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Municipal Corporations—Competition Between Public Utilities

Eldon C. Parr

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problem not only overlooks this first element of the doctrine, but further confuses the inquiry by the use of the term "imputable."

The second element of the "conscious" form of last clear chance involves the question of whether the defendant was negligent after he discovered the plaintiff's peril. *Leftridge v. City of Seattle*, *supra*. The court found that *D* was not negligent as a matter of law, applying the "emergency rule," which in essence is that a person who is compelled to act instantly to avoid an injury is not negligent if he makes a choice, though not the wisest one, which any prudent person in the same situation would make. *Ruff v. Fruit Delivery Co.*, 22 Wn. 2d 708, 157 P. 2d 730 (1945); *Hook v. Kirby*, 175 Wash. 352, 27 P. 2d 567 (1933). Our court, however, said that because of this rule *D* was "not required to elect horn blowing or any other particular course of action at his peril." The compelling inference from this and other language of the opinion is that since *D* was faced with an emergency situation, he *could not* be negligent, which overlooks the possibility that despite his predicament *D* could still have failed to use reasonable care. *Reuman v. La Monica*, 58 Cal. App. 2d 303, 136 P. 2d 81 (1943); PROSSER, TORTS § 37 (1941). The "emergency rule" does not purport to preclude negligence, but is merely a reminder that the emergency is one of the circumstances to be considered in judging a defendant's conduct. *Clark v. Farmer*, 229 Ala. 596, 159 So. 47 (1935); 9 NOTRE DAME LAW. 244 (1934).

Since negligence is normally a question of fact, unless only one reasonable inference can be drawn from the evidence, it would seem that the question of *D*'s negligence under the emergency situation in the instant case was properly left to the jury, because reasonable minds could easily differ as to whether he should have blown his horn, notwithstanding the admonition of the "emergency rule." See *Carroll v. Union Pacific Ry.*, 20 Wn. 2d 191, 146 P. 2d 813 (1944); *Brucker v. Matsen*, 18 Wn. 2d 375, 139 P. 2d 276 (1943).

While the applicability of last clear chance is a question of law, the court need only determine whether the physical facts at the time of the accident were such that the jury might find the elements of the doctrine present, and the question of negligence should be for the jury, except in the clearest of cases. *Smith v. Gamp*, 178 Wash. 451, 35 P. 2d 40 (1934); *Anspach v. Saraceno*, 149 Wash. 312, 270 Pac. 811 (1928). In the instant case, the Supreme Court rejected last clear chance, not for the reason that the situation did not call for its use, but on the ground that *D* was not negligent as a matter of law. Since *D*'s negligence in failing to blow his horn was properly a jury question, it would seem the court erred in rejecting last clear chance, because the decision finding it inapplicable was based entirely on the question of *D*'s negligence under the "emergency rule." Judge Schwellenbach has pointed out that if our court continues to determine negligence as a matter of law, thus preventing last clear chance from operating in appropriate situations, the doctrine "might just as well be rolled up and permanently placed off the highway." *Sarchett v. Fidler*, 37 Wn. 2d 363, 223 P. 2d 843 (1950) (dissenting opinion). In the instant case his concurring opinion suggests that he believes his prediction has now come true.

GORDON F. CRANDALL

Municipal Corporations—Competition Between Public Utilities. A Public Utility District (P.U.D.), organized in 1937 and including the Town of Newport in its territory, in June 1949 purchased the properties of a public service corporation which supplied the Town of Newport and the surrounding area with electric power. The P.U.D. thereafter performed this service. In July 1949, the Newport City Council proposed that the city acquire its own power system. An election was conducted which

avored the proposal. Action by the P.U.D. to enjoin issuance of revenue bonds by the Town of Newport to finance the proposed acquisition. Judgment for the Town of Newport. On appeal, that part of the judgment holding the election valid was reversed, but the Court declared by way of dictum that a town or city may, after a P.U.D. has installed authorized utilities, enter into competition with the P.U.D. *Public Utility District No. 1 v. Town of Newport*, 38 Wn. 2d 221, 228 P. 2d 766 (1951).

In providing for the establishment of municipal corporations the Legislature has plenary power, in the absence of constitutional limitation. *Wheeler School District v. Hawley*, 18 Wn. 2d 37, 137 P. 2d 1010 (1943). Where independent municipal corporations are formed for the same purpose and perform the same function, they may not exercise the same powers, at the same time, in the same territory. If both are authorized to annex the same territory, the one which acts first acquires control to the exclusion of the other. *Sheldon v. Board of Supervisors*, 51 Iowa 658, 2 N.W. 590 (1879); *Trumbull County Board v. State ex rel. Van Wye*, 122 Ohio St. 247, 171 N.E. 241 (1930) (school district cases). Where one municipal corporation is authorized to annex the territory of another, the latter is merged and ceases to exist when such annexation occurs. *In re Sanitary Board of East Fruitvale Sanitary District*, 158 Cal. 453, 111 Pac. 368 (1910). However, two distinct municipal corporations may exist in the same territory, at the same time for different purposes. *City of Aurora v. Aurora Sanitation District*, 112 Colo. 406, 149 P. 2d 662 (1944); *People ex rel. Greening v. Bartholf*, 388 Ill. 445, 58 N.E. 2d 172 (1944); *Kelley v. Brunswick School District*, 134 Me. 414, 187 Atl. 703 (1936).

REM. REV. STAT. § 9488 [P. P. C. § 416] authorizes the acquisition, ownership, and operation of certain utilities, including power generating plants and electrical distribution systems, by incorporated towns and cities. REM. REV. STAT. § 11605 *et seq.* [P. P. C. § 833-1 *et seq.*] authorizes the establishment of power districts which may include towns and cities within the proposed district if these towns and cities do not own and operate such utilities. The question raised by the dictum in the instant case is whether the city may acquire utilities under REM. REV. STAT. § 9488, after the P.U.D. has provided the utilities under REM. REV. STAT. § 11605.

The Washington Supreme Court has recognized the rule that independent municipal corporations may not exercise the same powers, in the same territory, at the same time. *Royer v. Public Utility District*, 186 Wash. 142, 56 P. 2d 1302 (1936); *Bayha v. Public Utility District*, 2 Wn. 2d 85, 97 P. 2d 614 (1939). In the principal case, the Court declined to apply this rule, pointing out that the function here was proprietary and not governmental. While such a distinction is no doubt proper in some situations, *e.g.*, tort liability, the usual rule used to determine whether municipal corporations may coexist has been whether their purposes and functions have been the same, regardless of whether these functions were proprietary or governmental. *Sheldon v. Board of Supervisors*; *Trumbull County Board v. State ex rel. Van Wye*; *People ex rel. Greening v. Bartholf*; *Kelley v. Brunswick School District*; *City of Aurora v. Aurora Sanitation District*, *supra*.

When REM. REV. STAT. § 9488 was first enacted in 1909, P.U.D.s were unknown, and although the statute was reenacted in 1947 without substantial change, it is improbable that the Legislature ever considered the problem raised by this case—whether a town or city may enter into competition with a P.U.D. after the P.U.D. has entered the field. When the Legislature considered the converse problem, it expressly authorized the P.U.D. to include towns and cities not owning and operating authorized utilities, but expressly forbade the P.U.D. to enter into competition with a town or city owning and operating its own utilities, REM. REV. STAT. § 11605 *et seq.* Since the Legislature expressly forbade the P.U.D. to enter into competition with a city, it seems

the Legislature would have forbidden the town or city to enter into competition with a P.U.D. had that problem been considered.

The proposition that the Legislature did not intend to authorize towns and cities to enter into competition with established P.U.D.s by the general authorization of REM. REV. STAT. § 9488 is reinforced by a consideration of the economic consequences. Here the P.U.D. had sold revenue bonds and investors had bought the bonds relying on the revenue to be derived from the inhabitants of the town. If the town should hold another election and then enter into competition with the P.U.D., the P.U.D. would be deprived of a substantial number of its potential customers with a resultant loss of revenue. To the rural consumer this loss of revenue would mean higher rates; to the P.U.D. it could mean anything from a difficult financial situation to bankruptcy depending on the extent of the loss; and to the investor it could mean a partial loss on his investment.

It may be that in the future, an area composed of a town or city and the surrounding rural area which could enjoy the benefit of public power and which may desire to establish a P.U.D. for the mutual benefit of the municipal and rural area will experience difficulty in doing so. The rural consumers may resist the plan fearing that the city or town might withdraw leaving them with the debt of the P.U.D. And such P.U.D., if established, may experience further difficulty in financing the acquisition and operation of the necessary facilities, for investors will be reluctant to risk money knowing that a substantial part of the potential revenue of the system which must repay the loan may be legally cut off.

ELDON C. PARR

Trusts—Purchase Money Resulting Trusts Between Parties Living in Meretricious Cohabitation. *P*, separated from his wife, illicitly cohabited with *D*. *P* purchased their residence with his separate property, taking title in *D*'s name. *D* asserted ownership of the property and evicted *P*. *P* brought action claiming *D* held the property as a trustee for *P*'s benefit. The trial court found for *D*. On appeal, *Held*: Reversed. Since *P* advanced all the consideration for the property, a resulting trust is presumed. *Walberg v. Mattson*, 38 Wn. 2d 808, 232 P. 2d 827 (1951).

The rule in Washington has been that a transfer of property to one party, with the purchase price being paid by another, raises the presumption that the grantee holds the property as a trustee for the person advancing the consideration. In re *Cunningham's Estate*, 19 Wn. 2d 589, 143 P. 2d 852 (1943); *Scott v. Currie*, 7 Wn. 2d 301, 109 P. 2d 526 (1941); see RESTATEMENT, TRUSTS §§ 440-444 (1935); 3 SCOTT, TRUSTS 2239 (1939). The normal exception to this rule is a presumption of gift rather than resulting trust where the grantee is related to the purchaser in such a way as to be the natural object of the bounty of the purchaser. *Scott v. Currie*, *supra*; *Dimes v. Hyland*, 180 Wash. 455, 40 P. 2d 140 (1935); see 24 WASH. L. REV. 164 (1949). However *Creasman v. Boyle*, 31 Wn. 2d 345, 196 P. 2d 835 (1948), created a second exception—a presumption that the property was disposed of according to the intent of the parties, where there is a meretricious relationship coupled with an absence of an inconsistent intent. This exception apparently makes the form of the transaction (i.e., putting the deed in the grantee's name), rather than the presumed intent of the purchaser, the controlling factor; it is contrary to authority. *Mouser v. O'Sullivan*, 22 Wn. 2d 543, 156 P. 2d 655 (1945); *May v. May*, 161 Ky. 114, 170 S.W. 537 (1914); *Hanson v. Hanson*, 78 Neb. 584, 111 N.W. 368 (1907); *Dunn v. Zwilling*, 94 Iowa 233, 62 N.W. 746 (1895); 3 SCOTT, TRUSTS 2239 (1939).

The court in the *Walberg* case applies the general rule of resulting trusts in a meretricious relationship, but still recognizes the exception created by the *Creasman* case,