Volume 53
Issue 3 *Dickinson Law Review - Volume 53, 1948-1949*

3-1-1949

Recent Cases

RECENT CASES

NEGLIGENCE — MASTER AND SERVANT — TORTS: The principle established in the famous case of *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455 (1852), to wit, that a seller is held libale to a third person for negligence in the preparation or sale of an article "inherently dangerous" to human safety, was extended to an insurance company by the Pennsylvania Supreme Court in the recent case of *Bollin v. Elevator Construction & Repair Co., et al*, 63 A. 2d 19 (Pa. 1949).

Plaintiff, an elevator operator in the building of his employer, suffered personal injuries when the elevator fell in its shaft. Plaintiff sued the elevator company with whom his employer had contracted to repair the elevator, alleging repairs negligently made. The elevator company joined the employer and the Globe Indemnity Co. as additional defendants. The elevator company alleged that the Globe Co. had insured the employer against loss from elevator accidents and, as such insurer, under the Act of May 2, 1929, P. L. 1518, was under a duty to members of the public to make proper inspections, which it negligently failed to do. The court said that the question to decide was this: "What is the legal liability of an insurance company by reason of its having assumed on behalf of the owner to discharge the statutory liability of inspecting and reporting on the condition of an elevator, not within the terms of its contract, but under and pursuant to the terms of a statute?" The Supreme Court reversed the lower court and held the insurance company liable to the plaintiff elevator operator. The court relied on the line of cases as first founded on the *Thomas* case and held that since the insurance company failed to perform the duty it undertook, *i. e.*, to inspect and report on the condition of the elevator it "should reasonably have foreseen that a natural result of this neglect of the duty so allegedly undertaken would be injuries not only to the other party to the contract, but also to persons lawfully using that elevator." Chief Justice Maxey added that the source of the obligation of the insurance company was not only in the contract between it and the employer, but in the words of Judge Cardozo in *Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190, "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

NEGLIGENCE — PLEADING — SALES: In *Loch et ux. v. Confair*, 63 A. 2d 24 (Pa. 1949), the Pennsylvania Supreme Court made a distinction between purchases made over the counter of an ordinary retail store, and purchases made in a self-service store, with respect to the passage of title to the goods. The plaintiff in the action selected a bottle of ginger ale from the rack of a self-

service store of the Great Atlantic and Pacific Tea Company, and as he went to put it into his merchandise cart it exploded, injuring his wife, also a plaintiff. On the bottle was a label to the effect that the ginger ale was bottled for the A. & P. by Confair's Beverage Company. The plaintiffs sued the beverage company in assumpsit upon a warranty implied by Sec. 15 of the Sales Act of May 19, 1915, P. L. 543. The defendants alleged that the suit, if one was maintainable, should have been in tort for negligence.

The court held that assumpsit would not lie because the plaintiffs had been unable to establish a sale or contract of sale of the beverage. The court said that the plaintiff's contention that there had been a contract of sale failed because (1) there was no agreement as regards the sale of the beverage, and (2) there was no delivery by the seller. Delivery and payment, according to Sec. 42 of the Act, *supra*, are concurrent conditions. The court said: "The sale in a self-service store differs materially from the ordinary cash sale made over the counter. In the latter, the order for the goods, the payment of the price, delivery to the customer, and the passing of title to the goods all occur at substantially the same time." The court did not decide the time at which the retailer parts with title in a self-service store but held only that possession of the goods by the buyer is not the equivalent of delivery to the buyer.

WORKMEN'S COMPENSATION — INJURY INCURRED ENROUTE TO WORK: The Supreme Court of Pennsylvania in *Butrin, et al. v. Manion Steel Barrel Co.* et al., 63 A. 2d 345, Penna. (Jan. 1949) held to the effect that plaintiff-employes were engaged in the furtherance of their employer's business while enroute to work before normal working hours, but at the request of the employer, and without any contract of employment requiring the employer to furnish transportation to and from work. Thus the plaintiffs were entitled to workmen's compensation for injuries incurred in an accident which happened while so enroute.

The foreman of the employer directed another employe to take a company truck, go to the home of the fellow-employes, and bring them to the plant before regular working hours in order to work on an emergency order. The employes received no compensation from the employer for the time spent riding to work; there was no contractual duty on the employer to furnish such transportation.

The Court recognized the rule that an employer is not liable for payment of compensation for an accident occurring while the employe is going to or returning from work in absence of a contract of employment providing that the employer furnish the transportation. However, in a four to three decision, the Court held that this case was an exception since there was a special duty undertaken by the employes for, and at the direction of, the employer. The Court added that the test under the Workmen's Compensation Act was not whether or not wages were paid for the services, but whether the special act performed by the employes

at the employer's direction was in the furtherance of the employer's business. Since speed was essential for the emergency order, the Court held that the transportation constituted a furtherance of the employer's business, and the Act was applicable.

In a vigorous dissent, Justice Patterson found that the use of the truck to bring the employes to work was a mere convenience to the employes. In order for the Compensation Act to apply to employes off the premises, while going to or from work, the dissent argued that (1) the contract of employment must provide that the employer shall furnish the means of going to and from work; or (2) a special contract must exist to provide for transportation and the employer must consider such transportation necessary to secure the employe's services and in the furtherance of his business; or (3) to secure a service, compensation is paid as a part of the consideration from the time of beginning the journey.

Apparently the court did not, in either opinion, consider the fact of whether or not the employes could have arrived at their job in the time desired had they relied on transportation provided by themselves. This would seem to be an important factor in considering whether the transportation was a mere convenience or not.