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Recent Decisions

Martin J. Husung

William P. Mahoney

dependent upon the "automobile trade." Yet, there are many decisions to the effect that the courts have not at all times been lenient towards such businesses if located in a residential section. However, in those citations, it is universally true that noises from automobiles constituted but one of many disagreeable noises. It is obvious, therefore, that where the nuisance alleged is caused almost entirely by noises emanating from the operation of automobiles, unless this noise is excessive, the trend will be to refuse the injunction following the test laid down in *Brown v. Easterday*. Consequently, *Hall v. Putney* lends its strong support for this argument. There is no way to get around the argument that the automobile is here to stay and lawful businesses dependent upon the automobile trade should attain a status above those neighboring individuals who are so annoyed by the inescapable fact that automobile horns honk, that gears grind when shifted, that doors bang when slammed, and that racing motors are irritating to the ear. It is fortunate that, with the advance of automotive science, these causes will more and more lose their legal cogency.

Louis Da Pra.

RECENT DECISIONS

LANDLORD AND TENANT—LIABILITY OF THE LANDLORD FOR PERSONAL INJURY TO TENANT ARISING FROM FAILURE TO PERFORM CONTRACT TO REPAIR DEMISED PREMISES.—The plaintiff, a child three and one-half years old, brought this action in tort to recover for injuries sustained when she fell from an unguarded balustrade surrounding a stair landing. Defendants are the owners of the apartment house in which plaintiff's parents are tenants. During the negotiations for the rental of a third floor flat the defendants were informed by plaintiff's parents that they had a small daughter, and defendant's attention was called to the dangerous condition of the outside stairway and landing, and that if the balustrade were not enclosed plaintiff might fall through the openings in the balustrade and suffer serious injury. In consideration of plaintiff's parents becoming tenants from month to month defendants orally agreed to enclose the balustrade with wire screening or other suitable material. Defendants negligently failed to so enclose the landing and stairway, in consequence of which, plaintiff fell from the landing and struck a concrete walk some 12 feet below, suffering serious and permanent injuries. The trial court sustained a demurrer to the complaint and the Missouri appellate court affirmed that ruling, holding that the plaintiff had mistaken her remedy which was on the contract and not in tort. The court said, "A tenant may not ground an action in tort for personal injury growing out of the failure of the landlord to perform a contractual duty, except, of course, where he also owes a duty apart from the contract. *Norris v. Walker,* 110 S. W. (2d) 404 (Mo. 1937).

It is well settled that, in the absence of a statute or an express covenant, there is no duty on the part of a landlord to keep the demised premises in repair, 36 C. J. 125. However, in the principal case there is a contract, and even more important. it is apparent that the making of the contract was designed to prevent the very injury complained of. The cases bearing on this question are in considerable confusion both as to the results obtained and as to the theory upon which those re-

sults are predicated. And as might be expected the texts and encyclopedias reflect the uncertainty found in the cases. In 16 R. C. L. at page 1059 the general rule denying recovery for personal injury either in contract or tort is founded upon the reason that "a contract to repair does not contemplate as damages for failure to perform it that any liability for personal injuries shall grow out of it, because the tenant has the duty of repairing the premises himself and charge it to the landlord." Tiffany likewise agrees with the view that exempts the landlord from liability for personal injury, but calls attention to the fact that many cases have allowed a recovery for injury to the tenant's property, which injury would not have occurred had the landlord performed his covenant to repair, and then adds that no distinction can be made between those cases fixing liability for damage to property and those denying liability for injury to the person. Tiffany—Landlord and Tenant, vol. 1, pp. 593 and 596.

Concerning the cases the numerical weight of authority establishes the doctrine that there can be no recovery in such cases of personal injury whether on the contract or in tort. Notes: 8 A. L. R. 765; 68 A. L. R. 1195. But even in those few cases in which the factual situations closely parallel the principal case the reasons for denying liability are not in accord. In *Lane v. Raynes,* 223 Mass. 514, 112 N. W. 152 (1916), and in *Dailey v. Vogl,* 187 Mo. App. 261, 175 S. W. 707 (1915), it is said that where the right of possession and enjoyment passes to the tenant the rule of caveat emptor applies and the tenant takes the premises in whatever condition they may be in, and that this rule is not affected by the fact that the lessor covenants to repair the premises, insofar as concerns his liability for personal injury to the lessee or those in privity with him, although the existence of the defect is attributable to the failure of the lessor to repair according to his agreement. The case of *Dice's Adm'r v. Zweigart's Adm'r,* 161 Ky. 646, 171 S. W. 195 (1914) which adopts verbatim the reasoning of *Dustin v. Curtis,* 74 N. H. 266, 67 Atl. 220 (1907), ascribes another and somewhat different ground for relieving the landlord of liability. In that case the plaintiff, a boy of five, while playing in the backyard of premises leased by his father from defendant, fell into an unguarded cistern in consequence of the failure of the landlord to "fix" *(sic)* the cistern as he had agreed to do prior to the letting of the premises. The court there said: "It may be stated as a principle of law, that where the only relation between the parties is contractual, the liability of one to the other for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done; and that the mere violation of the contract, where there is no general duty, is not the basis of a tort action." That a mere breach of contract of itself does not constitute a tort is regarded in 68 A. L. R. 1194 as a "Cardinal Principle of Law." The preponderance of cases which support the majority view do so on the theory that damages for personal injury are not within the contemplation of the parties and are too remote. *Brady v. Klein,* 133 Mich. 422, 95 N. W. 557 (1903); *Reams v. Taylor,* 31 Utah 288, 87 Pac. 1089 (1906); 11 L. R. A. N. S. 504. But this theory is open to the criticism that the court deliberately blinds itself to the obvious facts. As stated in *Marcheck v. Klute,* 133 Mo. App. 280, 113 S. W. 655 (1908), the injuries sued for were the very ones contemplated.

A few states reject in whole or part the majority doctrine. In Minnesota the leading case of *Barron v. Liedloff,* 95 Minn. 474, 104 N. W. 289 (1905), though not factually pertinent here, lays down a broad general rule applicable to the type of case under consideration. It is: "Where the landlord agrees to repair the premises his right to enter and have possession is necessarily implied, and *his duties are in some respects similar to those of an owner and occupant,* and if his negligence in making or *failing* to make repairs results in an unsafe condition of the premises he is liable for injuries caused thereby to persons lawfully on the premises, who are not guilty of contributory negligence on their part." It is thus seen that the basis of liability is negligence—the fundamental concept underlying all the minority cases.

The Supreme Court of Texas expressly repudiates the majority doctrine. *Ross v. Haner,* 244 S. W. 231 (1922). In that case the plaintiff sued for injuries sustained when he fell from a third story window of his parents' apartment owned by defendant. At the time of negotiations for the rental of the apartment plaintiff's mother called defendant's attention to the dangerous condition of a screen to her small son, the plaintiff, whereupon defendant in consideration of the rental promised to put a safety catch on the screen. Because of the latter's failure to perform, the plaintiff fell through the window when the screen swung outwardly in response to the slight pressure he put upon it. The court in sustaining the verdict for the plaintiff held in accord with what it deemed to be the "best reasoned" cases and laid down the rule that "Where landlords . . . stipulate for repairs, not for comfort and convenience only, but for safety and to avert a condition of danger, and fail to make the repairs through negligence which is the proximate cause of injury to the tenant's child, the landlords have breached their duty and are liable for the injury, especially where the safety of the child was within the contemplation of the parties as the purpose for which the promise of repairs was required and made." This case was affirmed in 1924. *Ross v. Haner,* 258 S. W. 1036. To the *contra* is *Chelefou v. Springfield Inst. for Savings,* 8 N. E. (2d) 769 (Mass. 1937), on exactly the same set of facts, the court refusing to allow recovery on the ground that the omission to put safety catches on the screen was not such "active negligence or misfeasance" as would support an action for personal injury to the plaintiff, a child, who fell through the screened window.

One of the most enlightening expositions of the minority view is the recent case of *Dean v. Hershowitz,* 119 Conn. 398, 177 Atl. 262 (1935). Here again, as in the above minority cases, liability is founded upon active negligence. The court in this case reasoned that in certain recognized instances, such as in the relationships of bailor and bailee; lawyer and client; and, physician and patient, the law imposes upon the relationship as a part of the contract itself a positive duty to use care. The extent to which liability in negligence may arise out of a contractual relationship is not limited to those enumerated above; such tort liability has arisen out of other situations which began as a contractual relationship. The real basis of liability, according to the opinion, is not so much in the relationship, but in the fact that one person has assumed the performance of some act which may affect the rights of another under such circumstances that, unless he uses proper care, the other person will suffer injury. The law thus imposes a duty to use care. Hence, the court says, if the elements necessary to found an action for negligence are present, the fact that a precedent relationship arises from a contract is no sound reason why the action should not lie. The court concludes with the statement: "If there rested upon the defendant the duty of replacing the floor of the porch (as per contract), she is liable in negligence, upon proof of the necessary facts, for her failure to perform that duty."

On the strength of the cases supporting the minority doctrine it would seem that the Missouri court, by giving greater consideration to the reasoning upon which they rest, might have reached a more equitable decision in view of the fact that the parties to the contract in the principal case in contracting for repairs to the premises did so to prevent injury to the plaintiff.

Martin J. Husung.

LARCENY—ELECTRICITY AS PROPER SUBJECT OF LARCENY.—Now that electricity has become a commodity which is bought, sold, and used by almost everyone, there is a question whether electricity can be a subject of larceny. In *People v. Menagas,* 367 Ill. 330, 11 N. E. (2d) 403 (1937), the defendant had tapped the Commonwealth Edison Company's wires and was on trial for larceny. His counsel maintained that there could be no such thing as larceny of electricity because electricity

is not personal property capable of being "taken and carried away." The Supreme Court decided that the wrongful taking of electricity constituted larceny.

The court based its decision on two grounds: the testimony of an electrical engineer who was called in by the court to inform the latter of the precise nature of electricity; and the numerous holdings of other courts, on different factual situations, that electricity is personal property. Since the whole question hinges upon electricity's being regarded personal property, both of these grounds tended to prove that it is personal property and therefore a proper subject of larceny. The engineer testified that the substance sold by plants and bought by consumers consisted of energy produced in electrons and caught in a resistance wire on the consumer's premises after the electrical energy had been carried by the electrons through the plant's conductor. Further testimony revealed that, though intangible, electricity is under the control of the owner of the conductor, and may be carried away by tapping the conductor and using the energy at another point; that it could be stored, as in a battery; and that it could be measured, priced and sold. The court concluded from this testimony that electricity is definitely intangible personal property and capable of asportation.

To further substantiate its conclusion, the court cited numerous cases in which, under different factual situations, electricity is held to be personal property. In *People v. Wemple,* 129 N. Y. 543, 29 N. E. 808 (1892), it was held that electrical energy is a commodity; that a company which manufactures and furnishes it is a manufacturing company within the meaning of a statute exempting certain manufacturing concerns from taxation. A similar result was reached in a Pennsylvania case. *Commonwealth v. Keystone Electric Light, Heat & Power Co.,* 145 Pa. 105, 22 A. 839 (1899). *In Hetherington v. Camp Bird Mining Co.,* 70 Colo. 531, 202 P. 1087 (1921), the court held, in a suit to recover for electric power furnished, that artificially produced electricity is personal property. Electricity was also held to be property by the United States Supreme Court in the case of *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288 (1935).

At Common Law electricity, like water power, was not the subject of larceny, because it was incorporeal and did not correspond to what was ordinarily regarded as "goods and chattels". The Illinois statute on larceny is broader than the common law rule, providing that larceny may be of intangible, as well as of tangible, things. This problem arose in a case exactly in point, the only other case that this writer could find on larceny of electricity. That case is *United States v. Carlos,* 21 Philippine Rep. 533 (1911). The holding was that electrical energy may be the subject of larceny. The main contention of the defense was that it couldn't be such because it was not a corporeal thing, a tangible, movable chattel that could be carried away. In holding that concept discarded, the court laid down the following test: "The true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of appropriation by another than the owner."

Though the main case is the first holding in this country on the larceny of electricity, it advances what will probably be the general rule in other jurisdictions. The tendency is to regard electricity as personal property. And since in most states the statute requires that the subject of larceny be personal property, and not, as in Texas, corporeal personal property, it is reasonable to conclude that the courts generally will hold that electricity is a proper subject of larceny.

William P. Mahoney.