Buffalo Law Review

Volume 1 | Number 1 Article 20

4-1-1951

Municipal Corporations—Notice of Claim—Infants

Burton B. Sarles

Edward J. Schwendler Jr.

thereupon wrote to the dairies requesting them to enforce the agreement between the dairies and the union to the effect that the dairies would not sell to any independent peddlers who did not observe the same conditions of employment as those maintained in the organized plants. This action by the union was held to constitute the seeking of an unlawful end by the use of unlawful means. But as was pointed out by the dissent, the peddler-distributors "were engaged in a type of activity which justifiably may be considered by labor as a whole as inimical to its own economic interests . . . and we cannot justifiably pronounce that unions must either admit to membership such opponents or else refrain from taking economic measures against them." *Bautista* v. *Jones, supra* at 772, 155 P. 2d at 357.

The situation above relates one instance in which it may be that a union has reasonable grounds for excluding an individual even if it does deprive him of his job in a particular situation. It may also be reasonable for a union to refuse to admit Communists and thus keep them from working on the grounds that in times such as these they would be unsafe to work with, and also on the ground that they would weaken the union internally and in the public eye. As *Wilson* v. *Hacker* points up, the primary question is whether a union has reasonable grounds for keeping a man off the job; the matter of exclusion from the union is secondary. And the case clearly states that a union can have reasonable grounds for getting a man discharged. However, since the court here failed to find such grounds, and since all the prior cases reach the same result, the law remains that: "A union may restrict its membership at pleasure; it may under certain conditions lawfully contract with an employer that all work shall be given to its members. But it cannot do both." *Wilson* v. *Newspaper and Mail Deliverers' Union, supra* at 351, 199 A. at 722.

David Buch

MUNICIPAL CORPORATIONS — NOTICE OF CLAIM — INFANTS

A conflict in lower court decisions regarding the applicability of § 50-e of New York General Municipal Law (N. Y. Laws 1945, c. 694) to infants has finally been resolved by the Court of Appeals in *Martin* v. *School Board of Union Free District,* 301 N. Y. 233, 93 N. E. 2d 655 (1950).

Section 50-e makes it necessary to file a notice of claim, as a condition precedent to the commencement of an action against a municipal corporation, within 90 days after the cause of action accrues (effective Sept. 1, 1950 N. Y. Laws 1950, c. 481; prior to this date, the time allowed was 60 days). Subdivision 5 of that section provides an exception for infants and other incapacitated persons by allowing them up to one year after the cause of action accrues, instead of only 90 days, to apply for leave to serve the notice of claim.

Notwithstanding the wording of § 50-e, there had been recent decisions holding that even later than a year after a cause of action accrues, an infant might apply for, and receive, leave to serve the notice of claim. *Application of Curtain,* 196 Misc. 587, 92 N. Y. S. 2d 624 (Sup. Ct. 1949) (allowing serving of notice of claim 15 months after the cause of action accrued); *Application of Hector,* 193 Misc. 727, 85 N. Y. S. 2d 440 (Sup. Ct. 1948) (allowing serving notice of claim two years after the cause of action accrued). Other courts followed the statute literally, refusing to allow a notice of claim to be served after a year had elapsed. *Ferris* v. *Board of Education,* 195 Misc. 871, 92 N. Y. S. 2d 884 (County Ct. 1949); *Ennis* v. *Peekskill,* 276 App. Div. 779, 92 N. Y. S. 2d 881 (2d Dept. 1949).

In the principal case, the question before the court was whether the guardian ad litem of a twelve year old infant could be given permission to file his notice of claim 19 months after the alleged cause of action accrued. The court in a 5-2 decision held he could not, concluding that the court did not possess the power to extend the period in which a notice of claim must be filed. Desmond, J., delivering the opinion, held that § 50-e was enacted in 1945 to set up in one section the whole of the law on the subject of notice of claims against municipal corporations. The decisions rendered before 1945, in which the courts had used their discretion in extending the time allowed for the filing of notice of claim as required in the special statutes applicable to various municipalities in one section the whole of the law on the subject of notice of claims against 762 (1932); *Murphy* v. *Fort Edward,* 213 N. Y. 397, 107 N. E. 716 (1913), were meaningless now. This is so because the Legislature, when enacting § 50-e, had before it the recommendations of the Judicial Council, 10 N. Y. Jud. Council Rep. 265-296 (1944), urging the statutory enactment (in the proposed § 50-e) of the decisional law existing in New York, giving more than the statutory time for the filing of notice of claim to infants, and yet the Legislature did not embody such recommendations in the statute as passed.

The dissent, delivered by Froessel, J., applied a different interpretation to the Legislature's omission of the Judicial Council's recommendations. He reasoned that the Legislature was aware of the past decisions on the point, wherein the courts had been liberal in extending the time limit for infants, though special statutes said otherwise, and felt that the omission of the recommendations indicated the intent of the Legislature to leave the principle of those past decisions untouched, even though the literal meaning of § 50-e is otherwise.

At first impression, the result reached in the instant case appears to be a normal judicial reaction to what most observers would find to be the legislative intent. Moreover, the desirability of prompt notification of claim by one

aggrieved by a municipality is not to be denied; the usual reasons advanced for any statute of limitations apply *a fortiori* to the need for a speedy notification of claim against a municipality.

However, the decision may well be classed as sound legislative interpretation resulting in unsound law. In the light of § 60 of the Civil Practice Act, which saves to an infant a right of action during his infancy, § 50-e of the General Municipal Law, as interpreted, would appear to cause a result not favored by the sound public policy of protecting infants.

Perhaps the Legislature will take the hint of the court when it said: "Wise or unwise, fair or harsh, that law is binding on the courts as it is on the petitioner." The Legislature should amend § 50-e as soon as possible for it would be an anomaly to have an exception to § 60 of the Civil Practice Act where public corporations are the defendants.

Burton B. Sarles
Edward J. Schwendler, Jr.

UNFAIR COMPETITION — FAIR TRADE LAW HELD TO PROHIBIT CASH REGISTER RECEIPT DISCOUNT PLAN

Plaintiff, a manufacturer and distributor of well-known drug products sold under distinctive trade-marks, brought an action to enjoin defendants, fifteen merchants, from continuing a merchandising plan, called a "Dividend Club." Under the plan, cash register receipts were given on all purchases, whether of fair-traded goods or not; these receipts were redeemable at 2½% of their amount in any merchandise of the member stores. *Held* (5-2): injunction granted on the ground that the plan constitutes price-cutting and is within the prohibition of the Fair-Trade Law. *Bristol-Meyers Co.* v. *Picker,* 302 N. Y. 61, 96 N. E. 2d 177 (1950).

Violations of the Fair-Trade Law are properly remedied by injunctive relief, which will be granted without proof of actual damages if it is established that there is good will to be protected, but injury to good will is ordinarily presumed if there is unlawful price-cutting. *Guerlain* v. *Woolworth Co.,* 297 N. Y. 11, 74 N. E. 2d 217 (1947); *accord: Seagram Distillers Corp.* v. *Nussbaum Liquor Store,* 166 Misc. 342, 2 N. Y. S. 2d 320 (Sup. Ct. 1938); *Calvert Distillers Corp.* v. *Stockman,* 26 F. Supp. 73 (E. D. N. Y. 1939). The validity of the fair-trade statutes is predicated on the protection which they afford to the manufacturer as the owner of the identified goods. *Old Dearborn District Co.* v. *Seagram Distiller Corp.,* 299 U. S. 183 (1936), followed in *Bourjois Sales Corp.* v. *Dorfman,* 273 N. Y. 167, 7 N. E. 2d 30 (1937).

Other jurisdictions have refused relief in the instance of trading stamp