Case Western Reserve Law Review

Volume 13 | Issue 3

1962

Personal Property

John H. Wilharm Jr.

because of the emphasis placed by the court in the *Kimball* case on the New York four inch rule. Adopting this questionable interpretation, the court in the *Reeves* case said that the facts had properly been submitted to the jury.

The confusion in this area obviously results when courts attempt to follow the line of decisions supporting either the *Kimball* case or the *Griffin* case. For about five years Ohio courts of appeal have been in a dilemma as to which Ohio Supreme Court precedent should be followed. It appears that the plaintiff may recover in these cases under one of the following theories: (1) where there is a defect over four inches and the plaintiff contends that this is a nuisance as a matter of law adhering to the New York rule, and, (2) by requesting the submission of the case to the jury where the defect is under four inches and emphasizing a special fact which either implies greater negligence on the part of the municipality or less responsibility on the part of the individual. This second theory appears more reasonable. It is the authors' opinion that this theory is already in use and should be recognized as the test of liability by the courts. For example, in the *Griffin* case the court emphasized the fact that the injury occurred at night, while in the *Reeves* case, the court implied that loose gravel in the hole on the sidewalk constituted a trap. It appears that a special fact of this nature may dictate the result of the court's decision regarding submission to the jury.

PERSONAL PROPERTY

There were few major developments in the case law concerning personal property reported in 1961; however, there were some decisions worthy of brief comment.

GIFTS CAUSA MORTIS

The supreme court and a court of appeals both had occasion to review the basic law of gifts causa mortis. In *Adams v. Fleck*[1] the donor, during a serious illness, gave a check to his attorney to hold for his children until his death. The check however was to be returned to the donor if he survived the present illness. The supreme court, in holding that a valid gift causa mortis was not made, reemphasized the rule that where the death of the donor was a condition precedent to the vesting of title

1. 171 Ohio St. 451, 172 N.E.2d 126 (1961). See also discussion in *Workmen's Compensation* section, p. 551 *infra.*

in a third party, or in the donee, no valid gift causa mortis could be made.[2]

In *Koehler v. Koehler*[3] a devoted father, as a result of advanced age, suffered an impairment of his physical and mental capacity. He was induced by his son to endorse stock certificates in blank, whereupon both parties were made owners "in survivorship." Later, the father denied having made the endorsements, and claimed that his signature was forged. The court held that the father had no capacity at the time the certificates were signed to make any kind of gift, inter vivos or causa mortis. It could not be a gift causa mortis because of the father's lack of intent and his failure to surrender control. Furthermore, even if it were a gift causa mortis, the father would have revoked the gift by his demand or by the filing of the suit.

From both of these cases, the observation can be drawn that it will be difficult to prove a gift causa mortis in an Ohio court. The attorney must present clear and convincing evidence of the gift, and must avoid its being contradicted in any material respect. The attitude of the court in applying the law to the facts of the particular gift involved will also be important.

BAILMENTS

The case of *Fawcett v. Miller*[4] involved the bailment of an automobile. The defendant repair shop attempted to absolve itself from liability by being classed as a gratuitous bailee rather than a bailee for hire. The plaintiff had his car repaired, considered the work unsatisfactory, and returned it to the garage to be improved. The garage checked the car, found that the complaint was unjustified and returned the car to the plaintiff. During the course of delivery of the car to the plaintiff, the driver skidded into another car. Plaintiff brought this action against the repair garage for damage to his automobile. The court held that the defendant was not a gratuitous bailee, as the defendant had urged, because part of the original job for which defendant garage was hired was to check the complaint, and therefore the bailment for hire continued. There was clear precedent for this decision in the case of *Allstate Insurance Company v. Globe Auto Paint Shops, Incorporated*,[5] decided by the court of appeals for the same district six years before; however, the decision was not referred to by the *Fawcett* court.

JOHN H. WILHARM, JR.

2. For a full discussion of the ramifications of this case including the problem of whether Ohio even recognizes gifts causa mortis, see *Recent Decision*, p. 608 *infra*.

3. 113 Ohio App. 192, 171 N.E.2d 360 (1960).

4. 172 N.E.2d 328 (Ohio Ct. App. 1961).

5. 127 N.E.2d 37 (Ohio Ct. App. 1955).