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Community Property—Life Insurance—Effect of Husband Changing Beneficiary Without Wife's Consent—Scope of Statute Exempting Wife's Share of Proceeds; Evidence—Impeachment by Statements Showing Bias—Laying Foundation; Tenancy by Will—Tenant or Employee—Contract for Watchman in Gravel Pit as Creating Landlord-Tenant or Employer-Employee Relationship; Municipal Corporations—Streets—Closure as War Measure—Effect as to Statutory Rules of Conduct; Contract—Interpretation—Admissibility of Parol Evidence

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RECENT CASES

COMMUNITY PROPERTY—LIFE INSURANCE—EFFECT OF HUSBAND CHANGING BENEFICIARY WITHOUT WIFE'S CONSENT—SCOPE OF STATUTE EXEMPTING WIFE'S SHARE OF PROCEEDS. Husband was insured in favor of his wife by four life insurance policies, all the premiums of which had been paid with community funds. He changed the beneficiary clause to read in favor of his executors or administrators. His son was principal beneficiary under his will. The executor and widow made adverse claims to the proceeds of the policies. The trial court held that the attempted change of beneficiary of the policies was ineffective and that the widow was entitled to the proceeds of the insurance contracts. Executor appealed. *Held:* The husband as manager of the community may change the beneficiary and dispose of his interest by valid testamentary disposition; that the whole of the proceeds are, as all other marital assets of the community, first subject to the community debts before distribution according to the laws of community property. One justice dissented as to the coverage of REM. REV. STAT. 7230-1. *In re Towey's Estate*, 122 Wash. Dec. 199, 155 P.(2d) 273 (1945).

The instant case is a delineation of the broad language of *Occidental Life Insurance Co. v. Powers*, 192 Wash. 475, 74 P.(2d) 27, 114 A. L. R. 536 (1937). Therein it was held that an attempted change of beneficiary of a life insurance policy, the premiums of which were paid out of community funds, was entirely abortive if not concurred in by both parties of the community. Other jurisdictions confronted with this problem have held that the husband as manager of the community has power to make such a change, but the new beneficiary takes subject to the wife's half interest in the proceeds as community funds. *See, e.g., In re Castagnola's Estate*, 68 Cal. App. 732, 230 Pac. 188 (1924); *Berry v. Franklin State Bank and Trust Co.*, 186 La. 623, 173 So. 126 (1937). The Washington court in the Power's case held such would be incompatible with the settled Washington concept as enunciated in *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916). Taking the decision in the Power's case at its face value it would seem that the husband could not change the beneficiary of such a policy without the consent of the wife and the respondent so contended. *See also, e.g., Metropolitan Life Ins. Co. v. Skov*, 51 F. Supp. (E. D. Or. 1943); *comment*, 13 WASH L. REV. 321, wherein it is implied in the writer's concluding sentence that the husband may not bequeath his share of the proceeds as community property. The broad language of the Power's case is somewhat misleading when applied to the facts of the *Towey* case, and under these facts the major premise of the *Powers* case is inapplicable; that is, there is here no attempt by the husband to make a gift of community property.

The result reached in the principal case seemed to be anticipated by the late Prof. Luccock in his exhaustive paper on this subject appearing in 16 WASH. L. REV. 187 wherein it is stated, "Where the estate of the insured is designated as beneficiary there is no problem, such designation does not affect the community interest in the policy." The statement is not conclusive that he expected the instant result, for it merely covers the case wherein the estate is named beneficiary, no mention being made of the problem of change; however, from the tenor of his analysis of the Washington concepts concerning the ability of either spouse to effect a gift it is submitted that the instant result was anticipated. Luccock also suggested the language of the *Powers* case did not preclude the possibility that the mere designation of a spouse as beneficiary is sufficient to constitute a gift

of the insured's community interest in the policy. His recognition of the problems of distribution to children and that of estate and inheritance taxes in the event the non-insured spouse should die first if such a theory was adopted, as in some jurisdictions, *e.g., In re Miller's Estate,* 23 Cal. App. (2d) 16, 71 P.(2d) 117 (1937), perhaps was heeded by the court in the *Towey* case, for there such a possibility is dispelled.

REM. REV. STAT. § 7230-1 allows exemptions of proceeds from the claims of creditors, in the absence of fraud, when a life insurance policy is "in favor" of a married woman. The dissenting justice's interpretation that the wife's community interest in the proceeds should inure to her separate benefit free from the claim of creditors, evidences an even new extreme liberal position beyond that liberality accorded her in Washington which is now far beyond that of the other community property jurisdictions. The statute neither expressly prohibits nor demands such a result. Being a derrogation from the former status of the creditor in regards to the proceeds of insurance policies it seems that the normal rule of strict statutory construction against change when confronted with ambiguity should be applied. *See Allen v. Griffin,* 132 Wash. 466, 232 Pac. 363 (1925); Crawford, *Statutory Construction,* § 248. It is a noble motive to protect the wife, and such a result is reached in at least one jurisdiction wherein a series of cases have consistently construed a similar statute liberally. *See In re Will of Grilk,* 210 Iowa 587, 231 N. W. 327 (1930). It is submitted that the coverage of the statute allowed by the instant case is correct in the absence of any vested separate property interest of the surviving spouse in the policy.

W. C. K.

EVIDENCE—IMPEACHMENT BY STATEMENTS SHOWING BIAS—LAYING FOUNDATION—At a criminal trial *B* testified for the state. On cross-examination *B* was asked if he had not made a statement to *W* in Seattle that he "had had some difficulty with *D* over dice, and that he was going to get *D* one of these days." *B* denied this statement. *D* then called *W* and asked him if *B* had not in January or February of 1942 made a statement to him concerning what he was going to do to *D* because of a purported dice game. Objection by prosecutor was sustained. On appeal from judgment of convictions it was *held:* that a "foundation must be laid" for the introduction of a prior statement showing bias and that, in this case, the foundation was insufficient. *State v. Harmon,* 121 Wash. Dec. 562, 152 P.(2d) 314 (1944).

This jurisdiction has consistently followed the general rule requiring that a "foundation be laid" for impeachment based upon a prior inconsistent statement. *State v. Constantine,* 48 Wash. 218, 93 Pac. 317 (1908); *Scandinavian American Bank v. Long,* 75 Wash. 270, 134 Pac. 913 (1913); *State v. Gleason,* 116 Wash. 548, 199 Pac. 739 (1921); *State v. Green,* 158 Wash. 574, 581, 291 Pac. 728 (1930). A proper foundation is laid when the witness's attention is called to the contradictory statement, and to the time and place where it was made, the circumstances surrounding its making, and is given an opportunity to deny, admit, or explain it. *State v. Constantine, supra.* But whether a foundation need be laid before the introduction of a prior statement showing *bias* is a question on which the courts have split. The majority refuse admission to prior statements showing bias unless a foundation has first been laid. Cases collected in Note (1922) 16 A. L. R. 984; 3 Wigmore, *Evidence* (3rd ed. 1940) § 953 n. 1. *Also* Note (1929) 39 YALE L. J. 129. A strong minority holds contrariwise. *See* Note (1922) 16 A. L. R. 991; 3 Wigmore § 953; and particularly *Kidd v. People,* 97

Colo. 380, 51 P.(2d) 1020 (1935). Objections to the majority rule and its arbitrary and inflexible application are forcefully stated in 3 Wigmore § 1027. *See also* Note (1927) 13 IOWA L. REV. 482.

While there are many prior decisions in this jurisdiction requiring the laying of a foundation before a witness can be impeached by showing prior *inconsistent* statements *(see* Washington cases cited *supra),* the question whether a foundation need be laid prior to showing *bias* by former statements was apparently of first impression in this jurisdiction. In holding that the foundation must be laid in either event the court cited only Underhill's *Criminal Evidence* (4th ed. 1935) p. 908.

The authoritativeness of the holding upon the point discussed may be somewhat weakened by the circumstance that the court also held that on other grounds (irrelevancy and no seasonable offer of proof) the exclusion of the evidence was not reversible error. M. B. K.

TENANCY AT WILL—TENANT OR EMPLOYEE—CONTRACT FOR WATCHMAN IN GRAVEL PIT AS CREATING LANDLORD-TENANT OR EMPLOYER-EMPLOYEE RELATIONSHIP. Plaintiff was employed as watchman and caretaker of a gravel pit owned and operated by the City of Seattle, said employment to last until the defendant city should have just cause to discharge plaintiff or until the city should cease to own and use the pit. Plaintiff seeks an injunction restraining defendants from ejecting him from the property in that there was no just cause for the termination of the employment, or in the alternative for $300, which sum plaintiff had expended in improving the house he occupied on the premises. *Held:* Dismissal affirmed. Plaintiff was tenant at will of defendant city, not an employee, and the tenancy could be terminated on reasonable notice which was given. *Najewitz v. The City of Seattle,* 21 Wn.(2d) 656, 152 P.(2d) 722 (1944).

The specific tenancy created was that of a tenancy at will. An earlier Washington case of *Morris v. Healy Lumber Co.,* 46 Wash. 686, 91 Pac. 186 (1907) contained dicta to the effect that the four tenancies created by statute were exclusive and hence there was no tenancy at will in Washington. In the recent case the court said, "For in construing an agreement creating a tenancy which does not fall within any of the four categories of tenancies defined by statute, we think the rights of the parties can be properly determined only by report to the rules of common law."

Tenancy at will is defined as an estate which is terminable at the will of the transferor and also at the will of the transferee and which has no other designated period of duration. 1 Tiffany, *Real Property* (3rd ed. 1939) § 155 and *Restatement of Property* (1936) § 21. The question as to whether the relationship created is that of landlord and tenant or employer and employee is generally determined by the character of the holding under the contract. 32 *Am. Jur.,* Landlord and Tenant, §§ 9-10. As a general rule where the employee occupies premises of his employer for the purpose of better carrying out the employer's business, and without payment of rent, these circumstances are usually decisive that the relationship of landlord and tenant does not exist between the parties. 3 Thompson on *Real Property* (perm. ed. 1940) § 1073. Ordinarily a caretaker in charge of the premises is not a tenant. *Presby v. Benjamin,* 169 N. Y. 377, 62 N. E. 430 (1902). A servant or bailiff, or any person occupying land or buildings in a merely ministerial character does not acquire possession. 1 Tiffany, *Landlord and Tenant* 9. Where the plaintiff didn't have possession as such, there was no tenancy at will created. *Cook v.. Klenk,* 142 Cal. 416, 76 Pac.

57 (1904). It has been held that continuance in possession after the termination of the employment is by the mere sufferance of the master, and creates a tenancy at sufferance. This result would seem to be precluded by the statutory definition in Washington in REM. REV. STAT. § 10621, but it seems clear that at common law a tenancy at sufferance would be created.

J. D.

MUNICIPAL CORPORATIONS—STREETS—CLOSURE AS WAR MEASURE—EFFECT AS TO STATUTORY RULES OF CONDUCT. A street within the defendant's corporate limits was restricted in its use by the army as a war security measure. Armed guards were placed at each end of the prescribed area allowing only defendant's busses and people with the proper passes to enter. Within this area, while walking along the *right* side of the street, the plaintiff was injured by one of the defendant's busses. REM. REV. STAT. (vol. 7a, 1937) § 6360-101 states that on a public highway having no sidewalks pedestrians must walk on the left side of the pavement. Defendant maintains that plaintiff was guilty of negligence as a matter of law thus denying to her recovery for damages. *Held:* For plaintiff. State traffic code does not apply to an area restricted in its use by the United States Army. *Bennett v. Seattle*, 122 Wash. Dec. 423, 156 P.(2d) 685 (1945).

The fact that the United States through the army assumed control of an area would not *ipso facto* suspend state and local laws. Even where military government has been proclaimed local laws remain in force except insofar as they are suspended or superseded by regulations ordained by the military authority. 67 C. J. 422, § 177; *Leitensdorfer v. Webb*, 20 How. 176 (1858). When the United States, upon receiving the state's consent, has assumed exclusive jurisdiction, the state and local laws then in existence remain in force insofar as they are not inconsistent with federal law. *James Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940); *Chicago, R. I. & P. R. R. v. McGlinn*, 114 U. S. 542 (1885); *State v. Rainier Park Co., Inc.*, 192 Wash. 592, 74 P.(2d) 464 (1937). On the general proposition that the state legislature must cede the state's jurisdiction before the United States can acquire exclusive jurisdiction *see Ryan v. State*, 302 U. S. 186 (1937). For a recent discussion of the jurisdiction problem *see Penn Dairies v. Pennsylvania*, 318 U. S. 261 (1943); *Pacific Coast Dairy v. California*, 318 U. S. 285 (1943).

But granting that the army did not by the fact of its control suspend state laws, did the restrictions so limit the use of the thoroughfare that it no longer could be classed as a public highway? REM. REV. STAT. (vol. 7a, 1937) § 6360-1(qq) defines a public highway as one which the public may use "as a matter of right." The court held that the street is not public within the definition of the statute. In reaching that result, however, the court states that the public easement has not been dissolved by the army control. This statement coupled with the fact that the *use* of the street has not changed tends toward the conclusion that the state law should apply. Also, it is the general policy of the state to regulate traffic as a matter of public safety. This policy should be given considerable weight especially in light of the fact that no traffic regulations are effective in this very congested area if those of the state do not apply. On the other hand, the fact that *every* member of the public could not use the street as a "matter of right" would not seem to be controlling. No "rights" are completely unrestricted. The public cannot use the toll bridges of the state as a "matter of right"—the toll must be paid first! No one would deny that the state traffic laws

apply to the roadways on those structures. The wartime restrictions on air travel or on telephone service deny their use to a portion of the public as a "matter of right." No one would suggest that the "public" character of those businesses is lost by reason of these temporary restrictions.

This is a case of first impression. The implications of this decision could be great. Could not state regulations relative to health and safety and even the workmen's compensation law be swept aside in industrial establishments subject to similar war-time restrictions if reasoning analagous to that in this case were employed? W. A. Z.

CONTRACT—INTERPRETATION—ADMISSIBILITY OF PAROL EVIDENCE. In 1939 defendant sold three retail stores to plaintiffs under a written contract providing for the payment of the balance of the purchase price in installments —the last installment maturing in July, 1944. In the contract defendant agreed to render buying service for plaintiffs so that plaintiffs could get their merchandise at from five to seven per cent less than wholesalers' prices. The services were to be rendered without charge until January 1, 1940, after which defendant was to continue to render such service subject to the payment of a fee in an amount to be mutually agreed upon. The service was rendered until February, 1942, when defendant refused to continue. Plaintiffs brought action for damages for breach of contract. Defendant contended at the trial that after January 1, 1940, he could cancel the service at will because the contract specified no time limit for the continuance of the services. Over defendant's objection the trial court allowed plaintiffs to introduce evidence that defendant, after signing, but prior to the delivery of the contract, orally promised that the services would continued as long as plaintiffs owned defendant money. Jury rendered a verdict for plaintiffs. Judgment was entered upon the verdict. Defendant appealed, one of defendant's assignments of error being that the trial court had allowed parol evidence to come in to alter a written instrument. Judgment of the trial court was affirmed by the Supreme Court *en banc. Held:* that the evidence was admissible. Three judges dissented. *Randall v. Tradewell Stores, Inc.*, 21 Wn.(2d) 742, 153 P.(2d) 286 (1944).

The Supreme Court rendered four different opinions: *Robinson, J.*—"That it is the intent of the contract [as written] that the seller should be bound to render the buying service after January 1, 1940, is unmistakable." The trial court might have held as a matter of law that the parties intended that the services were to continue for the "remaining life of the contract;" nevertheless, the trial court was justified in admitting oral evidence consistent with this implication of the contract "in order that the intention of their contract be found and its ambiguity resolved." Blake, Jeffers and Mallary, JJ., concur. *Steinert, J.* (concurring in result)—"Since the contract here involved did not provide the length of time of its continuance or when it should terminate, a reasonable time is to be implied." In determining what is a reasonable time, evidence of all the surrounding facts and circumstances, "including the conversation and parol agreements between the parties," is admissible. The instructions not being before the court, it is to be presumed that the jury was instructed in accordance with these principles. Grady, J., concurs with Steinert, J. *Simpson, C. J.* (dissenting)—No time having been fixed, a reasonable time is implied. However, the introduction of parol evidence that a specific time limit was

agreed upon contradicts and varies the effect of the contract as written and thus violates the parol evidence rule. It was his view, also, that "under the authority of the majority opinion, it is clear that hereafter every contract construed in this state, whether written or not, will ultimately rest in parol." Beals, J., concurs with Simpson, C. J. *Millard, J.* (also dissenting)—Subscribed to the dissent of Chief Justice Simpson and emphasized the desirability of adhering to the rule of prior cases: "With us the rule of legal stability is a myth. Each time we disregard the rule of *stare decisis*, to which I would not yield if by so doing error were perpetuated and principle sacrificed, we advise the bar that it must be content to continue to practice the legal profession in terms of surmise. It may be that I am too insistent in urging respect for the principle of *stare decisis* and that I display consummate ignorance in continually kicking against the pricks. See Acts 9:5. However, I would not like to appear, as John Bunyan has it 'much tumbled up and down in my mind,' divided between my wish to help a poor litigant and the duty of maintaining legal stability."

To the writer it does not appear that the majority's decision is necessarily inconsistent with the prior Washington cases cited in the dissenting opinions. The contract was not exclusively for services, but for the sale of property with an incidental agreement to render services; the life of the sale contract was specifically fixed; it is a fair implication that the services were to continue during the life of the sale contract, and the parol evidence merely confirmed this implication. E. D. L.