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Recent Decisions

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could and did absorb the rightful remuneration that the producer should have received. When it became apparent that an injustice to the producer, as well as injustice to the public, resulted from these unfair practices of the middleman, legislatures and the courts aided the producer in overcoming the tyranny of the monopolistic middleman. Co-operatives were developed to combat the parasitic intermediary.

The middleman role has been taken in part by the producers in the form of co-operatives. The intermediary has become more burdensome than he is convenient in these cases. The ideal co-operative is the intermediary between the producer and the consumer, and since the co-operative is an association of producers in a marketing co-operative or an association of consumers in a purchasing co-operative, we see that the bridge between the producer and the consumer is very short indeed. It brings the producer into a position of veritably handing the goods to the consumer. It is difficult, then, to understand how we can logically attack a true co-operative as a restraint of trade.

Thomas Broden

RECENT DECISIONS

DAMAGES IN CLASS ACTION FOR MENTAL ANGUISH.—*Codell Construction Company v. Miller et al.*, — Ky. —, 202 S. W. (2d) 394 (1947).—To what extent may a class action be pursued in claiming damages for mental pain and anguish? A recent decision by Justice Dawson of the Kentucky Court of Appeals gives answer to the question, and a ruling on excessive claims for damages.

The original complaint was brought against the appellant for "wrongful, wanton, and reckless desecration of (appellees' grandparents) graves." The construction company had a contract with the Kentucky Department of Highways for the relocation of a new roadway which required a deep cut through the land adjacent to the old Miller graveyard. In blasting to dislodge an overhanging boulder that menaced the safety of the highway, a slide occurred that extended into the graveyard property, thereby destroying parts of the two graves. The plaintiffs joined the other heirs of their grandparents and were authorized by the lower court to prosecute their cause as a class action. The award of the jury was in their favor for $4,500 and judgment entered.

The appellant sought reversal first, on the grounds that class actions are improper when brought under such facts, because the mental pain and anguish suffered by each heir separately is indeterminable and, therefore, cannot be grouped under one complaint as a class action in pursuit of damages for all the decendants. One party to the suit might suffer greater anguish than another more distant heir, but in an award to a class each heir shares equally. Justice Dawson decided that although poorly drawn the allegations of the appellees sufficiently followed the liberal interpretation of Section 25 of the Civil Code of Practice. The factor of allowing the suit as a class action when heirs are unknown or unavailable outweighs the factor of equitable distribution of damages.

The appellant, secondly, claimed that interference was not done maliciously or with gross negligence, but the evidence was sufficient to point out facts that the

blasting was done with "reckless disregard of others." The appellants were assumed to be experienced in blasting operations of this type, knew the condition of the soil, the proximity of the boundary line to the boulder to be removed, and the location of the graves. The construction company relied on the case of *Hunt-Forbes Construction Company v. Robinson,* 227 Ky. 138, 12 S. W. (2d) 303 (1928) in which work done, in strict conformity with plans and specifications of the Highway Department, was released from liability. The rule of this latter case was not applicable in the *Johnson v. Kentucky-Virginia Stone Company,* 286 Ky. 1, 149 S. W. (2d) 496 (1941) which gave adequate protection to adjacent landowners in their property rights.

The instructions given by the lower court were here ruled erroneous because simple negligence could not sustain an award by the jury, but the finding of wanton or reckless disregard of the rights of the next of kin would. Two outstanding cases on this same subject point out the limit to which the Kentucky courts go in mitigating or refusing excessive damages for ordinary or prudent conduct. In *North East Coal Company v. Pickelsimer,* 253 Ky. 11, 68 S. W. (2d) 760 (1934) a subjacent coal mine caused wide cracks to be formed in the graveyard above, due to the lack of proper support, and the heirs of disturbed graves sought an award for mental pain and anguish. Although gaps appeared on the surface no indignity or physical movement of the dead could be proven. The damage award here was limited to the reasonable cost of restoration of the graves and maintaining proper ingress and egress to the cemetery. An actual physical movement of a dead person's coffin is discussed in *Louisville Cemetery Ass'n. v. Downs,* 241 Ky. 773, 45 S. W. (2d) 5 (1932). The coffin of a negro woman was buried in the wrong lot and without the parents' knowledge, exhumed and reburied in the proper lot. The lower court awarded $1,000 compensatory damages and $1,500 punitive damages which were allowed to be mitigated by the appellate court because, although improperly done, the appellants acted in good faith and were only trying to rectify their previous mistake.

It was found in the present case that the appellees were qualified to collect damages under the physical injury and indignity rule. There was no evidence to show any close relationship between any of the plaintiffs and the Miller grandparents. It was also admitted that none of the appellees had visited the graveyard in forty years and that shrubs, weeds, and other forms of vegetation had been allowed to grow wild in the graveyard. These facts viewed together give considerable weight to the contention that the damages were excessive beyond the actual "mental pain and anguish" that possibly could be suffered by such remote heirs. Therefore, a reversal was granted consistent with these facts, and the $4,500 found excessive.

In many situations damage awards are allowed to be inflated by this doctrine of mental pain and anguish but here we see that it must truly be of a personal nature. Certainly moderation in its application should follow more of our lower courts' decisions. Facts supported by adequate evidence must supplant the stock set of circumstances around which lawyers attempt to build cases for damages.

Richard H. Keen

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS.—*Craig et al. v. Harney,* — U. S. —, 67 S. Ct. 1249 (1947)—This case came to the Supreme Court on a writ of certiorari to the Court of Criminal Appeals of the State of Texas. In the latter court, the petitioners had been denied their application to be discharged from custody and imprisonment under a contempt judgment. Constructive criminal contempt by the petitioners had been adjudged by the County Court of

Neuces County, Texas. The sentence of this court was that the petitioners be confined to jail for three days. They sought to challenge the legality of their confinement by applying to the Court of Criminal Appeals for a writ of habeas corpus. That court by a divided vote denied the writ and remanded the petitioners to the custody of the county sheriff.

The petitioners in the lower court were a publisher, an editorial writer, and a news reporter of newspapers published in Corpus Christi, Texas. The County Court had before it a forcible detainer case which turned on whether one Mayes' lease was forfeited because of non-payment of rent. At the close of the testimony each side moved for a directed verdict. The judge instructed the jury to return a verdict for Mayes' opponent, one Jackson. This occurred on May 26, 1945. When the jury returned with a verdict for Mayes, the judge refused to accept it, and he again instructed the jury to return a verdict for Jackson. The jury returned a second time with a verdict for Mayes, and once more the judge refused to accept it and repeated his prior instruction. When the jury reconvened on the next day, it again refused to return the directed verdict, but finally it complied, stating that it acted under coercion of the court and against its conscience.

Mayes' motion for a new trial was denied on June 6th, but two days prior to this an officer of the county court filed with that court a complaint charging petitioners with contempt by publication. The publications referred to were an editorial and news stories published on five successive days in the newspapers with which petitioners are connected. In these articles, Browning, the judge, who is a layman and who holds an elective office, was criticised for taking the case from the jury. That ruling was called "arbitrary action" and a "travesty on justice." It was deplored that a layman, rather than a lawyer, sat as judge. Groups of local citizens were reported as petitioning the judge to grant Mayes a new trial and it was said that one group had labeled the judge's ruling as a "gross miscarriage of justice." It was also said that the judge's behavior had properly brought down "the wrath of public opinion upon his head," that the people were aroused because a serviceman "seems to be getting a raw deal," and that there was no way of knowing whether justice was done, "because the first rule of justice giving both sides an opportunity to be heard, was repudiated." And the fact that there could be no appeal from the judge's ruling to a court "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel" was deplored.

From such criticism, the judge concluded that the reports and editorials were designed falsely to represent to the public the nature of the proceedings and to prejudice and influence the court in its ruling on the motion for a new trial then pending. The petitioners contended at the hearing that all that was reported did no more than to create the same impression that would have been created upon the mind of an average intelligent layman who sat through the trial. They disclaimed any purpose to impute unworthy motives to the judge or to advise him how the case should be decided or to bring the court into disrepute. The purpose was to "quicken the conscience of the judge" and to "make him more careful in discharging his duty."

In dening the writ of habeas corpus, the Court of Criminal Appeals stated that:

> There is no escape from the conclusion that it was the purpose and intent of the publishers . . . to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to change his decision.

The text of that court's argument is contained in 193 S. W. (2d) 178. In sustaining the contention that there had been contempt by publication, the court con-

cluded that there was a "clear and present danger" of interference with judicial processes.

In writing the majority opinion for the United States Supreme Court, Mr. Justice Douglas stated that the case presented one important problem—the power of a court promptly and without a jury trial to punish for contempt on cases pending before it and awaiting disposition. He said that, with respect to this problem, the history of the power to punish for contempt and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice. Going further, he stated that what transpires in the courtroom is public property. If a transcript of the court proceedings had been published, there could be no punishment for contempt. In this connection, those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire before it. A judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him."

Mr. Justice Douglas, in summing up, said that there was no attempt on the part of the newspaper to pass on the merits of the case before it was decided. The fact that the writings were put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to elevate it to the criminal level. The only demand was for a hearing, and a more substantial showing is required to punish for contempt.

Concurring in the majority opinion, Mr. Justice Murphy added that in his view, the Constitution forbids a judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception, in his mind, is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice. Any summary suppression of unjust criticism carries with it an ominous threat to summarily suppress all criticism. It is to avoid that threat that the First Amendment, as he views it, outlaws the summary contempt methods of suppression.

In a strong dissenting opinion written by Mr. Justice Frankfurter and concurred in by the Chief Justice, the question for the court's decision was said to be as follows: if Texas had expressly provided in its Constitution that publications in the circumstances as found in this case should constitute contempt of court, would the Supreme Court of the United States hold that such a finding by the Texas court and such a provision in the Texas Constitution collide with the Constitution of the United States? Since the publications were not only reasonably calculated to accomplish that purpose but there was also a "clear and present danger" that they would change the ruling of the Texas court, the interference could not be defended. He went on to say that if under all the circumstances, the Texas Court was not justified in finding that these publications created "a clear and present danger" of the substantive evil that Texas had a right to prevent, namely the purposeful exertion of extraneous influence in having the motion for a new trial granted, "clear and present danger" becomes merely a phrase for covering up a novel, iron constitutional doctrine.

In a separate dissent to the majority ruling, Mr. Justice Jackson said that the right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. In his mind, the publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. The state