Missouri Law Review

Volume 3
Issue 2 April 1938

1938

Recent Cases

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Recommended Citation

Recent Cases, 3 Mo. L. Rev. (1938)
Available at: https://scholarship.law.missouri.edu/mlr/vol3/iss2/5

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Recent Cases

Constitutional Law—Due Process and Equal Protection—Fair Trade Statutes.

Old Dearborn Distributing Co. v. Seagram—Distillers Corp.¹
McNeil v. Joseph Triner Corp.²
The Pep Boys, Manny, Moe and Jack of California, Inc. v. Pyroil Sales Co., Inc.³
Kunsman v. Max Factor & Co.⁴

The first two cases are on appeal from the Supreme Court of Illinois, and the second two on appeal from the Supreme Court of California. They involve almost identical Fair Trade Acts in the two states, and the Court’s decision in the Old Dearborn case is controlling in all of them. The statutes sanction contracts relating to the sale or resale of commodities which bear the trademark, brand or name of the producer or owner, and which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that such contracts stipulate (a) that the buyer will not resell except at the price stipulated by the vendor; and (b) that the producer or vendee of such commodities shall require, upon sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. Exceptions are made in cases of (a) a close-out sale, (b) damaged or deteriorated goods, or (c) any officer acting under court orders. Further, willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made consistent with the act, whether the person advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.⁵ Plaintiffs sought to enjoin the defendants from selling at less than the prices stipulated in contracts between the distributors and various retailers or dealers. The constitutional question centers around the last named provision, binding those not a party to any contract. The plaintiffs, now appellees, sought and obtained the injunctions in the state courts, and defendants, now appellants, maintain that the acts are unconstitutional and hence invalid, in that they violate the due process and equal protection clauses of the Fourteenth Amendment, depriving appellants of freedom of contract, fixing prices at which goods can be sold, and delegating power to private individuals to control the property of others. The court held the acts constitutional. First, as to the con-

1. 299 U. S. 183 (1936).
2. Ibid.
3. Id. at 198.
4. Ibid.
tention of violation of due process, the Court held that there is no price fixing, as claimed by the appellants, but rather certain designated persons are permitted to contract with respect to price. The essence of statutory violation lies in forbidden use of trade or brand names. Such names carry with them good-will, and the purpose of the statutes is to protect the producer's right to this good-will. Price restriction is adopted as an appropriate means to that legitimate end. The Court accepts and carries into effect the opinion of the legislature. Second, as to equal protection, the acts do not deny equal protection by conferring a privilege on trade-marked goods; and they are reasonable, having a fair and substantial relation to the object of the legislation. The statutes are inapplicable to unmarked goods, however.

There is an interesting economic question involved in the passage of these statutes which it might be well to consider briefly. For some time past, and particularly during the depression, the practice of price-cutting has been very prevalent. From this, the so-called "cut rate" store has developed. It is the common practice of such stores to offer well-known articles at a low price, or even at a price representing a loss to the dealer. These articles are used as "loss leaders," to draw customers. Other dealers in the same article then refuse to deal in it longer, or, after cutting prices in retaliation, sell similar articles on which there is a greater profit. The result is that the manufacturer or producer loses part of his trade or is forced to sell inferior products in order to keep his prices low. Customers are attracted by the name of the article itself, knowing the article to be a good one, and knowing that its usual price is higher. Thus, the unethical retailer pirates the good name of the producer, and in so doing ruins the trade of the producer. In reality, it is the producer himself who sells his products to customers today, through advertising. Often the retailer acts as nothing more than an agent. Having produced his own good-will and his own market, the producer feels that he should be protected in getting a reasonable profit and in keeping this good-will and potential market. Nor is competition removed by such fixing of prices by the producer. The producer is still in competition with other "name" brands in his own field, and will naturally have to make his prices such as to keep his own customers. Some such reasoning, then, lies behind the statutes now under consideration.

In the absence of statutes, there has been a split of authority among the states as to whether contracts whereby a manufacturer has sought control of the resale price of his product are valid. The Supreme Court has previously held such contracts invalid as not being reasonably necessary for the protection of the manufacturer, as being in restraint of trade at common law, and as being a violation of the Sherman Anti-Trust Act. The first statute of the kind here

7. Id. at 458.
under discussion was passed in New Jersey in 1916. This act made it unlawful to appropriate the name, brand, trade-mark, reputation or good-will of any maker of any product, or to discriminate against it by depreciating the value of the product in the public mind by misrepresentation as to value or quality by price inducement. That act was held valid. The next case involving such an act was a New York case involving a statute identical with the ones here involved, in 1936. The New York Court of Appeals held the statute invalid as applied to that case. Under the peculiar circumstances existing in the New York case the decision may have been perfectly consistent with the decision in the principal cases. It may be distinguished from the instant cases, and was so distinguished by the courts of California and Illinois, on the basis of the fact that the contract there was between a corporation and its subsidiary, and there was no general system of contracts as to resale price. Of course, a statute may be invalid as applied to one set of facts, and valid as applied to another. Hence, the validity of the New York statute, as applied to circumstances such as in the principal cases, is presumably still undetermined.

Possibly the decision of the Court in the principal case was indicated in Mr. Justice Brandeis' statement in Boston Store v. American Graphophone Co. In that case, one in which the majority held, in the absence of any statute, that an agreement as to resale price was invalid, Brandeis said that the question as to whether a manufacturer or producer could by contract fix the prices at which purchasers could sell was an economic question, to decide which it was necessary to consider the relevant facts, industrial and commercial, rather than the established legal principles.

The appellants in the cases under discussion relied heavily on that group of cases in which price-fixing by the legislature was held invalid, but Mr. Justice Sutherland, who wrote the opinion here, denied that those cases had any precedent value under the present facts, saying that the Fair Trade Acts did not involve legislative price-fixing, but rather legislative permission to make contracts as to price. Appellants further relied on that group of cases in which

15. 246 U. S. 8, 27 (1918).
it was held there was unconstitutional delegation of power to private individuals to control the disposition of the property of others, in that those not entering into the contracts here were bound by the terms thereof. Justice Sutherland disposed of this argument by saying that in the group of cases so holding the property had been acquired without any pre-existing restrictions, whereas here the property was acquired after the imposition of restrictions, and the appellants were aware of the restrictions at the time of acquiring the property.

It is interesting to note that in the New York case holding a Fair Trade Statute invalid, and also in the dissent in *Max Factor v. Kunsman*, one of the principal cases, in the state court, these two classes of cases on which the appellants relied were considered as controlling. On this basis it is a fair conjecture that the New York court would have held the Fair Trade Act in that state invalid as applied to any set of facts.

Although the Court here does not discuss it, the Supreme Courts of California and Illinois cited the case of *Nebbia v. New York* as of precedent value in the principal cases. The *Nebbia* case declared constitutional a New York statute providing for the fixing of milk prices, and the Court there said that in the absence of restriction a state can adopt whatever economic policy may reasonably be deemed necessary to promote public welfare. It is thus obvious that the state courts considered the Fair Trade Acts to be price-fixing in character. As for the *Nebbia* case, it could have been decided on the basis of emergency power, in view of the circumstances that surrounded the milk industry in New York. But for that matter, it is not beyond the bounds of possibility that the Fair Trade Acts could also have been held constitutional on the basis of emergency power, provided that the Court considered the acts as price-fixing.

In view of the fact that it is reasonably arguable as to whether the acts are price-fixing or not, it is interesting to surmise what the Court would have held as to their validity had cases involving price-fixing acts arisen prior to the *Nebbia* case. Might not the decision of the New York Court of Appeals and the vigorous dissent in the *Max Factor* case have been the ruling of the Supreme Court of the United States?

**John P. Hamshaw.**

21. 5 Cal. (2d) 446, 468, 55 P. (2d) 177, 188 (1936).
CONSTITUTIONAL LAW—RIGHT OF NEGRO TO VOTE IN PRIMARY ELECTION.

Grovey v. Townsend.1

The state democratic party of Texas adopted a resolution limiting membership in the party to white citizens. Plaintiff, a citizen of Texas, and a believer in democratic tenets, applied to defendant, county clerk, to vote in absence in the democratic primary election but was denied because he was a negro. Plaintiff sued in tort. The United States Supreme Court held that the defendant's action did not constitute state action and therefore did not violate either the Fourteenth or Fifteenth Amendment of the United States Constitution, both of which are in terms applicable only to action by a state.

This case marks the climax in the democratic party's endeavor to exclude the negro from the primary, which, in a strong democratic state virtually means excluding him from voting. In May, 1923, the legislature of that state passed a statute which read: "... in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas. ..."2 In 1927 this was held invalid in the case of Nixon v. Herndon as being in violation of the equal protection clause of the Federal Constitution.3

Immediately after that decision, the legislature repealed this statute and enacted a second act providing: "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall, in its own way determine who shall be qualified to vote or otherwise participate in such political party. ..."4 This was also held invalid in 1932 in the case of Nixon v. Condon.5 The United States Supreme Court in that case said that prior to this statute the parties controlled membership and, since the statute gave power to the executive committee, this power was by statute state action and therefore subject to the provisions of the Federal Constitution relating to state action.

Three weeks after the Court held that statute invalid, the democratic convention met and passed a resolution: "Be it resolved that all white citizens of the state of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and entitled to participate in its deliberations." It was under this resolution that the

5. 286 U. S. 73 (1932). See also (1932) 32 Col. L. Rev. 1069; (1933) 27 Ill. L. Rev. 686. In White v. Lubbock, 30 S. W. (2d) 722 (Tex. Civ. App. 1930), a state convention resolution under the same statute was held valid. Grigsby v. Harris, 27 F. (2d) 942 (S. D. Tex. 1928), also held this statute valid. Billey v. West, 42 F. (2d) 101 (C. C. A. 4th, 1930), held negroes could vote in primary despite restriction imposed by resolution of the West Virginia democratic convention. However, there the state paid for the costs of the election which has been the basis for distinction by some courts.
defendant refused the plaintiff a ballot. The Court in the instant case held this was not state action but only action by a "voluntary association for political purposes," and therefore valid. The court relied chiefly on *Love v. Wilcox* and *Bell v. Hill* cases decided by the Supreme Court of Texas. The opinion in *Bell v. Hill*, while holding this resolution valid, also criticized Mr. Justice Cardozo's opinion in *Nixon v. Condon* and said the executive committee was only the agent of the party and so its action was not action by the state. The United States Supreme Court could not accept that in view of *Nixon v. Condon*, but it did to a great extent base its opinion on that case on the point as to whether the primary was part of an election.

The entire controversy hinges on the question whether a primary is part of an election so as to constitute state action, and thus be subject to provisions of the United States Constitution. The Court did not go into great detail as to its opinion on this question, but chose rather to accept the state court's decision on that. The Court did not consider Mr. Justice Holmes's statement in *Nixon v. Herndon* when he said, "If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election . . ." and, "the objection that the subject matter of the suit is political is little more than a play upon words." From this it would appear that Mr. Justice Holmes was of the opinion that the primary was part of the election but the Court did not mention that, stating even though it was not bound by the state court they thought the state court's decision should receive their "highest respect."

The plaintiff argued that since political parties have been subjected to other legislation as to manner of election, place of election, and other matters, it was also subject to legislation concerning membership. The Court here, as in *Nixon v. Herndon*, said that the other regulations of the parties were permissible under the police power which is totally foreign to the right to vote. However, the contention of the plaintiff has been accepted by some state courts.

It was not impossible for the Court to reach the opposite result here in view of the fact that the state courts are in conflict as to whether the primary is part of the election. It could have accepted the federal case of *White v. County Democratic Executive Committee*, which held that a state political convention was an agent of the state and therefore reached the same result that the United States Supreme Court reached in *Nixon v. Condon* even though they did

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6. 119 Tex. 256, 28 S. W. (2d) 515 (1930) (state democratic committee held without power to deny candidate right to participate in democratic primaries because of candidate having voted against democratic nominees at last general election, after participating in the primaries).

7. 74 S. W. (2d) 113 (Tex. 1934) (holding the same resolution valid).


10. 60 F. (2d) 973 (S. D. Tex. 1932). The federal court said that Nixon v. Condon disposed of this case.
not have a statute expressly delegating agency. The White case held the act invalid but refused jurisdiction on other grounds. It would seem better to determine what is state action, not on the basis of agency, but on the basis of whether the thing is so integrated in the state's affairs as to become a part of the state's action.\footnote{11}

In view of the weight placed on the state decision, it may be that had this case been appealed from a state where the rule had been laid down that a primary was part of an election, the court might have had a more difficult problem. However, in Newberry v. United States,\footnote{12} the United States Supreme Court in passing on Corrupt Practice Acts held that a primary was not part of an election. Although the case is quite different from the one under consideration, it would seem that the holding as to primaries would apply in the cases under discussion.

The right to vote is one which the court should be zealous to protect. It is common knowledge that victory in the primary means victory in the final election in a one-party state, such as Texas. The present decision enables the democratic convention of Texas to destroy the very end that the Fourteenth Amendment sought to establish by "a mere play upon words."\footnote{13} The change from the statute in Nixon v. Herndon is merely formal, for there the statute expressly excluded the negro; and here the resolution has that effect even though it does not expressly provide for such.

In view of the fact that the question of whether a primary election is part of an election is in such controversy so that the Court could have held either way, plus the fact that this was a deliberate attempt to avoid the express provision of the Federal Constitution, it is lamentable that the Court was forced to reach the result it did merely because it could not find an express provision as it did in Nixon v. Herndon and preserve the right of the negro to vote.

Barkley Brock.

DEDICATION—LIABILITY after DEDICATION.

\textit{Sheridan v. City of St. Joseph}\textsuperscript{1}

Mary A. Sheridan brought suit for damages for personal injuries against the city of St. Joseph, Robert D. France, and the Morris Plan Company. The injuries were sustained by the plaintiff in falling on the sidewalk in front of the building owned by Robert D. France and others, the building being occupied by the Morris Plan Company. The building had originally been built out to a point within ten feet of the curb by the predecessors in title of the present owner, thus leaving a ten foot sidewalk. Later, the owners of property along the street,

\footnotesize
1. See note (1933) 46 HAV. L. REV. S12.
2. 256 U. S. 232 (1921).
1. 110 S. W. (2d) 371 (Mo. App. 1937).
contemplating a then projected widening of the street, along with the then owner of the building, moved the fronts of their buildings back four feet, thus increasing the sidewalk space to fourteen feet. On the direction and advice of the city engineer, the whole sidewalk was reconstructed so that the original ten feet of sidewalk was lowered to eliminate a high curb then existing, and the new four feet was six inches higher. It was on this step that the plaintiff stumbled and suffered her alleged injuries. The plaintiff alleged that France was the owner of four feet of sidewalk in front of his building; that he knowingly and carelessly maintained it in its dangerous condition; that the City of St. Joseph negligently acquiesced in the construction and maintenance of the sidewalk; and, further, that the City of St. Joseph could by the exercise of ordinary care have remedied the dangerous condition. Before the trial the suit against the Morris Plan Company, the lessee in the building, was dropped. At the trial a verdict was returned for the city, against the plaintiff; and for the plaintiff against the present appellant, France, the owner of the building. On appeal, the court reversed the judgment against the defendant France, holding that there was no showing of negligence in the construction or maintenance of the sidewalk; that the sidewalk was built under the supervision of the city engineer, and was not a purely private benefit; that the topography of the land demanded such a walk; that the sidewalk had been in continued and uninterrupted use for thirty-three years and no one else had ever been hurt to defendant's knowledge; that the construction of the walk for public use amounted to dedication by the owners and acceptance had been made by the public; and that the liability, if any, was upon the city of St. Joseph.

Dedication or devotion of private property to public use has long been recognized, and is recognized in Missouri for many purposes. The doctrine of dedication demands only that there be an intention, express or implied, to dedicate the property, and acceptance in some manner by the public. As said by the court in this case, use by the public constitutes acceptance. By the act of dedication, in this manner, the public has a right of user, and the dedicator is precluded from using it as his own property, though he still retains legal title. The walk, as constructed and used in this case, was not intended to be a purely private benefit for the users of the defendant's building. If it had been so intended by the dedicator, there would not be dedication.

From the facts and opinion in this case it is clear that there was dedication, and that the dedicator was thereby relieved from liability for neglect to

2. 2 TIFFANY, REAL PROPERTY (2d ed. 1920), § 479.
5. 2 TIFFANY, op. cit. supra note 2, at § 486.
6. Id. at § 490.
repar the property in question. The court held that the city of St. Joseph, if anyone, was under a duty to maintain the walk. Under the facts on appeal, the city was no longer a party, hence this last statement as to the duty of the city was mere dictum. Yet it brings out a point that presents a problem. Is it possible for the public to accept the dedication so that the dedicator could not revoke and for that reason be under no duty to maintain the property, and yet there not be sufficient acceptance by the proper authorities so as to impose a duty on the city to repair?

It is doubtful, upon consideration of the cases relied on by the court as upholding the proposition that the city would be liable, that they support any such contention. One of them involved a street dedication by means of a plat, and in that case the city had invited use by the public by putting up street signs, lights and other things. The other case relied on seems more clearly in support of the court’s dictum, where it appears that five and one-half years’ use of the sidewalk by the public was thought sufficient to make the city liable.

But there is the further point in the latter case in that the city was really held liable because it had broken up a walk used by the public, and not because it had failed to exercise a duty to repair the walk. There is a Missouri case which seemed to indicate that acceptance sufficient to impose liability might be shown by proving use by the public. But in that case there were additional facts. The city authorities had passed an ordinance naming the street and fixing the grade, so that those acts might be considered as sufficient acceptance of responsibility by the proper corporate officials.

Where the court is dealing with whether there has been a dedication sufficient to preclude the dedicator from using the dedicated property as his own, user by the public is considered as sufficient acceptance, and there is no need of showing formal acceptance by the corporate officials. But where a city’s liability for failure to repair is in question, more than public user is required to be shown. Query, in the instant case, whether the fact that the city engi-

7. Eustace v. Jahns, 38 Cal. 3 (1869); Manchester v. City of Hartford, 30 Conn. 118 (1861); Jansen v. City of Atchison, 16 Kan. 358 (1876); Kirby v. Boylston Market Ass’n, 14 Gray 249 (Mass. 1859); City of Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937 (1890); Hill v. City of Fond du Lac, 56 Wis. 242, 14 N. W. 25 (1882); Robbins v. Jones, 15 C. B. N. S. 221 (1863).
12. Ibid.
14. Baldwin v. City of Springfield, 141 Mo. 205, 42 S. W. 717 (1897); Downden v. Kansas City, 156 Mo. 60, 56 S. W. 902 (1899); Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418 (1909); Curran v. City of St. Joseph, 264 Mo. 656, 175 S. W. 584 (1915); Proctor v. City of Poplar Bluff, 184 S. W. 123 (Mo. App. 1916); Rabbit v. City of St. Joseph, 186 S. W. 1131 (Mo. App. 1916); Jackson v. City of Sedalia, 193 Mo. App. 597, 187 S. W. 127 (1916). These cases involved dedication by means of plat, but the question as to the city’s liability is the same.
neer approved the improvement in the sidewalk would constitute some evidence of acceptance by the city, for purposes of responsibility?

The plaintiff in this case apparently found himself in one of the few situations in the law where an interest has been invaded which the law recognizes for protection, yet where there may be no cause of action available under the rules applicable to dedication. Thus it might be possible for an injured plaintiff to hold neither the dedicator nor the public authorities for a condition arising after the dedication but prior to acceptance of responsibility by the proper corporate officials.

JOHN HAMSHAW

EMINENT DOMAIN—EFFECT ON RENT—RULE FOR DETERMINING VALUE OF RESPECTIVE INTERESTS.

City of St. Louis v. Senter Commission Co.1

The respondents leased the premises, known as 604 Market Street in St. Louis, for ninety-nine years to J. R. Thompson, who assigned to appellants, J. R. Thompson Co., a corporation. The respondents held the reversion in fee. The lessee was to surrender the premises with all repairs upon the termination of the lease. The leased property was taken under the power of eminent domain, and $70,091 was paid into the registry of the court for the use of the parties lawfully entitled thereto. At that time the lease had approximately eighty years remaining to run. After the appellant took possession under the lease, he spent over $32,000 in reconstruction work on the building located on the premises. Three men who were engaged in real estate business in the city of St. Louis testified that neither at the time the lessee vacated the property, nor when the condemnation suit was filed, was there a market value for the unexpired term of the lease. The court affirmed a judgment giving all the compensation to the lessors.

From the facts of the reported case it is not clear if the entire amount or only a portion of the leased premises was condemned. In Missouri, if all the leased property is condemned, the landlord and tenant relationship is terminated, and the obligation to pay rent is suspended.2 On this question most courts agree.3 The great difference in the holdings comes from a situation where only a portion of the leased premises is taken by condemnation proceedings. Many courts

1. 108 S. W. (2d) 1070 (Mo. App. 1937).
2. Biddle v. Hussman, 23 Mo. 597 (1856); Barclay v. Picker, 38 Mo. 143 (1866).
hold that that proceeding has no effect on the obligation under the lease, the tenant remaining liable for the whole rent. The position taken in Missouri, where a part of leased premises is condemned, is that the rent accruing subsequently is reduced in proportion to the amount taken. Under this view, the taking dissolves the relation of landlord and tenant pro tanto. It seems that under this rule complete justice can be done to both parties and further difficulties avoided. Many other jurisdictions have adopted the same view either by judicial decision, or by force of statutes.

The effect that the condemnation proceeding has upon the landlord-tenant relationship, and the tenant’s corresponding obligations under it, will have a very direct bearing on the amount of compensation that the parties will receive for the taking of the property in which they both have an interest. The public must pay the present value of the property, which is to be distributed between the landlord and tenant, according to their respective interests. Of course, in those cases where part only is taken, and the lessee is to remain liable for the rent on the property taken, he has an interest that will entitle him to more compensation than if the lease and its obligations were ended for that part condemned. This means that the tenant will receive compensation because of this liability for rent, although his obligation to pay rent is secured only by his personal ability to pay. It may seem inequitable to allow him to collect full damages because of this obligation to pay rent and leave the landlord without security for the rent. This reasoning has been applied when all the land has been taken, and it seems that the same should apply where only a part is condemned.

On the other hand, the measure of compensation for the tenant’s interest, where the landlord-tenant relationship is extinguished in all or in part of the property taken, is the reasonable market value of the unexpired term of the lease. The appellants in the instant case contended that the rule works a

5. Biddle v. Hussman, 23 Mo. 597 (1856); Kingsland v. Clark, 24 Mo. 24 (1856).
7. Levee Com’rs. v. Johnson, 66 Miss. 248, 6 So. 199 (1889); Cuthbert v. Kuhn, 3 Whart. 357 (Pa. 1838); Reg. v. Young, 7 Can. Exch. 282 (1901).
10. 2 TIFFANY, LANDLORD AND TENANT (1910) 1185. It has been suggested that a court of equity might interpose and appropriate enough of the funds to pay the rents due or to come due for the duration of the term. Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577 (1891). But this may be doubtful even on a showing of insolvency. Moreover such a proceeding could not determine the continued solvency or insolvency of the tenant during the whole period of the lease. See TIFFANY, loc. cit. supra.
11. Cf. City of Pasadena v. Porter, 257 Pac. 526 (Cal. 1927), where the court says that the mere possibility of hardship on the lessor’s part should be no objection.
hardship on them and should not be too strictly adhered to. They felt that some compensation should be paid for the improvements that have been made upon the land. On first thought it does appear to work an injustice to the lessee, but then these improvements which he made would add to the rental value of the premises, and under the rule the tenant would be compensated for them. But the fact was, due partly to the decrease in the value of property in that part of St. Louis, that even with the lessee's improvements his interest is worth no more (not as much) than the amount of rent he was obligated to pay, so he is entitled to nothing. It appears that in the main this is a just rule, and to start making changes and allowing exceptions to it may lead to uncertainty and confusion. The rule being that the condemning party must pay the present value of the property, that should be the time for determining the lessee's interest as well as that of the landlord's. There is clearly no fault on the part of the latter, and if he must be contented with the present value of the premises the same should apply to the lessee. The parties should realize that over a ninety-nine year period this very thing may happen, and they should draw their leases in the light of the law as it stands. Of course, the rule works the other way to the benefit of the lessee where property values have increased.

CHARLES H. REHM.

LIBEL—QUALIFIED PRIVILEGE—NEECESSITY OF JURISDICTION OF RECIPIENT TO HEAR THE CHARGE AS CONSTITUTING THE NECESSARY INTEREST.

_Fisher v. Myers_1

Plaintiff and defendant were members of the Missouri Grand Chapter of the Eastern Star which held an annual meeting in St. Joseph, October 9, 1928. During the meeting pamphlets were circulated by defendants containing affidavits and court records gathered by defendants to the effect that plaintiff had cohabited with X in a hotel room in Higginsville in 1905. This charge was proved to be false. At the beginning of the meeting, the pamphlets were distributed and defendant Grow moved that plaintiff “be expelled from the privileges of this Grand Chapter and that her position on the Advisory Board of the Masonic home be declared vacant.” The motion was seconded, but it was declared out of order and further circulation of pamphlets was forbidden. Circulation was continued, however, during that day and the two following days of the meeting. The defense was truth, thus not denying the conspiracy.

_Fed. Cas. No. 15,441a (S. D. Ohio 1873); Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489 (1895); Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577 (1891); Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515 (1895); Biddle v. Hussman, 23 Mo. 597 (1856); McAllister v. Reel, 53 Mo. App. 81 (1893)._ A different rule favoring the tenant is found in McMillin Printing Co. v. Pittsburg, C & W. R. R., 65 Atl. 1091 (Pa. 1907). There it was held that the lessee was entitled to damages equal to the loss resulting from a deprivation of his right to remain in undisputed possession to the end of the term.

1. 339 Mo. 1196, 100 S. W. (2d) 551 (1936).
charged by plaintiff. Only one defendant pleaded qualified privilege although the other defendants wished to rely on that defense after the falsity of the report had been proved. It was held that, from the evidence, a jury might well find actual or express malice on the part of these five defendants and, therefore, a prima facie case was made against them. It was held further that the occasion was not a privileged one because the Grand Chapter had no jurisdiction to investigate, hear or pass upon plaintiff’s fitness for office, as that was for the local chapter only; and that the motion for expulsion was without authority, precedent, or basis in Eastern Star law, usage, or procedure, and was but a flamboyant gesture tending to show actual malice, affording no ground for a claim of qualified privilege in circulating the pamphlet.

"An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which the other because of his common interest is entitled to know." Looking to the policy behind the privilege, it is socially desirable to allow one to speak out when necessary to protect his own interests or the interests of others. If this interest is present we protect him even if the words spoken are false. This is to prevent the declarant from hesitating to make his statement from fear he might be held liable in an action of defamation unless he could meet the heavy burden of proving the statements true. To satisfy this policy the statement made by the declarant must operate to protect his interest. If it is made to a recipient who has no authority or power to deal with the situation, declarant’s statement would not protect his interest and, therefore, it is not privileged because the policy is not satisfied. This is illustrated in the instant case by the presentation of charges against the plaintiff before a group which could take no action against her. This is true even though declarant and recipient bona fide believed some thing could be done to protect their interest. The court in the instant case pointed out that common membership in an organization does not afford

4. A member of an incorporated medical society introduced a resolution for the purpose of procuring the expulsion of plaintiff who had recently been admitted by means of false pretenses. The resolution was held not to be privileged as the society had no power to expel a member for these reasons, even though it adopted the resolution and acted on it thinking it had the power. Fawcett v. Charles, 13 Wend. 473 (N. Y. 1835). "It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. Though it is said in a Maryland case (Fresh v. Cutter, 73 Md. 87 (1890) 'If the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable, because privileged, though spoken voluntarily.' Newell, Slander and Libel (3rd ed. 1914) § 563. In the Maryland case, however, plaintiff was a former employee of defendant's, and defendant made slanderous statements of plaintiff's character to X who was a prospective employer, so the case can easily be distinguished.
that common interest in the subject matter involved in this case sufficient for the privilege.

The question of a privileged occasion depending on the authority or jurisdiction of the recipient has not been presented in many cases. There are many cases where defamatory statements have been made by one member of an organization to the society pertaining to another member of the society. In these cases, however, the recipient society had not only an interest to be protected or advanced but it could do something about the matter. Instances of this type include defamatory statements made to church societies, lodges, and other societies. There are other cases in which the defendant has made complaints to tribunals or administrative officers in the reasonable belief that the tribunal or officer had power to act with respect thereto, although it in fact had no such authority. The instant case, however, is not of this type. An early New York case held that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding before a tribunal, or before some individual or associated body of men, such tribunal, individual or body must be vested with authority to render judgment, or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications.

In the instant case it really made little difference that the communications were not privileged, except on the burden of proof, as it would have been easy to establish excessive publication, under the facts of the case, which would show malice sufficient to remove the privilege. Where one upon an occasion which is conditionally privileged knowingly publishes the defamatory matter to persons to whom the privilege does not extend, he is held to have abused and, therefore, to have lost the privilege. In this case the facts showed that the convention hall was filled with many non-members of the Grand Chapter so as to make the circulation of the pamphlets containing the defamatory matter quite excessive as to those recipients. Their knowledge was wholly unnecessary to the protection of the interest in question. Neither was the publication merely incidental. Furthermore, the methods employed in the promiscuous circulation of the defamatory matters were clearly suggestive of improper motives.

6. See many cases collected, including Missouri authorities, in (1919) 3 A. L. R. 1654; (1921) 15 A. L. R. 453; (1929) 63 A. L. R. 649.
9. See RESTATEMENT, TORTS (Tent. Draft, 1936) § 1047; (1923) 26 A. L. R. 843. But see Cranfill v. Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805 (1900), where a libellous statement, in a challenge of the right of a delegate to a seat in a church convention published in a church newspaper, was held to be privileged without consideration of the fact that the papers might reach the public. In the instant case, however, there was more than a mere possibility that the pamphlets would reach others than properly interested lodge members under the widespread circulation.
What constitutes a privileged occasion is a question for the court, and it is the province of that body to weigh the extent of the plaintiff's injury against the defendant's interest which is sought to be protected by the words spoken. The court is confronted with two interests, only one of which can be protected in the action. Either a recovery may be given against the defendant, with the attendant danger that if this is done the policy of the privilege will be circumvented in that declarants will hesitate to make statements to protect their interests, or the court may deny a recovery to the plaintiff with the result that his interest in a good reputation will not be protected. Where these two interests are fairly evenly balanced from a social point of view, it would seem that protection should be given to the plaintiff's reputation.

CHARLES M. WALKER.

NEGLIGENCE—HUMANITARIAN DOCTRINE.

Smithers v. Barker

In this case the plaintiff was driving west, and defendant was driving south on a street that was designated as an arterial or through street. Considering the evidence most favorable to the plaintiff, the plaintiff stopped at the east edge of the north-south arterial street on which the defendant was driving south, and waited for a north-bound car to pass, and while waiting, he actually saw the defendant coming south at a speed of about twenty-five miles per hour. Plaintiff then started from a complete stop, shifted to intermediate gear, and drove into the direct pathway of defendant's car, which then struck the car of the plaintiff. Plaintiff, after seeing the defendant's car and starting on across the arterial way, did not look again at the car of the defendant, for he "assumed" he "had time to cross the street in safety." Plaintiff could have stopped his car "in three, or four and a half feet." Defendant could have stopped his car or averted the accident by turning, apparently, if he had seen plaintiff at the time plaintiff started to cross the street, or at any time before the plaintiff approached the immediate vicinity of the zone of physical helplessness, or that zone in which plaintiff would have been unable to extricate himself by turning or stopping. However, it was not shown that defendant could have averted the accident by the exercise of reasonable care after the plaintiff entered that


11. For a good example of the considerations to be made in balancing these respective interests, see Note (1937) 23 IOWA L. REV. 83, commenting on the situation where plaintiff, having been disbarred in state X, moves to state Y where he is admitted to the bar. X bar association informs Y bar association which in turn disbars plaintiff. Plaintiff now sues the X bar association. For a more complete analysis of the factors which enter into a consideration of the existence of a conditionally privileged occasion, see RESTATEMENT, TORTS (Tent. Draft, 1936) § 1037.

1. 111 S. W. (2d) 47 (Mo. 1937).
zone. The lower court instructed the jury that defendant owed a duty towards the plaintiff everywhere and at all times after plaintiff's car was "entering into, upon and crossing said intersection." However, the supreme court held that this charge was prejudicial error, and hence reversed the judgment and remanded the cause.

This case would hardly give pause for consideration, since it is well in line with previous applications of the humanitarian doctrine, were it not for the recent case of Perkins v. Terminal R. Aes'n of St. Louis. In that case, the supreme court held that mental obliviousness was not so essential to the plaintiff's case under the humanitarian doctrine that the defendant was entitled to an instruction requiring the jury to find such obliviousness before awarding the verdict to the plaintiff. The majority opinion stated rather that the jury merely had to find the plaintiff was in or approaching a zone of imminent peril. Earlier cases had required not only that defendant could have seen or known of plaintiff's imminent peril where he was in such physical peril, but that defendant saw or knew, or by exercise of reasonable care could have seen or known, of plaintiff's obliviousness where he was not actually in physical peril. Hence, the Perkins case seems definitely to have broadened the defendant's duty under the humanitarian doctrine to cases where defendant could by reasonable care have seen or known that a plaintiff was in or approaching a zone of imminent peril, regardless of whether he was oblivious of such peril or not.

In holding that the charge of the lower court in the instant case was prejudicial error against the defendant, the opinion states that where the plaintiff knows of the near approach of defendant's oncoming vehicle and deliberately goes into its path, as here, the zone of imminent peril is very narrow, and the defendant's duty to avoid the accident under the humanitarian rule does not commence until the plaintiff is actually in the path of defendant's approach without opportunity for escape, or so close thereto that it is apparent that he will not stop before reaching the approaching defendant's path. This seems to place a highly desired restriction on the implications of the Perkins case.

Therefore, while it is not necessary to plead obliviousness, and hence no instruction is required on this point for a verdict for plaintiff, if it is apparent that plaintiff voluntarily and knowingly approached the zone of imminent peril, such zone is much narrower than if obliviousness is shown. Where there is obliviousness, plaintiff is in the danger zone before he actually reaches the on-

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3. 102 S. W. (2d) 915 (Mo. 1937).
coming defendant’s path, for not knowing of the danger, he will probably continue on his course. The plaintiff who deliberately approaches the zone with ability to stop or turn knows of the danger, however, and can avert the accident anytime before actually placing himself in physical danger. Moreover, in the instant case, there is nothing to show that the defendant could have averted the accident by use of reasonable care after the plaintiff had reached the zone of actual physical peril, hence all the more reason why the lower court’s judgment should be reversed.

Of course, the very nature of the humanitarian doctrine, in cases where both plaintiff and defendant have been mentally oblivious, assuming a duty owed by the defendant to persons of the plaintiff’s class, has been to make the defendant take better care of the plaintiff than plaintiff is required to take for himself. But the Perkins case in its implications seemed to open up further protection to the plaintiff, and the court will need to indicate just how far this protection is to be carried. Ellison, C. J., points out in his dissent in the Perkins case that the majority opinion seems to put no responsibility on the plaintiff, and consequently he could recover in spite of even the most extreme carelessness on his part. Hence, any such limitations as are imposed by the instant case seem highly desirable from a standpoint of fairness.

It is clear that if this question had arisen in a different way, for example, by a demurrer to the evidence, as it did in the case of Pentecost v. St. Louis Merchants’ Bridge Terminal R. R., the same result would have been reached.

George W. Wise.

7. 66 S. W. (2d) 533 (Mo. 1933). This is the interpretation given to the Pentecost case by Tipton, J., in Perkins v. Terminal R. Ass’n of St. Louis, 102 S. W. (2d) 915, 922 (Mo. 1937).