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Recent Trial Court Decisions

Dicta Editorial Board

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE: It is intended in each issue of Dicta to note interesting decisions of the United States Circuit Court of Appeals for the new Tenth Circuit, although such are not trial decisions, the United States District Court, the Denver District Court, the County Court, and occasionally the Juvenile Court.)

UNITED STATES CIRCUIT COURT OF APPEALS—10th CIRCUIT—*Chicago, Rock Island and Pacific Railway Co. vs. Daisy Fanning.*

Appeal from the District Court of the United States for the District of Colorado. Decided January 27, 1930. Opinion by Judge Lewis.

Facts.—Appellee on evening of March 2, 1927, at the request of her husband, was riding with him in an automobile on the way to a dance. The evening was very foggy. The husband was driving the automobile at a rate of 12 miles per hour. The highway passed over a bridge maintained by the Railway Company which spanned a deep cut in which the tracks of the Railway Company lay. Fifteen feet of the road contiguous to and approaching the bridge was within the railway's right of way. At the side of this approach, there was a deep washout. The automobile went into the washout and as a result appellee was injured. The complaint alleged that the Railway Company was negligent in failing to fill in the washout or maintain proper barriers. The jury found for the appellee and a judgment was entered against the railway company on a verdict. The railway company alleged two principal errors: 1. That a fog would not necessarily be anticipated by the railway company and that therefore there was no proximate causation of the injury. 2. That the question of negligence of appellee's husband should have been submitted to the jury, and if he were negligent, such negligence should be imputable to appellee.

Held.—1. The issue of negligence and proximate causation was properly submitted to the jury. The washout in this instance was on defendant's right of way and the defendant would be responsible for its continuance. Landowners whose properties adjoin adjacent public highways are bound to regulate their conduct and maintain an unguarded excavation on

their premises in contemplation of the persons who travel upon such highways. A reasonably prudent person should have anticipated injury in this instance.

2. Negligence of the operator of a motor vehicle is not imputable to a guest or passenger of such vehicle, and this applies as well between a husband and wife as any other passenger or guest, unless the relation is such as to entitle the passenger to give direction, e. g. master and servant. This latter relation did not exist in the instant case.

Judgment Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS—10th CIRCUIT—
C. I. T. Corporation vs. United States of America.

Appeal from the District Court of the United States for the District of Kansas. Decided January 29, 1930. Opinion by Judge Cotteral.

Facts.—One Humbred was convicted for the transportation and possession of intoxicating liquors. A Reo coupe which was in his hands was confiscated by the Government. Plaintiff intervenor, at the time said Reo coupe was sold, had taken an assignment of the conditional sales contract of the automobile from the seller, and in this action sought possession of the coupe under said sale contract or petitioned to have a mortgage enforced thereon for the amount of the unpaid balance of the contract. Section 40—Title 27 of the U. S. Code provides that any vehicle seized in the transportation of intoxicating liquors shall be ordered sold by the court "unless good cause to the contrary is shown." The District Court ordered a sale of this automobile. Intervenor appealed.

Held.—The intervenor had a lien interest under the sale contract. Such interest is sufficient "good cause" and was "created" without guilty notice to the intervenor. The intervenor therefore is awarded possession of the Reo coupe if its value is less than the claim. If the automobile has been sold then the net proceeds of the sale shall be turned over to intervenor or if the proceeds exceed the claim, the excess shall be paid to the Treasury of the United States. *Order Reversed;*

and case remanded for the entry of an order in accord with the opinion.*

UNITED STATES CIRCUIT COURT OF APPEALS—10th CIRCUIT—*Blackburn Construction Company vs. Cedar Rapids National Bank.*

Appeal from the District Court of the United States for the Eastern District of Oklahoma. Decided January 24, 1930. Opinion by Judge Cotteral.

Facts.—Plaintiff in the lower court brought an action on two promissory notes. The only material defense was that of payment. At the conclusion of the trial, both sides moved for a directed verdict. The Court thereupon ruled that the motions withdrew the case from the jury and submitted it to the court. After reviewing the testimony, the Judge directed a verdict for the plaintiff bank and rendered a judgment on such verdict. The defendant alleged error, first, in directing a verdict for plaintiff and not for defendant; second, that the court failed to submit additional instructions to the jury on the issue of the discharge of the notes by payment.

Held.—Motions by both parties for a directed verdict without request for instructions are regarded as joint requests for findings of fact by the court and a direction to the jury in accordance with such findings and the law applicable to them, thereby withdrawing the case from the jury. On appeal therefor, the sole question open to review is whether or not the findings of the court are based on substantial evidence and the law correctly applied. This court having reviewed the evidence finds it sufficient to support the findings of the District Judge.

Judgment Affirmed.

DENVER DISTRICT COURT—NO. 100,086—DIV. 1—*Quinn and McGill Motor Supply Co. vs. Broadway Improvement & Investment Co., et al.—Hon. Frank McDonough, Judge.*

Facts.—One Brown leased certain premises from defendant Investment Company and remained in possession of the

*EDITOR'S NOTE: Compare the decision of the Colorado Supreme Court in *Lindsley v. Warner* noted on page 33 of Dicta for February, 1930.

premises until August 13, 1927. On that date plaintiff took possession of the premises and certain property described in a chattel mortgage executed in its favor by Brown, this property being located on said premises. Plaintiff removed the property described in the mortgage, with the exception of an electric sign. The last of this property being removed on August 13, 1927. The keys to the premises were then delivered to a representative of the Investment Company. The electric sign in question was affixed to the building by heavy iron bars which pierced the brick walls and by rods bolted to the roof. Defendant Investment Company having found a new tenant for the premises who insisted that the sign be removed, sold the sign in question for $200.00 and the purchasers removed the same. The lease contained the following provisions: "No hole shall be made or drilled in the stone or brick work of said premises." "No alterations, additions or fixtures of any kind shall be made to the premises without the written consent of lessor endorsed on this agreement. All such additions or fixtures shall, on the termination of this agreement, remain and be the property of the lessor unless otherwise agreed in writing by endorsement on this lease." "Each tenant must upon termination of the tenancy hereby created restore the keys of the demised premises to the lessor or his agent." Plaintiff made a demand for said sign on November 25, 1927, and upon refusal of such demand filed this action for conversion.

Trial was had before the Court.

Held.—1. The electric sign in question having been affixed to the building became the property of the landlord according to the terms of the lease, and the attempt to include it in the chattel mortgage to plaintiff was without right as against the interest of lessor.

2. That the keys to the premises had been surrendered to the owner and the premises had been abandoned by the tenant as well as the mortgagee; that the demand and the assertion of right to the sign by plaintiff company was a mere after thought, and the plaintiff cannot recover therefor because of the abandonment of the property.

Judgment for Defendant.