. 1212 (P. C. 7723) Rem. C. S. 2290 (P. C. 8725). One who has been convicted of crime, however, is generally recognized as not being entitled to the same credit as one without a criminal record, and as a result, proof of prior conviction of various classes of crimes is allowed for the purpose of impeachment. *State v. Hollister*, 157 Wash. 4, 288 Pac. 249 (1930) *State v. McCormick*, 145 Wash. 117, 259 Pac. 29 (1927) *State v. Heimbigner* 137 Wash. 409,

242 Pac. 654 (1926) It is undoubted that the prior conviction may be shown by the record thereof· *State v. Jones*, 249 Mo. 80, 155 S. W 33 (1913) some courts deeming this the best evidence of the conviction. *People v. Blevins*, 251 Ill. 381, 96 N. E. 214 (1911) *Commonwealth v. Borasky*, 214 Mass. 313, 101 N. E. 377 (1913) 1 GREENLEAF Evidence, section 372. In most jurisdictions, however, largely by virtue of statute, cross-examination is a proper method of showing such convictions. *State v. Gaffney et al.*, 151 Wash. 599, 276 Pac. 873 (1929) *State v. Evans*, 145 Wash. 4, 258 Pac. 845 (1927) *State v. Joffery*, 129 Wash. 322, 225 Pac. 48 (1924) *Fields v. United States*, 137 C. C. A. 98, 221 Fed. 242 (1915) *State v. Kight*, 106 Minn. 371, 119 N. W 56 (1908) *People v. Cardillo*, 207 N. Y. 70, 100 N. E. 715 (1912) *Redsecker v Wade* 69 Or. 153, 134 Pac. 5 (1913) 2 WIGMORE ON EVIDENCE, section 1270. That a party is himself the person to be impeached makes no difference for when he offers himself as a witness he is subject to the same rules as any other witness *State v. Mariana*, 125 Wash. 531, 217 Pac. 4 (1923) *State v. Dale* 119 Wash. 604, 206 Pac. 369 (1922) *Ochsner v. Commonwealth*, 128 Ky 761, 109 S. W 326 (1908).

Ordinarily the conviction of any felony may properly be shown for impeaching purposes. *People v. Herges*, 14 Cal. App. 273, 111 Pac. 624 (1910) *Reed v. State*, 66 Neb. 184, 92 N. W 321 (1902) but in a few jurisdictions the offense must be of an infamous character. *Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. 546 (1901). In still others, an offense of any character, whether felony or misdemeanor, may be shown under statutes authorizing the introduction of previous convictions of "Crimes." *State v. Maloney*, 135 Wash. 309, 237 Pac. 726 (1925) *State v. Nichols*, 121 Wash. 406, 209 Pac. 689 (1922) *State v. Stone*, 66 Wash. 625, 120 Pac. 76 (1912) overruling *State v. Payne*, 6 Wash. 563, 34 Pac. 317 (1893) 4 Wash. Law REV. 34 (1929).

Evidence of the name and nature, and the circumstances of the crime, has been held inadmissible, the conviction itself having been proved, *Lamoureux v. New York, New Haven & Hartford Railroad Co.*, 169 Mass. 338, 47 N. E. 1009 (1897) *State v. Mount*, 73 N. J. L. 582, 64 Atl. 124 (1906) *Flournoy v. State*, —— Tex. —— 59 S. W 902 (1900) and at least one state has laid it down that while the credibility of a witness may be impeached by proof of his prior conviction of a felony the details and circumstances comprising the offense should not be gone into. *People v Jacobs*, 73 Cal. App. 334, 238 Pac. 770 (1925) *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (1895) On the other hand, in accordance with the holding of the principal case, there is some authority to the effect that upon proof of the former conviction of a witness, it is competent to show the nature of the offense. *State v. Brames*, 154 Wash. 304, 282 Pac. 48 (1929) *State v. Steele*, 150 Wash. 466, 273 Pac. 742 (1929) *Thompson v. Bankers Mutual Casualty Insurance Co.*, 128 Minn. 474, 151 N. W 180 (1915) *Cooke v. Glassheim*, 207 App. Div. 592, 202 N. Y. S. 599 (1924) It should be noted that the New York and Minnesota decisions were rendered under statutes identical with that in effect in Washington. This jurisdiction having adopted the statute of the others, the decision of the principal case seems correct if for no other reason than that a statute adopted from another state carries, or is presumed to carry, with it, the construction placed thereon by its courts. *Spokane Lumber etc. Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198 (1889). Moreover, some crimes have no bearing on the veracity of the witness whatsoever, and, on the theory that the Legislature had this in mind when it framed and enacted the statute—that is, that the showing of the nature of the crime could be as beneficial to the witness or to the party for whom he was testifying as it might be to the other party—the decision is quite justifiable; and as the cross-examining party is not bound by the answers of the witness, if the record had been resorted to, it would of necessity have shown the indictment, nature of the offense, and the judgment of conviction. The record would have disclosed the facts detailed in the testimony of the witness; and that which could have been shown by the record should be competent to be shown by parol. It is to be presumed that the witness will protect himself, as far, at least, as the truth will permit, and no one can know better the favorable circumstances. J. C. P

WILLS—CONSTRUCTION OF A GIFT TO A WIFE BY NAME—EFFECT OF DIVORCE. T, after expressly disinheriting his daughter C, provided that if his "beloved wife," B, should survive him for a period of three months she should have all of his property. He made no provision for his son, saying that his wife would provide for him, but if his "beloved wife," B, did not survive hime for a period of three months, all of his property should go to the son. Subsequent to the execution of the will T and B were divorced. A Washington statute prevented the wife from taking. C contests he will on the ground that B having survived T for three months the condition upon which the son was to have the property has not happened. Held: The son prevails. The gift to B was a gift to her as a wife and not as an individual, and, as she was divorced from T, she did not survive him for three months as his wife. *Peiffer v. The Old National Bank & Union Trust Co.*, 65 Wash. Dec. 591 6 Pac. (2) 386 (1931).

A gift to a wife, naming her, is a gift to her as an individual and not as a wife, since the words "my wife" merely describe the individual. *Boddington v. Clariat*, L. R. 22 Ch. Div. 597, L.R. 25 Ch. Div. 685 (1883) *In re Brown's Estate*, 139 Iowa 219, 117 N. W 260 (1908) *In re Jone's Estate*, 211 Pa. 364, 69 L. R. A. 940 (1903) *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187 (1881). Whether the words of description precede or follow the name is immaterial. *Knox v. Wells*, 48 L. T. 655 N. S. (1883), *Murphy v. Markis*, 98 N. J. Eq. 153, 130 A. 840 (1926). And the mere fact that a gift is made to a named legatee in the character of a wife does not avoid the gift if the legatee does not happen to fill the description. *Bullock v. Zilley*, 1 N. J. Eq. 489 (1832) *Giles v. Giles*, 1 Kee (Eng.) 685 (1836), *Boddington v. Clariat, supra.* Consequently a will is not revoked by a divorce granted subsequent to its execution. *Murphy v. Markis, supra; Brown v. A. O. U. W.*, 208 Pa. 101, 57 A. 176 (1904), *Irish v. Smith*, 8 Serg. & R. (Pa.) 573, 11 Am. Dec. 648 (1822) Unless the instrument shows that testator clearly intends that the beneficiary take in the character named. *Collard v. Collard*, 67 A. (N. J.) 190 (1907). *Bell v. Smalley*, 45 N. J. Eq. 478, 18 A. 70 (1889) *Rogers v. Hollister*, 156 Wis. 517, 146 N. W. 488 (1914). Nor will a property settlement accompany a divorce between testator and his wife revoke a prior will. *In re Nenaber's Estate*, 55 S. D. 257, 225 N. W 719 (1929) *Succession of Cunningham*, 142 La. 701, 77 So. 506 (1918) *Pacetti v. Rowlinski*, 169 Ga. 602, 150 S. E. 910 (1929).

However, a contrary holding has been reached in a few jurisdictions on the ground that the divorce coupled with a property settlement raises the natural presumption that testator intended to make no further provision for his wife. *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 445, 54 N. W 699 (1893) *In re Bartlett*, 108 Neb. 681, 189 N. W. 390, 25 A. L. R. 39 (1922) *Donaldson v. Hall*, 106 Minn. 502, 119 N .W 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cases 541 (1907).

In the principal case the wife was prevented from taking, whether the gift was to her as an individual or as a wife, by Rem. Comp. Stat. 1399, which provides that, "A divorce subsequent to the making of a will, shall revoke the will as to the divorced spouse." If under this statute the gift is construed to be an individual, which is the usual rule, then, the testator dies intestate. This result violates the well recognized presumption that testator intends to die testate. *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105 (1911) *Green v. Greene*, 7 N. Y. Supp. 284 (1885), *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910) *Shattuck v. Stickney*, 211 Mass. 327, 97 N. E. 744 (1912) *Clark v. Mack*, 161 Mich. 545, 126 N. W 632, 28 L. R. A. (N. S.) 479 (1910) *Wilmes v. Tiernay*, 187 Iowa 390, 174 N. W 271 (1919). Consequently to give effect to this presumption the court is forced to the conclusion that the gift is to the wife in the character named. Although this is in conflict with the usual rule it is justified in order to prevent intestacy.

B. E. C.