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Negligence--Car Owner's Liability for Negligence of Thief After Leaving Ignition Keys in Car

J. S. T.

West Virginia University College of Law

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untenantable are in effect synonymous, thereby actually only reiterating the already overwhelming view in this country that taking of the whole of leased property terminates the lease and absolves the tenant from further payment of rent.

It is further submitted that the West Virginia court may reach the same result in a similar situation by our statute, W. VA. CODE c. 37, art. 6, § 29 (Michie 1955), if the words "whole of any tract of land" are construed to encompass untenantable property, as was evidently done in the principal case. Once property is determined to be untenantable it is for all practical purposes completely useless to the lessee and should be considered destroyed whether the act which renders it untenantable is from natural or unforeseen causes or by eminent domain.

It should be noted however, that a taking under eminent domain proceedings which absolves the tenant from his liability of paying rent is not effected by the mere vesting of title in the condemnor, but requires surrender of possession by the tenant. Annot., 163 A.L.R. 679 (1946).

J. E. J.

NEGLIGENCE--CAR OWNER'S LIABILITY FOR NEGLIGENCE OF THIEF AFTER LEAVING IGNITION KEYS IN CAR.—*D* parked his car, turning the engine off and leaving the key in the ignition. A thief stole *D*'s car and negligently collided with *P*'s car. *P* brings action against *D* for damages. Nonsuit; *P* appeals. *Held*, that failure to remove switch key does not render owner of automobile liable for negligent operation thereof by thief who steals it, especially where there is no ordinance or state law against leaving key in ignition switch. Affirmed. *Williams v. Mickens*, 100 S.E.2d 511 (N.C. 1957).

The instant case is only another of a rash of similar cases which have appeared in the past two decades throughout the United States. More than two dozen law review articles have been written on the subject. See, e.g., *Comments*, 12 U. MIAMI L. REV. 120 (1957), 9 ALA. L. REV. 380 (1957). Therefore, this comment will be confined to a brief review of the cases and the possible outcome of a similar case in West Virginia.

In cases determining liability of an automobile owner to a third party when an unauthorized driver is at fault, there is a dichotomy

between (1) jurisdictions having statutes prohibiting a driver from leaving the key in the ignition of an unattended vehicle, and (2) jurisdictions having no such statute.

Among the states having no "car key" statute, the majority view is that the owner is not liable for the thief's negligence. Among the reasons advanced for this view are: (1) the negligence of the thief is not foreseeable. *Wagner v. Arthur*, 134 N.E.2d 409 (Ohio C.P. 1956); *Holder v. Poperdan*, 146 Cal. App. 2d 557, 304 P.2d 204 (1956). (2) The owner has no duty to anticipate such an act. *Curtis v. Jacobson*, 142 Me. 351, 54 A.2d 520 (1947). (3) There is no proximate cause connection between acts of the owner and the thief. *Saracco v. Lyttle*, 11 N.J. Super. 254, 78 A.2d 288 (1951). (4) The thief's act is the intervening proximate cause. *Holder v. Poperdan, supra*; *Curtis v. Jacobson, supra*. The owner has been held liable under slightly different circumstances where small boys wrecked his vehicle after having tampered with the vehicle on previous occasions. See *Lomano v. Ideal Towel Supply Co.*, 25 N.J. Misc. 162, 51 A.2d 888 (1947).

Among the states having "car key" statutes, the majority still deny recovery against the owner. Reasons given in various jurisdictions are: (1) Violation of a penal statute is not intended to result in civil liability. *Cf. Richards v. Stanley*, 43 Cal. App. 2d 58, 271 P.2d 25 (1954). (2) Although violation of a statute is negligence per se, such negligence of the owner is not the proximate cause of the injury. *Anderson v. Theisin*, 231 Minn. 369, 43 N.W.2d 272 (1950); *Galbraith v. Levin*, 323 Mass. 255, 81 N.E.2d 560 (1948). (3) Negligence of the thief is not reasonably foreseeable. *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 106 N.E.2d 395 (1952). (4) The owner could not anticipate the theft and the injury. *Frank v. Ralston*, 145 F.Supp. 295 (W.D. Ky. 1956). But the minority view in states having a statute holds that the owner's violation of the statute is negligence and constitutes the proximate cause of the injury. *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E.2d 537 (1948); *Bullock v. Dahlstrom*, 46 A.2d 370 (D.C. Mun. App. 1946).

West Virginia has had a typical "car key" statute since 1951:

"No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake thereon and, when standing upon any grade, turning the

front wheels to curb or side of the highway." W. VA. CODE c. 17C, art. 14, § 1 (Michie 1955).

Thus far this statute has provoked no litigation reaching the supreme court.

It is settled law in this state that the violation of a statute is prima facie negligence, *but only if the violation is the proximate cause of the injury*. See e.g., *State Road Comm'n v. Ball*, 138 W. Va. 349, 76 S.E.2d 55 (1953); *Somerville v. Dellosa*, 133 W. Va. 435, 56 S.E.2d 756 (1949); *Oldfield v. Woodall*, 113 W. Va. 35, 166 S.E. 691 (1932); *Tarr v. Lumber Co.*, 106 W. Va. 99, 144 S.E. 881 (1928). The proximate cause of an injury is the *last negligent act* contributing thereto and without which the injury would not have resulted. *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950); *Anderson v. Baltimore & O.R.R.*, 74 W. Va. 17, 81 S.E. 579 (1914). Where there is a sole, effective intervening cause, there can be no other proximate cause of the injury. *Webb v. Sessler, supra*.

The most pertinent of all West Virginia cases holds that while the negligent act of one person may naturally cause injury to another, yet if before the injury results, the negligent act of a third party intervenes and produces the injury, the latter alone is responsible, although but for the first negligent act the injury could not have occurred. *Anderson v. Baltimore & O.R.R., supra*. Following such a holding, the court could not hold the car owner liable in a case such as the principal case even though he violated a statute.

In view of the foregoing, there seems to be no reason to believe that the West Virginia court would not follow the majority rule, absolving the owner of liability when a thief negligently injures a third person; the act of the thief constituting the intervening and proximate cause of the injury.

J. S. T.

RES JUDICATA—COLLATERAL ATTACK ON DECREE FOR SALE OF LAND FOR SCHOOL FUND.—Plaintiff brought suit to cancel two deeds made by the deputy commissioner of forfeited and delinquent lands conveying certain lands to the defendant. The deeds were made pursuant to orders of the circuit court in a chancery suit brought by the deputy commissioner directing and confirming the sale of the land for the benefit of the school fund. Plaintiff alleged