

1940

Kenneth White v. Kenneth J. Pinney as Pinney Beverage Company and A. C. Neslen : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KENNETH WHITE,

Appellant.

vs.

KENNETH J. PINNEY, doing business as the PINNEY BEVERAGE COMPANY, and A. C. NESLEN,
Respondents.

No. 6218

Appeal from the Third Judicial District Court,
Honorable M. J. Bronson, Judge.

Brief of Appellant

WOODROW D. WHITE,
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Attorneys for Respondents.

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Appeal from the Third Judicial District Court,
 Honorable M. J. Bronson, Judge.

BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

This is an appeal from a judgment made and entered in the Third Judicial District Court in and for Salt Lake County, on April 21, 1939, in favor of Appellee and

against Appellant, and from an order made and entered by the said Court on June 30, 1939, denying appellant's motion for a new trial. (Transcript 79 and 84, Abstract 58, 61, 62).

Appellant brought this action against the defendants to recover for personal injuries. On December 23, 1938 at about 4:30 p. m., appellant's Chevrolet panel truck was parked on the west side of Highland Drive, Salt Lake City, Utah, at a point opposite 2333 South. The truck was facing south and was parallel to and within six or eight inches of the west curb. Appellant was standing behind and a little to the west of the center of the truck and was in the act of handing some flowers to a customer, the witness Maxwell, who was standing slightly to the north and east of appellant, when a wheel with considerable force struck appellant on the left leg injuring him. (Transcript 95-99 and 141-144, Abstract 18, 19). The witness, Maxwell, testified that the wheel buzzed past him and he saw it strike appellant on the leg and bounce, coming to rest on the curb. (Transcript 141-144, Abstract 18, 19.) Just as he was hit, appellant saw a fast-moving, staked-body truck with barrels on the back going north, having passed the point on the street where appellant was hit. Appellant picked up the wheel and overtook the truck which was parked in front of an inn at about 2160 South Highland Drive. Appellant noticed a hand-truck or dolly with a missing wheel hanging on the side of the truck. On this hand-truck was a wheel similar to the

wheel which had struck appellant. Appellant gave the wheel to the driver of the truck, the defendant Neslen, informing him that the wheel had struck appellant. (Transcript 100-104, Abstract 15, 16). The defendant Neslen was driving the truck for the defendant Kenneth J. Pinney on December 23, 1938 and in the late afternoon passed the point on Highland Drive where the appellant was injured, and was parked at the Dixie lunch stand in Sugar House when appellant delivered to him the wheel. (Transcript 217-224, Abstract 32-35). The defendant Neslen testified that there was a wheel missing from the hand-truck and that the wheel the plaintiff handed him looked like one of the wheels off his hand-truck and he was surprised to find plaintiff had it. (Transcript 238, Abstract 35). The witness Butterworth testified that he was delivering mail to the Dixie Lunch when the appellant with whom he was acquainted arrived there with the wheel in his hand and that the hand-truck with a wheel missing from it was hanging on the side of the truck just behind the driver's cab. (Transcript 151-154, Abstract 19-21). Upon examining the hand-truck produced in court by the defendants, the witness Butterworth testified that the wheels on it were different from the wheel which was on the hand-truck on the day of the injury and the wheel which struck appellant. The wheel which struck appellant was larger, the axle was larger, the tire covering on the wheel which struck appellant was worn and the iron showed through in a few spots. (Transcript 200, 201, Abstract 29). The appellant testified that the wheels on

the hand-truck produced in court were different from the wheel which had struck him and he pointed out the same differences as did the witness Butterworth, together with the additional difference that there was a different method of greasing the two wheels. (Transcript 207, Abstract 31).

II. SPECIFICATIONS OF ERROR

Appellant on this appeal has made 11 assignments of error which may be summarized as follows:

1. The trial court should have instructed the jury that the defendants were guilty of negligence as a matter of law. (Assignments of Error 1, 4, 7, 8, and 9. Abs. 66, 67).

2. The trial court should not have submitted the issue of contributory negligence to the jury. (Assignments of Error 2, 5, 6, 9, and 11. Abs. 66-68).

3. The instructions given by the trial court on contributory negligence were not confined to the contributory negligence alleged in defendants' answer, and having submitted the issue of contributory negligence to the jury the trial court should have given appellant's requested instruction No. 4. (Assignments of Error 3, 6, 9, and 11. Abs. 66-68).

4. The court usurped the prerogative of the jury in assuming as true evidence about which there was a substantial dispute. (Assignment of Error 10. Abs. 68).

III. BRIEF OF THE ARGUMENT

POINT 1.

The doctrine of res ipsa loquitur applied to the case and the appellant was entitled to a peremptory instruction that the defendants were negligent as a matter of law.

POINT 2.

There being no evidence supporting the defense of contributory negligence, that issue should not have been submitted to the jury.

POINT 3.

The trial court erred in not limiting its instructions on contributory negligence to that contributory negligence which was alleged in the answer.

POINT 4.

Having submitted the issue of contributory negligence to the jury the court should have given appellant's requested instruction No. 4, to the effect that appellant being shielded by his truck parked parallel to the curb was under no duty to maintain a constant look-out and his failure to maintain a look-out under those circumstances may not be considered as contributory negligence.

POINT 5.

That the defendants would not be liable if the defect in their equipment was simply unknown to them was a mis-statement of the law.

POINT 6.

The trial court usurped the prerogative of the jury in assuming as true evidence about which there was a substantial dispute.

POINT 7.

That the trial court should have granted appellant's motion for a new trial.

IV. ARGUMENT

POINT 1.

The doctrine of res ipsa loquitur applied to the case and the appellant was entitled to a peremptory instruction that the defendants were negligent as a matter of law.

There is a decided split in the authorities as to whether the doctrine of res ipsa loquitur raises a presumption of negligence or merely authorizes the jury to find negligence from the fact of the occurrence. The Supreme Court of Utah has committed itself to the view that when a thing which causes injury is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one hav-

ing such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care. That view is expressed in *Williamson v. Salt Lake & O. Ry. Co.*, 52 Utah 84, 172 Pac. 680, and *Zoccolillo v. Oregon Short Line R. Co.*, 53 Utah 39, 177 Pac. 201. In the latter case, the Court said, however, at page 63-64:

“It (negligence) may be inferred from such occurrence, and where no explanation is offered in such case the inference may be so strong as not only to justify, but to compel, a finding of negligence, which is the ultimate fact to be established.”

We believe that the case of *Furkovich v. Bingham Coal & Lumber Co.*, 45 Utah 89, 143 Pac. 121, supports the principle for which we are here contending. In that case the plaintiff was struck by large piece of coal which rolled down the mountainside. The plaintiff's companion went up the trail to the top of the mountain where the coal was being unloaded and found a man unloading coal out of a wagon and a pile of coal was located on the mountainside within a couple of feet from the brink of the steep incline of the mountain. In that case the trial court had instructed the jury as follows:

“You are instructed that if you should find from a preponderance of the evidence that the piece of coal which rolled down the mountain side and struck the plaintiff was a part of the coal being unloaded by the defendant at the time and place alleged in plaintiff's complaint, the rolling of such piece of coal down the steep mountain side raises

a presumption of negligence on the part of the defendant, and unless you should find from all the evidence in the case that such presumption is overcome, you should find for the plaintiff.”

The foregoing instruction was duly excepted to, but the Supreme Court upheld the instruction saying:

“If what we have said respecting the inference or presumption of negligence is correct, then it follows that the court did not err in giving the charge excepted to.”

The record in the case at bar is entirely bereft of any explanation whatever as to how the wheel flew from the hand-truck and struck the plaintiff. The defendant Neslen testified on cross-examination that he had never taken out the cotter key nor had he made any other inspection of the hand-truck, except greasing it, although the hand-truck had been used over a year (Transcript 240, Abstract 35, 36).

1 Shearman & Redfield on Negligence, 6th Ed., 130:

“Whether it (*res ipsa loquitur*) will warrant a peremptory instruction is to be determined as in other cases by the answer to the question, is there any other reasonable view of the case?”

That the circumstances may warrant a peremptory instruction is indicated by the foregoing quotation. The case of *Byrne v. Boadle*, 2 Hurlst. & C. 722, 159 Eng. Reports 299 applies the rule applicable to the case at bar. In that case plaintiff was walking in a public street past

the defendant's shop when a barrel of flour fell upon him from a window above the shop:

“We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the fact of the accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff. However could he possibly assert from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing of a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them.”

To the same effect is the case of Cincinnati Traction Co. v. Anna Holzenkamp, 74 Ohio St. 379, 78 N. E. 529. The plaintiff was struck by the falling of a trolley pole

from an electric car. The Supreme Court of Ohio held that the trial court “was warranted in taking judicial notice of the fact, as it did, that such a thing as the breaking of the trolley pole and the falling of the trolley with a portion of the pole does not happen in the ordinary course of events, unless there was some negligence either in its construction or in the management of it; and, this being so the court very properly charged the jury that the plaintiff in the absence of any evidence tending to rebut the presumption of negligence, was entitled to recover for her injuries.”

The following cases follow the same principle:

Hogan v. Manhattan Ry. Co., Court of Appeals of New York, 43 N. E. 403;

Heidt v. People's Motorbus Co. of St. Louis (Mo.), 9 S. W. 2d 650;

Crozier v. Hawkeye Stages, Inc., et al. (Ia.) 228 N. W. 320;

Mumma v. Easton & A. R. Co. et al. (New Jersey) 65 Atl. 208;

Francisco v. Circle Tours Sight-Seeing Co. (Ore.), 265 Pac. 801;

Chesapeake & O. Ry. Co. v. Rowland (Ky.), 214 S. W. 910;

State v. Emerson & Morgan Coal Co. (Md.), 133 Atl. 601;

Gates v. Crane Co. (Conn.), 139 Atl. 782;

Feeney v. New York Waist House (Conn.), 136 Atl. 554.

POINT 2.

There being no evidence supporting the defense of contributory negligence, that issue should not have been submitted to the jury.

The record discloses the following undisputed facts: At the time of the injury the appellant was shielded behind his Chevrolet panel truck in the act of handing flowers to the witness Maxwell. Maxwell was standing between him and the balance of the street. The truck was parked parallel to and within a few inches of the curb on the west side of the street. Cars proceeding in a northerly direction would have to get over on the wrong side of the street in order to present the danger of injury to him, and that was the direction in which the truck driven by the defendant Neslen was traveling. Furthermore, from the testimony of the witness Maxwell, who said that the "wheel buzzed past me," it would be reasonable to conclude that if the appellant could have seen the wheel before it struck him, he would not have been able to dodge it. It could not be reasonably contended that the appellant could have anticipated that the wheel would fly off the hand-truck, as he never had an opportunity or a duty to inspect the hand-truck.

It is universally held that although the question of contributory negligence is generally for the jury, if the evidence is undisputed and there is no fact showing contributory negligence or from which such negligence can be reasonably inferred, then it is the positive duty of the

court to eliminate that issue from the consideration of the jury. Some tangible evidence must be introduced before the question can be left to the jury; the burden of proving the defense cannot be sustained by silence. The very purpose of instructions is to enable the jury to better understand their duty and to prevent them from arriving at erroneous and false conclusions. In submitting an issue to the jury upon which there is no evidence, that purpose is thwarted.

This point has been passed upon by this Court many times. We submit that the case of *Atwood v. Utah Light & Ry. Co.*, 44 Utah 366, 140 Pac. 137, is directly in point. In holding the plaintiff free from contributory negligence as a matter of law, the Court said:

“The facts here are not disputed, at least not with regard to respondent’s conduct. Now what was there in her conduct from which a jury or anybody else would be justified to find that anything she did or omitted to do was the proximate cause of or directly contributed to, the accident and consequent injury? . . . We can see no reason whatever why, under the undisputed evidence, respondent’s conduct should likewise have been submitted to the jury . . . As a matter of course, in cases like the one at bar, the trial courts should ordinarily submit the question of negligence to the jury; and such should be done in all cases when there is any substantial evidence upon which a finding of negligence can be based. Where, however, as here, there is no evidence, the question must be determined as one of law and not of fact.”

In the foregoing case the trial court had charged the jury as follows: "You are instructed that there is no evidence in this case of any negligence on the part of the plaintiff." It was held by this Court that no error was committed by the court in so charging the jury.

To the same effect is the case of *Maybee v. Maybee*, 79 Utah 585, 11 Pac. 2d 973; *Parks v. Tillis* (W. Va.), 164 S. E. 797.

Confirming our position is the case of *Menafée v. Monongahela Ry. Co.* (W. Va.), 148 S. E. 109. In that case plaintiff was injured by a lump of coal which fell from a moving train when the driving brakes were applied jamming the train. Quoting from the opinion:

"We conclude from the whole record that there was no occasion to submit to the jury the question of contributory negligence, because there was no appreciable basis on which to predicate such charge. The record does not disclose any act of omission or commission on the plaintiff's part which contributed to his injury. In such situation the defense of contributory negligence is a question of law for the court and not of fact for the jury (citing cases). Such being the law, the fact that contributory negligence was mentioned in instructions Nos. 1, 2, and 3 given for plaintiff and omitted in others has no weight. If contributory negligence was not an issue, the negating thereof in some of the plaintiff's instructions did not make it an issue; it was mere surplusage. It follows that the failure to negative that defense in instructions Nos. 4, 7, and 8

was not improper. For the same reason defendant's instructions Nos. 7, 8, 9, 10, 11, 15, 16, 17, 19, 20, 21 and 22 were properly refused."

In appellant's requested instruction No. 2, the trial court was asked to instruct the jury that under the evidence the appellant was not guilty of contributory negligence in any way. (Transcript 24, Abstract 40). The question of contributory negligence was submitted to the jury in the following instructions: Nos. 7, 8, 10, and 13. (Transcript 58, 59, 61, 64, Abstract 45-49). The record is entirely nude of any fact which shows that appellant in lawfully standing in the street was guilty of a breach of duty, and there can be no negligence unless some duty has been violated.

In view of the evidence and of the foregoing authorities, appellant respectfully contends that the trial court committed prejudicial error in submitting the unproved issue of contributory negligence to the jury.

POINT 3.

The trial court erred in not limiting its instructions on contributory negligence to that contributory negligence which was alleged in the answer.

Appellant contends not only that the defense of contributory negligence was not proved, but certain of the trial court's instructions directed the jury to pass upon elements of contributory negligence which were not pleaded by the defendants in their answer.

In their answer the defendants alleged that the plaintiff acted in a “negligent, careless, imprudent and illegal manner in this: that at said time and place the plaintiff failed to observe any lookout for vehicles passing the point where he was standing and took no precautions whatsoever to protect himself against being injured in any manner by said vehicles so passing while the plaintiff was then and there standing in the traveled portion of the said highway.” (Transcript 14, Abstract 11, 12).

After stating some abstract propositions, the trial court, in its instruction No. 7, directed the jury as follows:

“If, therefore, you find from the evidence in this case that the plaintiff himself failed to use ordinary care for his own safety at the time and place complained of and that such failure proximately contributed to the accident and his resulting injuries, then your verdict must be in favor of the defendants, no cause of action.”

(Transcript 275, Abstract 45, 46).

A cursory reading of the instruction will serve to demonstrate its generality. It made no mention of the failure to maintain a look-out or failure to take precautions against being injured by passing vehicles, but authorized the jury to find any type of negligence.

Instruction No. 10 (Transcript 276, 277, Abstract 47) is even more objectionable:

“The jury is instructed that if it believes from the evidence that both the plaintiff and the defendant were guilty of negligence, and that the negligence of each directly contributed to the injury of the plaintiff, there can be no recovery in this case, and your verdict will be for the defendants.”

The instruction did not clarify the issue of contributory negligence for the jury; it merely contained a proposition of law; and the jury must perforce have interpreted the instruction to mean that if the plaintiff was guilty of negligence of any kind or character, pleaded or unpleaded, and if his negligence contributed to the injury which he sustained, then the jury must find against him.

Instruction No. 13 (Transcript 187, 188, Abstract 48, 49) makes the following reference to contributory negligence:

“... and, if you further find plaintiff was not negligent in being where he was and doing what he was doing, or such negligence of plaintiff, if any, did not proximately contribute to his injuries...”

The only contributory negligence pleaded consisted of acts of omission—failure to maintain look-out and to take precautions for safety. The instruction authorized a finding of negligence acts of commission, and the jury were instructed to disallow recovery if such negligence was found.

Appellant relies upon the case of *Lochhead v. Jensen*,

42 Utah 99, 129 Pac. 347, as authority for the proposition contended for under this point. Quoting from the opinion :

“Now as to the charge. Notwithstanding the single act of alleged negligence—running the automobile at a high rate of speed—the court nevertheless charged that if the jury found that the defendant ‘was driving said car negligently or carelessly, or if you believe that he was driving at a reckless or dangerous rate of speed’ and that ‘the death resulted directly and proximately from such negligence or carelessness, then you should find for the plaintiffs.’ Again, the court charged that if the jury found that ‘the defendant was not in the exercise of reasonable care in the operation of his said car, and that by reason thereof the injury occurred to the said deceased, and the said negligence of the said defendant was the direct and proximate cause of the said injury, ‘then the defendant was liable.’ The court also charged that it was the duty of the defendant in operating the automobile ‘to use due diligence in the driving of the same so as to have it under reasonable control at all times to avoid injury; and it is the duty of the driver of said car to keep a reasonable look-out for any obstructions or dangers that may be in the road upon which he is driving, and if he fails to do so and through his negligence causes injury to others, then he is liable therefor.’ The court further charged that in determining whether or not defendant ‘was exercising reasonable care’ the jury might consider ‘the matter in which the defendant was driving’ and ‘the speed at which he was driving.’ It is thus seen that the charge clearly presented to the jury questions of negligence far beyond that charged in the complaint and permitted the jury to base a verdict, not only

upon the negligence alleged but also upon any negligent or careless operation, management, control, or driving of the automobile, or failure to observe or keep a reasonable lookout for obstructions or dangers in the road. That the charge, in view of the alleged negligence, was erroneous and prejudicial needs no argument."

POINT 4.

Having submitted the issue of contributory negligence to the jury the court should have given appellant's requested instruction No. 4, to the effect that appellant being shielded by his truck parked parallel to the curb was under no duty to maintain a constant look-out and his failure to maintain a look-out under those circumstances may not be considered as contributory negligence. (Transcript 26, Abstract 40).

Although by urging this point we do not concede that the court was warranted in submitting the issue of contributory negligence to the jury, yet, having done so, it is contended that the trial court erred in failing and refusing to give appellant's requested instruction No. 4; and in substantiation of this contention, appellant respectfully calls the court's attention to the case of *Fabricus v. Vieira* (Calif.), 233 Pac. 396. In that case plaintiff parked his car facing north off the paved portion of the highway. The left side of the car was between 18 inches and 4 feet from the paved portion. Plaintiff was standing on the left side of the car in the act of fixing the carburetor when he was struck by a truck being

driven in the same direction that plaintiff's car was facing. It was contended that the plaintiff was guilty of contributory negligence. Quoting from the decision:

“It appears that there was nothing to have prevented plaintiff from parking his automobile at a greater distance from the pavement, and that he made no effort to observe approaching vehicles while he was adjusting the carburetor. Had he attempted to watch for approaching machines, he probably could have done little else, because the evidence was there were many automobiles traveling along the pavement in either direction. . . .

“There is no doubt as to the sufficiency of the evidence to show that the driver of the truck was guilty of actionable negligence which was the proximate cause of the injury. It is equally clear that the evidence does not show, as a matter of law, that the plaintiff was guilty of contributory negligence. These conclusions so clearly appear from a mere statement of the evidence that further discussion is deemed unnecessary.”

Bearing in mind the fact that the truck behind which the appellant was standing, in the case at bar, was a panel truck so that it would be impossible for appellant to see over the top of it to observe the defendants' truck which came from the opposite direction, and bearing in mind that the appellant, if he saw the truck approaching, would not be able to anticipate that a wheel would be thrown at him as it sped by, it is difficult to conceive, without doing violence to reason and common sense, why the appellant would be required to maintain a look-out. It would be impossible for anyone to open the back-doors

of a panel truck to get something out of it to effect a delivery, if during all the time he was required to in some manner watch for and dodge missiles which might be thrown at him from passing vehicles.

POINT 5.

That the defendants would not be liable if the defect in their equipment was simply unknown to them was a mis-statement of the law.

Appellant's objections in this regard are based principally upon the trial court's instruction No. 13 (Transcript 187, 188, Abstract 48, 49).

“... you must return a verdict in favor of plaintiff, unless you believe that the defect in defendants' equipment, if you find the wheel was thrown against plaintiff because of a defect in the equipment, was unknown to defendants, or could not have been discovered by them upon a reasonable prudent inspection, in which event, if you believe either of these two alternatives you should find in favor of the defendants and against the plaintiff, no cause of action.”

By the instruction two alternatives were presented to the jury and they should deny recovery if either of the two alternatives was found. In other words the clear import of the instruction is: if the defect in the equipment was unknown to the defendants, then the jury should find in favor of the defendants, no cause of action; or, if the defect could not have been discovered by the

defendants through a reasonable, prudent inspection, then they were not liable. We respectfully contend that the rule was improperly stated in the disjunctive in the forepart of Instruction 13 and the disjunctive was emphasized by the court stating the proposition in the alternative in the latter part of Instruction 13. This was a perpetuation of the misleading, disjunctive statement of the same proposition in Instruction 12 (Transcript 186, 187, Abstract 47, 48).

Appellant never contended at any time that the defect in defendants' equipment was known to them, nor did appellant attempt to prove that the defect was known to the defendants. In fact the testimony of both the plaintiff and the defendant Neslen was to the effect that the defendant Neslen was surprised to discover that the wheel was not on the hand-truck. And yet, the jury were instructed that if the defect was unknown to the defendants, then they must find in their favor, no cause of action. Remembering that it is the jury's sworn duty to follow the directions of the trial court, it is difficult to perceive how it would be possible for the jury under Instructions 12 and 13 to find for the plaintiff; and the instructions were tantamount to a peremptory charge that the defendants were not negligent at all.

It is submitted that the rule correctly stated is as follows: Although the defect in the equipment is unknown to the defendants, they are nevertheless liable for injuries caused by such defect if a reasonable, prudent inspection would have disclosed it.

Numerous illustrations of this proposition are afforded by the cases. In the derailment of a railroad train, those operating the train are not absolved from liability simply because they did not know of the defect in the track or in the equipment, which a reasonable, prudent inspection would have disclosed. In the case of *Kean v. Smith-Reis Piano Co. (Mo.)*, 227 S. W. 1091, the defendant maintained a flagpole over the sidewalk which fell upon plaintiff. It could not have been contended that the defendant could absolve itself from liability simply because it may not have known that there was a defect in the pole.

Indeed, appellant has not been able to find a case in which the rule applied in Instructions 12 and 13 has been approved.

POINT 6.

The trial court usurped the prerogative of the jury in assuming as true evidence about which there was a substantial dispute.

In its Instruction No. 16 (Transcript 280, Abstract 50, 51) the trial court told the jury that they had been permitted to view the motor truck and the hand-truck and dolly.

Reference is here made to the Statement of the Case given earlier in this brief where it is shown that there was a substantial dispute in the evidence as to the identity

of the wheel which struck appellant and the wheels which were on the hand-truck which the jury had been permitted to view and which was produced in court by the defendants.

Appellant contends that the wording of Instruction No. 16 disregards this dispute in the evidence and constituted an interference with the jury's fact-finding prerogative. The jury may have construed the instruction as a discrediting by the court of appellant's testimony and the testimony of the witness Butterworth, and was, therefore, most prejudicial.

The jury system is founded upon the fundamental principle that the members of the jury are the exclusive judges of a disputed fact and the jury system would fail if the court were allowed to interfere with its fact-finding prerogative by giving a judicial view of the evidence.

The Court's attention is called to the case of *Sullivan v. Miller* (Ala.), 140 So. 606;

“Charge 8 was also bad and should not have been given. It assumes that Cook carried the pistol on the premises of the plaintiff in the effort to take the property under the mortgage. While this may have been the purpose of Cook and it was open to the jury to so find under the evidence, yet the charge assumes it to be a fact, and, for assuming to be true a disputed fact was faulty.”

See also *Lorie v. Lumbermen's Mutual Casualty Co.* (Mo.), 8 S. W. 2d 81.

The Utah Supreme Court has passed upon this point in the case of *Nelson v. Lott*, 81 Utah 265, 17 Pac. 2d 272. In that case the trial court instructed the jury as follows: "The court instructs the jury that the plaintiff, Nelson, was, at the time of the injury in this case, in a place where he had a right to be, etc." This Court in condemning the instruction said:

"One of the most strenuously contested points in the case was whether or not respondent was standing in the position he claims to have been in when the collision occurred, or stepped suddenly into the position where he was injured at the moment of the impact. Neither of the parties were trespassers. They were invitees and they had an equal right to be on the premises. But to which of them had the right, or the prior or superior right to be in the particular spot where the injury occurred at the time of its occurrence, we think, in view of the conflict in the evidence, was a question which the jury should have been privileged to determine. We think the instruction was probably calculated to mislead the jury, especially when considered in conjunction with instruction No. 8."

POINT 7.

That the trial court should have granted appellant's motion for a new trial.

By reason of the prejudicial errors committed by the trial court as hereinabove discussed, which prevented appellant from having a fair trial, it is submitted that

the District Court should have granted appellant's motion for a new trial.

CONCLUSIONS

In concluding this brief, appellant submits that for the reasons herein outlined the trial court erred to the prejudice of the appellant in its instructions to the jury and in its failure and refusal to give the instructions which appellant seasonably requested.

It is further respectfully submitted by appellant that the trial court, in view of the errors herein assigned and herein discussed, should have granted appellant's motion for a new trial; and that the sound and long established principles of law and justice require that the judgment of the District Court be reversed and appellant be granted a new trial.

Respectfully submitted,

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