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Recent Cases

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RECENT CASES

STREETS—RIGHT OF THE CITY TO GRANT USE OF STREET FOR PURPOSES OTHER THAN TRAVEL. The defendants were owners and lessees of a so-called public market. The market extended along the whole front of a block. The street on which it was fronting was eighty feet wide, fifty feet between the curbs and fifteen feet on each side for sidewalks. The city of Tacoma granted the defendants the right to extend their market building so as to cover the fifteen feet of sidewalk in front of their market, in return for which the defendants granted an easement of twelve feet wide along the front of their property. The purpose of the arrangement was to have a display of goods on each side of the pedestrian travel. The plaintiffs, who were owners of abutting and nearby property on which they operated markets (see briefs), brought an action to compel the removal of that part of the defendant's building on the sidewalk, on the ground that it was a nuisance in that it obstructed the highway. *Held*, that plaintiffs were entitled to the relief prayed for. *Anderson et al v. Nichols et al*, 52 Wash. Dec. 194, 278 Pac. 161 (1929).

The question here involved is the right of a city to permit the use of the streets for purposes other than public travel. The city has no right to grant the use of a public street for purposes other than public travel and communication. *Motoramp Garage Company v. Tacoma*, 136 Wash. 589, 241 Pac. 16 (1925) *Chicago, R. I. & P Ry. Co. v. People*, 222 Ill. 427, 78 N. E. 790 (1906). The mere fact that it may add to the public convenience, comfort or health does not authorize a use of the streets which interferes with public travel. *Motoramp Garage Company v. Tacoma, supra.* Accordingly it has been held that the use of a part of the streets for purposes of

a gasoline or oil filling station may be abated, *State ex rel. Reynolds v. Hill*, 135 Wash. 442, 237 Pac. 1004 (1925) *State v. Camp Lewis Service & Garage Co.*, 129 Wash. 166, 224 Pac. 584 (1924). Neither can the city grant a use for purposes of a lunch wagon, *Commonwealth v. Morrison*, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 125 Am. St. Rep. 338 (1908) nor for storing automobiles, *Lowell v. Pendleton Auto Co.*, 132 Ore. 383, 261 Pac. 415 (1928). The right of a city to grant the privilege of conducting a private business in the streets has been denied in many instances as pointed out in the case of *Motoramp Garage Company v. Tacoma, supra.*

On the other hand, where the business is of a public character and dealing with public travel and communication, the city has the right to permit the occupancy of a part of the street for that purpose: public hack stands, *Waldorf-Astoria Hotel Co. v. The City of New York*, 212 N. Y. 97, 105 N. E. 803 (1914) *Swann v. City of Baltimore*, 132 Md. 256, 103 Atl. 441 (1918) water and gas pipes, *City Mut. Irr Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9 (1911) poles and wires, *Hook v. Bowden*, 144 Mo. App. 331, 113 S. W 261 (1910). These uses obviously deal with public travel and communication,, consequently the exercise of the use is not in excess of the easement held by the public in the street. In the instant case, however, the clear purpose of the use was to devote a portion of a public street to a private business where the use had no relation to public travel or communication. Other courts that have had occasion to pass on the question of the use of a public street for a privately owned market have reached the same conclusion. *Costella v. State*, 108 Ala. 45, 18 South. 820 (1895) *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W 898, 20 L. R. A. 783 (1893) *Winter Bros. v. Mays*, 170 Ky. 554, 186 S. W 127 (1916). A. O.

MASTER AND SERVANT—ASSUMPTION OF RISK. The plaintiff, 23 years old, employed by the defendants as a farm laborer, while engaged in his duty of caring for the live stock, was badly injured by a vicious bull. The animal was known to the defendants to be dangerous, but the plaintiff was unaware of the fact, the animal having, theretofore, appeared gentle. *Held*: The plaintiff could recover damages for his injuries, since he was not hired to care for a dangerous animal, and did not know that the animal was vicious; also that it was a question for the jury whether he assumed the risk. *Lander v. Shannon*, 48 Wash. Dec. 46, 268 Pac. 145 (1928)

A servant assumes all the risks and dangers pertaining to his employment which are known to him, or discoverable by the exercise of ordinary care. *Collelli v. Turner* 138 N. Y. S. 900, 154 App. Div. 218 (1915) But not only the defects but the dangers must be known to the servant to create an assumption of risk. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, 78 N. E. 599 (1906) The rule of assumption of risk has no application where the dangers are not obvious. *Brown v. Sharphouser Contracting Co.*, 159 Cal. 89, 112 Pac. 874 (1910). A driver's helper does not assume the risk of a defect in an auto truck rendering it dangerous to crank, of which he had no notice, as the risk was not open and apparent. *Collins v. Terminal Transfer Co.*, 91 Wash. 463, 157 Pac. 1092 (1916). An employee does not ordinarily assume risks arising from conditions beyond his knowledge and not obvious to a person of his experience and understanding. *Elliott v. General Constr Co.*, 93 Neb. 453, 140 N. W 1024 (1913). A servant does not assume the risk in using an unusually vicious mule furnished by the master without warning as to its viciousness, even though mules as a class are dangerous. *Stutzke v. Consumer's Ice & Fuel Co.*, 156 Mo. App. 1, 136 S. W 243 (1911) A servant does not assume the risk when he was not informed of, and did not know of, an extra risk known to the master. *Christianson v. Pac. Bridge Co.*, 27 Wash. 582, 68 Pac. 191 (1902). It cannot be ruled as a matter of law that the servant assumed the risk of the danger, when he was ignorant of its existence. *Letchworth v. Boston & M. R. R.*, 220 Mass. 460, 108 N. E. 500 (1915) Whether a danger of employment is so obvious that an employee should know of it is ordinarily a jury question. *A. L. Clark Lumber Co. v. Northcutt*, 95 Ark. 291, 129 S. W 88 (1910). Ordinarily it is a question of fact whether considering his age, experience and

intelligence, the employee did understand and appreciate or ought to have understood and appreciated the dangers to which he was subjected. *Di Bari v. Bishop Co.*, 199 Mass. 254, 85 N. E. 89 (1908). Where an employee was young and inexperienced, and did not know of the danger of the work he was undertaking, the question of assumption of risk is for the jury. *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818 (1910). Where the servant does not know of the defect causing the injury, whether he assumed the risk of it is a question for the jury. *Cielfield v. Browning*, 9 Misc. Rep. 98, 29 N. Y. S. 710 (1894). The principal case is clearly in accord with the authorities. S. R. H.

DAMAGES—PREVENTION OF PERFORMANCE. Defendant had a right to enter and cut trees on plaintiffs' land, but plaintiffs believing that the trees belonged to them, served defendant with written notice not to trespass on their land and threatened to sue for treble damages under the statute if the defendants did not heed the warning. Defendant withdrew, and in this suit by the plaintiffs to recover damages for the trees taken defendant counterclaimed for damages for prevention of work. *Held*: That the trees belonged to the defendant, but that he was not justified in abandoning the work because of the threat and thus was not entitled to damages. *Lewis et al. v. Eastern Ry. & Lumber Co.*, 51 Wash. Dec. 29, 274 Pac. 1055 (1929).

A mere threat to prevent performance on the part of the other party does not constitute such a prevention of performance as will give rise to an action for damages. *Cole v. Alexander*, 113 Ga. 1154, 39 S. E. 477 (1901). It is not duress for one who in good faith believes he has been wronged, to threaten the alleged wrongdoer with a civil suit, or even criminal prosecution. *Ingibrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 139 Pac. 188 (1914). It might be contended that the severity of the threatened action justified the defendant in his abandonment of the work. But he must have known or believed that he was in possession under some color or claim of title, and under the statute (Rem. Comp. Stat., sec 939, 940) such damages could not be allowed if the defendant had probable cause to believe the trees to be his own. *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645 (1911). A series of cases have held that if a person alleges his claim in good faith, and has an honest and reasonable belief that the claim is valid, such person does not render himself liable to damages, should his claim afterwards prove mistaken. *Adriance, Platt & Co. v. Nat'l Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163 (1903) *Huxley v. Hayes*, 191 Fed. 943 (1911) *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N. W 1136 (1913). It has even been held that where a third person notified a debtor not to pay his creditor an amount due under a contract, so that the creditor was forced to sue, that such person is not liable for damages for any delay caused by such notice, even though he acted maliciously. *Norcross v. Otis Bros. & Co.*, 152 Pa. St. 481, 25 Atl. 575 (1893). Washington has held that damages mean compensation for legal injury. *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 104 Pac. 820 (1909), and thus the defendant must show a legal injury, an actual interference with its rights.

From a legal standpoint, the defendant stands in the position of having voluntarily abandoned the work, and so was not entitled to recover on the theory that he had been prevented from continuing his work.

S. R. H.

MUNICIPAL CORPORATIONS—TORTS—DANGEROUS CONDITIONS — OIL AND GREASE ON STREET—SLIPPERINESS—LIABILITY. The city permitted the partial closing of a street, confining the general traffic to a space considerably narrower than had normally been the case, and causing, thereby, an amount of oil and grease to be deposited in such space, not usual when subjected to its ordinary use. There was evidence that the slippery condition owing to the oil and grease caused defendant's auto to skid, strike and injure the plaintiff. *Held*: That the city is liable, for it was bound to anticipate that hazards incident to users of street would be increased

due to such unusual accumulation of grease in the narrowed space. *Gabrielson v. Seattle*, 50 Wash. Dec. 83, 272 Pac. 728 (1928)

A municipality is not an insurer of its streets. *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006 (1894) *City of Americus v. Gartner*, 10 Ga. App. 754, 74 S. E. 70 (1912). Its liability arises only upon its failure to exercise reasonable diligence in keeping the street safe for ordinary travel. *Shearer v. Buckley*, 31 Wash. 370, 22 Pac. 76 (1903) *Lorence v. Ellensburg*, 13 Wash. 341, 43 Pac. 20, 50 Am. St. Rep. 42 (1895) 28 C. J. 1312. It is only against danger which can be or ought to be anticipated that the municipality is bound to guard. *Gasport v. Evans*, 112 Ind. 133, 13 N. E. 258, 2 Am. St. Rep. 164 (1887) *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944 (1903)

The city is not liable for accidents occasioned by the mere slipperiness of the sidewalks or streets due to the presence of wet leaves, mud, ice or snow. *Osborne v. Tarrytown*, 180 App. Div. 224, 167 N. Y. S. 681 (1917) *O'Reilly v. Syracuse*, 49 App. Div. 538, 63 N. Y. S. 520 (1900) *Kinney v. City of Troy*, 108 N. Y. 567, 15 N. E. 728 (1888). However, if such ice becomes rough, uneven or so rounded up as to create an obstruction and to cause it to be unsafe for travel the city is liable. *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054 (1893) *Murray v. Spokane*, 117 Wash. 401, 201 Pac. 745 (1921) *Magalia v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317 (1902) 28 C. J. 1372.

It is a matter of common knowledge that autos drop oil and grease, and rain falling thereon produces a slippery condition. It appears, therefore, as in the ice and snow cases, the liability of the city must be predicated upon the presence of some unusual condition, for otherwise the users of the street assume the risk of injury arising from the ordinary conditions.

By its own act the municipality has created a situation which is inherently dangerous, which increases the hazards incident to the users of the streets and greatly aggravates the normal risk. For its own acts the city must be responsible. P. C.