Marquette Law Review

Volume 23
Issue 4 *June 1939*

Article 8

Municipal Corporations-Torts-Liability for Failure to Keep Streets in Reasonably Safe Condition-Liability for Failure to Maintain Traffic Signals

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Gerard A. Desmond, *Municipal Corporations-Torts-Liability for Failure to Keep Streets in Reasonably Safe Condition-Liability for Failure to Maintain Traffic Signals*, 23 Marq. L. Rev. 216 (1939).
Available at: http://scholarship.law.marquette.edu/mulr/vol23/iss4/8

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By the weight of authority, it is not robbery to forcibly retake money lost in an illegal game, providing of course, that the state in question has a recovery statute giving to the loser a right of action to recover money so lost.

Thus, in *Thompson* v. *Commonwealth,* 13 Ky. L. Rep. 916, 18 S.W. 1022 (1892)) it was not robbery for a person who had lost money at an unlawful game to point a pistol at the winner to compel him to return the money, for, in Kentucky, the winner is not even entitled to possession of the money.

In Utah, it was held to be error to refuse to give the following instruction: "That if they (the jury) should find that the defendant acted under a bona fide impression and honest belief that the money taken was his and that he had a right to it, they render a verdict of not guilty." *People* v. *Hughes,* 11 Utah 100, 39 Pac. 492 (1895).

Similarly in *Sikes* v. *Commonwealth,* 17 Ky. L. Rep. 1353, 34 S.W. 902 (1892), it was held that it was not robbery for a person, who, having lost money at an unlawful game, compels its return by pointing a pistol at the winner.

However if the winner is at the same time compelled to surrender not only his winnings, but also some of his own individual money, then the one taking by force and putting in fear would be guilty of robbery, *Grant* v. *State,* 115 Ga. 205, 41 S.E. 698 (1902).

The minority view, in the absence of statutes, makes it a felony to forcibly retake money lost in an illegal game. The state of Texas, having no recovery statute, is typical of those states which likewise have no statutes permitting a right of recovery, and which adhere to the minority view.

Thus, in *Carroll* v. *State,* 42 Tex. Crim. Rep. 30, 57 S.W. 99 (1900), it was held that one who after voluntarily delivering money to another, which the latter had won from him by gambling, retakes it from the winner by force and by putting him in fear of life and bodily injury, is guilty of robbery. However, in Texas, title passes when one loses to another at a game of chance as distinguished from those states which have recovery statutes. Hence in *Coker* v. *State,* 71 Tex. Crim. Rep. 448, 160 S.W. 366 (1913), it was held that if the party voluntarily delivers the money lost to the winner's actual possession, the winner owns the money, so that the forceful retaking of it may constitute robbery. Also *Blain* v. *State,* 34 Tex. Crim. Rep. 448, 31 S.W. 368 (1895).

Wisconsin has no decision on this question. It would seem, however, that this state would adhere to the majority view because it has a typical recovery statute. "Any person who, by playing at any game or by betting or wagering on any game . . . shall have put up or deposited with any stake holder or third person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may within three months after such putting up, staking or depositing, sue for and recover the same . . . " WIS. STAT. (1937) § 348.10.

ALLEN O'DONNELL.

Municipal Corporations—Torts—Liability for Failure to Keep Streets in Reasonably Safe Condition—Liability for Failure to Maintain Traffic Signals. —The defendant city placed a hard rubber stop sign about two feet long, one-half inch thick and eight inches in height in the center of K Street where it intersects Houston Street, to notify motorists that the latter was a "through street." This stop sign was allowed to become invisible by reason of its having been worn down to the level of the ground. The deceased was a guest in an automobile proceeding along K Street towards the intersection. Both the driver

and the deceased observed a car approaching the intersection from the west on Houston Street, but being non-residents and unfamiliar with the fact that Houston Street was designated a "through street," they proceeded into the intersection. Both cars collided in the center of the intersection with such force that the guest was instantly killed. Plaintiff alleged negligence in failing to maintain the stop sign, and thereby failing to keep the streets in a reasonably safe condition. *Held,* Judgment for defendant. Failure to keep streets in a reasonably safe condition has reference to a physical condition, and not to the regulation of traffic thereon. The latter is a governmental function and no liability attaches to the municipality for negligence in the performance of that function. *Kirk* v. *City of Muskogee* (Okla. 1939) 83 P. (2d) 594.

Courts have regarded a municipality as possessing a two-fold character. In one character it acts as an arm of the state in the performance of governmental functions. In the other it acts in a mere corporate proprietary capacity for the benefit of the locality and its inhabitants. In the performance of its governmental functions, the municipality is immune from liability for negligence, while in the performance of its proprietary functions it is liable as a private person. *Smith* v. *City of Dallas* (Texas 1935) 78 S.W. (2d) 301. At common law a traveler had no right of action for want of repair of a highway, which is a governmental function, and today the right to maintain such action is purely statutory. *Johnson* v. *Board of Road Commissioners of Ontonagon County,* 253 Mich. 465, 235 N.W. 221 (1931); *Hogan* v. *Beloit,* 175 Wis. 199, 184 N.W. 687 (1921); *Ackeret* v. *City of Minneapolis,* 129 Minn. 290, 151 N.W. 976 (1915). However, in some jurisdictions not having statutes imposing liability in this connection, municipalities are held liable for negligence upon the ground that the duty of maintaining the streets is a ministerial and corporate one, and not governmental. *Griffith* v. *City of Butte* (Mont. 1925) 234 Pac. 829; *Hagerman* v. *Seattle* (Wash. 1937) 66 P. (2d) 1153; *Wright* v. *Richmond,* 146 Va. 835, 132 S.E. 707 (1926); *Shepherd* v. *Chattanooga,* 168 Tenn. 153, 76 S.W. (2d) (1935). In still other jurisdictions, in the absence of statutes, liability is imposed on the municipality on the grounds that the care of the streets is an exception to the general rule of immunity, *Schwalk's Adm'r* v. *City of Louisville,* 135 Ky. 570, 122 S.W. 860 (1909); and that since the municipality has full and complete control of the streets within its boundaries, it is liable for failure to keep them in reasonably safe condition. *Opitz* v. *Town of City of Newcastle* (Wyo. 1926) 249 Pac. 799.

The general rule requiring cities to keep their streets in safe condition is predicated upon a duty with respect to the physical condition of the street, rather than upon the manner in which the municipality shall exercise other governmental powers which may affect the convenience or safety of those using streets. *Hanson* v. *Berry* (N.D. 1926) 209 N.W. 1002; *Addington* v. *Town of Littleton,* 50 Colo. 623, 115 Pac. 896 (1911). In *Auslander* v. *City of St. Louis,* 332 Mo. 145, 56 S.W. (2d) 778 (1932), the court held that the regulation of traffic lights is a police power for the safety and convenience of its inhabitants, and therefore a governmental function, for the negligent performance of which the city is not liable. In a case where the traffic lights showed green in all directions, the city was held not liable by virtue of the immunity afforded by the rule of governmental function. *Parsons* v. *City of New York,* 273 N.Y. 547, 7 N.E. (2d) 685 (1937); *Vickers* v. *City of Camden,* 3 A. (2d) 613, 122 N.J.L. 14 (1939). In *Phillips* v. *State Highway Commission,* 84 P. (2d) 427, 148 Kan. 702 (1939), where the stop sign was hidden by weeds, the highway commission was not held liable for injuries sustained by a motorist. In *Powell* v. *City of Nashville,* 167 Tenn. 334, 69 S.W. (2d) 894 (1934), a traffic ordinance required

that a stop sign be maintained at an intersection, and the city was held not liable for failure to do so. In *Doughty* v. *Philadelphia Rapid Transit Co.,* 321 Pa. 136, 184 A. 93 (1936), where city ordinance made a one way street, the city was not held liable when it permitted street car operation in the opposite direction. In *Curran* v. *Chicago Great Western Ry. Co.,* 134 Minn. 392, 159 N.W. 955 (1916), where a city ordinance required gates at a railroad crossing, the city was held not liable for damages arising from failure to erect gates. Where the plaintiff was injured by a fire truck the view of which was obstructed by automobiles parked along the side of the street, the court ruled that the city was not liable since supervision of traffic on the streets is a governmental function. *Bradley* v. *City of Oskaloosa* (Iowa 1922) 188 N.W. 896. For defective traffic light signal resulting in injuries for which the city was held not liable see also *Martin* v. *City of Canton,* 41 Ohio App. 420, 180 N.E. 78 (1931).

In cases where misfeasance or nonfeasance of governmental duties result in a physical obstruction in the streets, in the nature of a nuisance, cities are held liable. In *Rollow* v. *Ogden City* (Utah 1926) 243 Pac. 791, a loose and movable marker in the street as a "silent policeman" was the cause of plaintiff's injuries. The court held that the question of the city's negligence in rendering the street unsafe for travel should have been put to the jury. Likewise in *Jablonski* v. *Bay City,* 248 Mich. 306, 226 N.W. 865 (1929). There the city had placed wires to guard grass plats from traffic. The growing grass concealed the wires. A pedestrian tripped over a hidden wire and was injured. The city was held liable. In *Murphy* v. *Farmingdale,* 252 App. Div. 327, 299 N.Y. Supp. 586 (1937), plaintiff collided with a concrete base on which was set a stanchion supporting an unlighted traffic control signal, the city was held liable. However, in *Shaw* v. *City of New York,* 165 Misc. 765, 1 N.Y. Supp. (2d) 311 (1937), where a pedestrian was struck by an unlighted safety zone stanchion with which a motorist collided, the city was held not liable, the court purporting to follow the doctrine set out by the New York Court of Appeals in the *Parsons* case, *supra.* The court voiced disapproval of the doctrine set out in the latter case, but felt itself controlled by that holding. It would seem, however, that the court (Supreme Court, trial division) extended the scope of the *Parsons Case,* and that it might well have reached the conclusion it professed to favor by applying the rule which the Appellate Division laid down in *Murphy* v. *Farmingdale, supra.*

—GERARD A. DESMOND.

Taxation—Chattels Purchased Under Conditional Sales Contracts.—A manufacturing company rented voting machines to a county. Under the terms of the contract, the county had an option to purchase the machines. If the option was exercised, the rental paid was to be deducted from the purchase price. *Held,* the company was liable for the tax on the machines since it was the owner of the legal and equitable title. Title would vest in the county only upon the exercise of the option. The relationship here was that of bailor and bailee. *Automatic Voting Corporation* v. *Maricopa County* (Ariz. 1937) 70 P. (2d) 447, 116 A.L.R. 320.

By the weight of authority, property covered by an ordinary conditional sales contract or by an agreement in legal effect a conditional sales contract is, as far as taxation is concerned, the property of the buyer. Thus in *Massey Harris Co.* v. *Lerum,* 60 S.D. 12, 242 N.W. 597 (1932) it was held that the conditional-vendee of a reaper-thresher was properly taxed although the legal title in the machine remained in the vendor until such time as the full purchase price was paid. It appears to be a clear, general principle that the buyer who is invested