Municipal Corporations--Violation of Municipal Ordinance--Liability of Abutting Owners and Occupants of Street and Sidewalks

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Available at: https://researchrepository.wvu.edu/wvlr/vol63/iss4/18

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The lone West Virginia case dealing with the underground storage of fugacious minerals is Tate v. United Fuel Gas Co., 137 W.Va. 272, 71 S.E.2d 65 (1952). In that case O, the owner of a tract of land in fee, conveyed it to P, excepting and reserving the oil and gas. Thereafter, O conveyed an undivided interest in the oil and gas to Z. O and Z leased the oil and gas to D. O and Z then entered into an agreement with D granting to the latter the exclusive right to use the Big Lime stratum for storage of gas. P, alleging that there is no recoverable gas and oil in the Big Lime stratum, sought an injunction to restrain D's use thereof for such purposes, cancellation of the gas storage agreement as a cloud on his title, and a decree for the value of the use of the premises. The court held that P was vested with title to the Big Lime stratum (since O's deed excepted and reserved the oil and gas and not the limestone) and that a court of equity had jurisdiction to remove cloud on title and to enjoin a continuing trespass.

Since in the Tate case, P, the owner of the Big Lime stratum, was able to maintain a suit against the injector of the gas for trespass, it appears that the West Virginia court is in line with the view expressed in the principal case. Thus, title to natural gas is not lost by its injection into underground storage reservoirs. If title to the gas were lost upon its injection into the ground, there could not have been liability for trespass in the Tate case.

Nick George Zegrea

Municipal Corporations—Violation of Municipal Ordinance—Liability of Abutting Owners and Occupants of Streets and Sidewalks

Action by a pedestrian against a municipality, an owner of a building, and an occupant of the building for injuries sustained when she fell on a sidewalk in front of a store which was owned by the occupant of the building. The sidewalk was paved by the occupants with terrazzo in a manner which constituted a violation of a city ordinance. The lower court directed a verdict for all three defendants. Held, the lower court's decision, in relation to the city and the owner of the building, in finding as a matter of law that the sidewalk was maintained in a "reasonably safe condition for travel in the ordinary modes with ordinary care by day or night", is affirmed. The court reversed and remanded as to the occupant of the
building, holding that since the occupant's conduct was in violation of a municipal ordinance, such violation may impose liability upon the occupant if it be found by the jury that such conduct was the proximate cause of the injury. *Costello v. City of Wheeling*, 117 S.E.2d 513 (W. Va. 1960).

Under common law no duty was imposed upon the owner or occupant to maintain the street or sidewalk abutting his premises in a safe condition. *Rich v. Rosenshine*, 131 W. Va. 30, 45 S.E.2d 449 (1947). As a corollary to this rule, no liability attached to the occupant for injuries which were sustained as a result of the streets and sidewalks being out of repair. Annot., 41 A.L.R. 212 (1926); 6 McQuillen, Municipal Corp. § 22.12 (3d ed. 1949). The duty to maintain streets and sidewalks in a safe condition devolved upon municipalities when by their own charters they were required to keep streets and sidewalks in repair. W. Va. Code ch. 17, art. 10 § 17 (Michie 1955). In order to obtain more efficient municipal organization the cities have enacted ordinances which delegate this responsibility to the owners and occupants of premises which abut the city's streets and sidewalks. To what extent do violations of such ordinances place civil liability upon the owners and occupants of such premises?

The West Virginia Supreme Court of Appeals has on two recent occasions been concerned with violations of similar ordinances. *Barniak v. Grossman Jewelry Co.*, 141 W. Va. 760, 93 S.E.2d 49 (1956); *Rich v. Rosenshine*, supra. The Barniak case has been the subject of recent law review comment. Comment, 59 W. Va. L. Rev. 90 (1956). The Rich and Barniak cases dealt with the violation of snow and ice ordinances which may be equated with the type of ordinance involved in the principal case. In both cases the occupant of the abutting premises was held liable, which holdings manifested a complete divergence from the common law concept. The interesting point is that in the Rich and Barniak cases and now in the principal case the West Virginia court has held the owner or occupant liable for violation of a municipal ordinance when their conduct is the proximate cause of the injury, but the court omits any discussion in relation to whether this type of ordinance was enacted for the benefit of the traveling public. It is a fundamental principle that in order for violation of an ordinance to constitute actionable negligence, the ordinance must be designed to protect that class of which the injured person is a member. *Cooper v. Agee*, 222
This precise question was considered in Johnson v. Bell, 117 S.E.2d 85 (Va. 1960). The court held that an ordinance, which places the responsibility on abutting owners and occupants to remove snow and ice from the sidewalk, is not for the benefit of the traveling public, but was enacted merely for the benefit of the municipality as an organized government. This represents the prevailing view throughout the country. For a collection of cases see Annot., 24 A.L.R. 387 (1923). The plaintiff in the Johnson case, supra, attempted to base his recovery upon Rich v. Rosen- shine, supra, and Barniak v. Grossman Jewelry Co., supra. The court recognized that both cases are contra to the weight of authority. The West Virginia court has thus placed upon the owners and occupants of premises which abut streets and sidewalks the onerous task of bearing civil liability for not maintaining the streets and sidewalks in accordance with the municipal ordinance. It would appear in view of this abandonment of established concepts that a discussion as to whom such ordinances were designed to benefit would be germane.

Under the common law view and in the majority of jurisdictions it is incumbent upon a municipality to maintain its streets and sidewalks in a reasonably safe condition for travel, and this duty cannot be avoided, suspended, delegated or passed on to others by any act of the municipality. W. T. Grant Co. v. Casody, 117 Colo. 405, 188 P.2d 881 (1948). A corollary to this rule is found in the almost universal concept that a primary obligation is imposed upon the municipality, and when such responsibility is delegated to an owner or occupant of abutting premises this places upon them only a secondary duty. W. T. Grant Co. v. Casody, supra. Some authority to the contrary can be found where the owner or occupant has a primary obligation and a secondary duty is imposed upon the city. Brody v. City of Philadelphia, 156 Pa. Super. 607, 41 A.2d 355 (1945). In many jurisdictions if the municipality is not liable then the occupant cannot be held liable as he occupies a position of secondary obligation. W. T. Grant Co. v. Casody, supra. In the principal case the majority opinion determined that the municipality was not liable as a matter of law, but recognized that this did not exonerate the occupant from liability. The West Virginia Supreme Court of Appeals is now taking the occupant
out of the rank of secondary obligation and placing upon him the primary duty of maintaining the abutting streets and sidewalks in a reasonably safe condition. Thus the principal case manifests another extension of the occupant's liability.

Upon first glance it would appear that West Virginia is now in accord with the view as expressed in the Brody case, supra. However, in Pennsylvania the ultimate burden of recovery rests upon the owner or occupant of premises which abut the city's streets and sidewalks. By this view, a recovery is permitted against the city only by virtue of the fact that the city has failed to discharge its duty to require the owner or occupant of abutting property to maintain the streets and sidewalks in a reasonably safe condition. Brody v. City of Philadelphia, supra. It is still recognized in West Virginia, however, that the city is absolutely liable for injuries resulting from its streets and sidewalks being out of repair. Costello v. City of Wheeling, supra. Is the court in the Costello case contending that the municipality is absolutely liable for injuries resulting from its streets and sidewalks being out of repair, yet occupying a position of secondary obligation? If an injured party recovers against the city does the city then have a right of indemnity from the owner or occupant?

In the Rich, Barniak and now Costello cases, the owner and occupant of premises which abut city streets and sidewalks no longer find themselves protected under the cloak of the common law and majority rule which relieves them from any civil liability for injuries resulting from a violation of municipal ordinances in relation to the maintenance of city streets and sidewalks. In the future when the occasion arises it would appear incumbent upon the West Virginia court to state explicitly that such ordinances do inure to the benefit of the traveling public, and also to resolve the question in relation to primary and secondary liability which is inherent in this problem. When such a pronouncement is made, the court will have totally defined its position in a clear and concise fashion.

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