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90 Md. 310, 45 A. 192

Court of Appeals of Maryland.
MAYOR, ETC., OF **BALTIMORE**
v.
LOBE.
Jan. 9, 1900.

Appeal from superior court of Baltimore city; Albert Ritchie, Judge.

Action by Philip Lobe against the mayor and city council of Baltimore. Judgment for plaintiff, and defendant appeals. Affirmed.

West Headnotes

Evidence 157 ⚿123(10)
157k123(10) Most Cited Cases
Declarations as to "how it happened," made by A., who was riding with plaintiff when he was thrown from a carriage, and who was himself thrown out a block further on, made after they had gone a block to a drug store, to one who had come the same distance after hearing of the accident, and while plaintiff's wound was being bound up, are not admissible as part of the res gestæ.

Evidence 157 ⚿241(1)
157k241(1) Most Cited Cases
Declarations of an agent, to bind a principal, must be made at the very time he is doing an act he is authorized to do, and must be concerning the act he is then doing.

Negligence 272 ⚿453
272k453 Most Cited Cases
(Formerly 272k141(8))

Negligence 272 ⚿1741
272k1741 Most Cited Cases
(Formerly 272k141(8))
An instruction that if plaintiff "was guilty of negligence which directly contributed to cause the accident" is equivalent to one if he "was guilty of negligence but for which the injury would have been avoided."

Argued before MCSHERRY, C. J., and PAGE, PEARCE, FOWLER, BOYD, BRISCOE, and SCHMUCKER, JJ.

J. V. L. Findlay, for appellant. William Cotton and Marcus Kaufman, for appellee.

PAGE, J.
This suit was brought by the appellee to recover damages for injuries to him while driving along Wolfe street, near Pratt, in the city of Baltimore, caused, it is alleged, by the negligence of the city in not maintaining that street in proper repair. At the point where the accident occurred, the street had been dug up for the purpose of laying water mains; and it is charged that the trench made, though filled to the surface, had not been properly repaired, so that, when the plaintiff attempted to drive over it, his horse sank in the soft earth, and, becoming frightened, ran away. The plaintiff was thrown from the vehicle, and injured, at or near the place where the horse started; but his servant, one Anderson, who was with him, remained in the carriage until "the horse reached the block below, where the buggy overturned," and he was thrown out. After the plaintiff was thrown from the carriage, the horse turned into Pratt street, so that the point where the servant, Anderson, came to the pavement was on that street a block below Wolfe. Both Lobe and Anderson then went or were taken to Baker's drug store, "on the block below the scene of the accident." Officer Gordon at the time of the accident was on the northwest corner of Lombard and Wolfe streets. He testifies that "a party came to him, and informed him there was an accident on Pratt street; that he immediately went there, and seen a crowd in front of Baker's drug store, and that he went in, and Mr. Lobe was sitting in a chair, and Mr. Baker was fixing his head up,-bandaging it up." The officer further ***193** testifies that he saw the young man Anderson with Mr. Lobe, and asked the former

how it happened. On objection being then interposed, the court asked the counsel for the city if he wanted "to contradict any statement of the young man." The counsel then stated that it was not offered for the purpose of contradicting the witness, but as "part of the case,"-as "part of the res gestae." The court allowed the witness to state that the young man had made "admissions" to him as to how the accident occurred, but declined to permit the officer to give what the young man said. This is the basis of the defendant's first exception.

It is claimed the court committed error in so ruling, because the statement of the young man to the officer, as to how the accident occurred, was made so near to the time of the happening, and sprang so spontaneously out of the incident itself, that any idea of deliberate design in making it was impossible, and that, therefore, it was admissible, as being contemporaneous with the main fact, and a part of the res gestae. This court has more than once stated the rule applicable to a case of this kind. Handy v. Johnson, 5 Md. 450; Dietrich v. Railway Co., 58 Md. 347; Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co., 11 Gill & J. 28. The latest case where the court has had occasion to further consider the matter is that of Wright v. State, 88 Md. 706, 41 Atl. 1060. It would be profitless to examine separately all these cases, as well as the cases from other courts. They do not substantially differ in their statements of the rule. All agree that, to make the declaration a part of the res gestae, it must be so connected with the transaction as to be reasonably a part of it; it must not be the result of premeditation or design, but the "immediate spur of the transaction"; and, though it need not appear that it was spoken at the identical point of time when the principal fact happened, yet it must have been made so soon thereafter as fairly to be a part of the transaction, and therefore elucidating and explaining it. But if the declaration was made after the main occurrence had ceased, and there is no necessary connection between it and the principal event, it is then nothing more than a narrative of a past occurrence, and is not admissible as a part of the res gestae. Now, the evidence shows that the accident to Mr. Lobe occurred near the corner of Wolfe and Pratt streets, and the boy was thrown from the vehicle a "block below." Both were taken to Baker's drug store, "on the block below the scene of the accident." Officer Gordon was also a block distant at the time he was informed an accident had occurred. When he reached the drug store, the occurrence was entirely over. He says he found a crowd had gathered in front of the store. Lobe was sitting in the chair, and Baker was bandaging up his head. He had some conversation with Lobe (of what duration does not clearly appear), and then turned to the young man, and asked "how it happened." While it does not appear how much time had elapsed since the happening of the accident (and therefore the proximity in point of time to the main event is not made to appear), it is clear there had been considerable time and several events. Both the parties had traversed a block or more to the drug store, and the officer, after being informed, had come from at least an equal distance. Moreover, time enough had passed for a crowd to assemble at the drug store, and for the druggist to be quietly engaged in "fixing up" Lobe's head. It cannot be presumed that absolute silence had in the meantime been observed by the parties and the persons assembled. How many conversations the former may have had, while traversing the streets or while in the drug store, we are not informed, but it is clear there was time enough for several to have taken place. Under these circumstances, it would seem to be unreasonable to presume there was any causal relation of the proposed statement of the young man to the main event, or that there was any connection with it, with respect either to time or locality. His declaration to Officer Gordon, made at that time and under the particular circumstances, could not in any manner tend to elucidate the principal act, and so "give color and

definiteness to it." It could be, in fact, nothing more than a narrative of a past occurrence. For the same reason, it could not be admitted on the ground that the young man was the agent of the plaintiff. For the principal to be bound by the declarations of the agent, they must be made at the same time, and constitute a part of the res gestae. Dietrich v. Railway Co., supra.

We find no error in the instructions granted by the court. The form of the plaintiff's third prayer was approved in Turnpike Road v. Parks, 74 Md. 286, 22 Atl. 399. The modification of the court in the defendant's third prayer was a change of form only, and did not modify the law. As offered, the jury were to be told that "if the plaintiff did not use reasonable care and diligence, and the injury complained of could have been avoided had he done so, then he is not entitled to recover." As modified by the court, they were told that "if the plaintiff did not use reasonable care and diligence, and the injury complained of was directly due to such failure, then he is not entitled to recover." There is no material difference in saying that the plaintiff was guilty of negligence which directly contributed to cause the accident, and that he was guilty of negligence but for which the injury would have been avoided; for, if the accident would have been avoided by the use of care and diligence, it follows that the want of such care and diligence directly contributed to cause it. We find no error in the record, and the judgment must therefore be affirmed. Judgment affirmed.

Md. 1900.
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