Notre Dame Law Review

Volume 16 | Issue 2 Article 4

1-1-1941

Recent Decisions

Ronald Rejent

James G. McGoldrick

James H. Neu

William J. Syring

RECENT DECISIONS

ADMIRALTY—THE APPLICATION OF LOCAL RULES TO PROBLEMS WHICH DO NOT WORK MATERIAL PREJUDICE TO THE CHARACTERISTIC FEATURES OF THE GENERAL MARITIME LAW.—The plaintiff is the widow of an employee, who died of injuries received in the course of, and by reason of, his employment. The decedent was employed by the Coney Island Company as a "utility man" at its park on the Ohio river. He was also required by the company to act as a mechanic upon a pleasure craft owned by the company, operated upon the river, on which the officials of the company entertained their guests. The wages of the decedent did not vary whether payment was made for work at the park or for work as a mechanic on the launch when the launch was used officially, or by the officers personally. The decedent in attempting to secure the craft at a wharf, while on its return from a trip out of the state of Ohio, on the Ohio river, was severely injured and later died as a result of such injuries. The court held for the Plaintiff stating that where an employee was employed by an Ohio corporation to perform services in Ohio and also on the Ohio river as a mechanic on a pleasure craft, and employee, in attempting to secure a launch at a wharf on return from a trip out of state on the Ohio river, received injuries from which he died, the employee's widow was entitled to death benefits under the Ohio Compensation Act under OHIO GENERAL CODE § 1465-90. *Klump v. Industrial Commission,* 29 N. E. 2d 627 (1940).

If a workman is injured on navigable waters, the determination of whether compensation may be recovered under a state workmens' compensation statute on the basis of the employer-employee relationship, or whether recovery lies solely within the exclusive jurisdiction of admiralty, depends upon the nature of the work performed by the employee. State compensation acts are inapplicable to maritime workers of a certain rank who have uniform rights. *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 37 Sup. Ct. Rep. 524, 61 L. Ed. 1068, L. R. A. 1918C (1917) — where a longshoreman was injured while he was unloading an ocean-going steamship, in a New York port, owned by a non-resident corporation and plying between ports of different states; *Chelentis v. Luckenback S. S. Co.,* 247 U. S. 372, 38 Sup. Ct. Rep. 501, 62 L. Ed. 1171 (1918) — where a fireman on board a steamship was injured while performing duties on ship-deck; *John Baizley Iron Works v. Span,* 281 U. S. 222, 50 Sup. Ct. Rep. 306, 74 L. Ed. 819 (1930) — where a painter was burned on board ship by a fellow workman cutting iron with an acetylene torch; *Great Lakes Dredge and Dock Co. v. Kierjewski,* 261 U. S. 479, 67 L. Ed. 756, 43 Sup. Ct. Rep. 418 (1923) — where a boilermaker employed by a dredge company to perform services as called upon was injured as he was making repairs on a scow moored in navigable waters; *Gonsalves v. Morse Dry Dock and Repair Co.,* 266 U. S. 171, 69 L. Ed. 228, 49 Sup. Ct. Rep. 39 (1924) — where a workman was injured while repairing shell plates of a steamer then in a floating dock; *Employer's Liability Assurance Corp. Ltd. v. Cook,* 281 U. S. 233 (1930) — where a state workmens compensation law, though elective in form, was inapplicable in the case of an employee injured while unloading a vessel, the employee being an "all around" worker doing dock work and helping in the unloading of steamships.

The fact that the injury occurred upon a navigable stream, however, does not of itself preclude the application of a state compensation act. In *Miller's Indemnity Underwriters v. Brand,* 270 U. S. 59, 46 Sup. Ct. Rep. 194, 70 L. Ed. 470 (1926), the court stated that although the work of an employee in removing the timber of an abandoned set of ways in navigable waters of the United States is maritime in its nature, the state in which the work is being performed may make its workmen's compensation act exclusively applicable to injuries received in the course of the work so as to exclude the jurisdiction of admiralty over the claim, since the

matter is one of mere local concern and its regulation by the state will work no material prejudice to the characteristic feature of the general maritime law. This case is fully in accord with the principal case and states the generally recognized view on the proposition in question. The following cases also uphold the injured party's right to state compensation under similar conditions. *United Dredging Co. v. Lindberg,* 18 F. 2d 453 (1927) — where an engineer was killed while on board a dredgeboat digging a canal; *Sunny Point Packing Co. v. Faugh,* 63 F. 2d 921 (1933) — where a watchman was killed allegedly disappearing from a fishtrap in navigable waters; *Alaska Packer's Ass'n v. Industrial Accident Commission,* 276 U. S. 467, 48 Sup. Ct. Rep. 346, 72 L. Ed. 656 (1928) — where a workman was injured while standing on shore and attempting to float a grounded boat, he being employed by a canning company to perform all services needed by the canning company; *Grant Smith-Porter Ship Co. v. Rohde,* 257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. Rep. 157, 25 A. L. R. 1008 (1922) — where a carpenter was injured while engaged in the work of finishing an incompleted vessel lying upon the navigable waters of the state; *Sultan Ry. & Lumber Co. v. Department of Labor,* 277 U. S. 135, 48 Sup. Ct. Rep. 505, 72 L. Ed. 820 (1928) — where a logger was employed in handling logs on navigable waters of the United States in connection with placing them in booms and conducting them to saw mills before transportation is begun and after it is ended.

The question of the extraterritorial application of the Ohio Workmen's Compensation Act has been recognized in Ohio for a long time. OHIO GENERAL CODE § 1465-90 states that an appeal from the industrial board may be made "in the Common Pleas court of the county wherein the contract of employment was made in cases where the injury occurs outside the state of Ohio." This section has been judicially determined by the Ohio courts. In *Industrial Commission v. Ware,* 10 App. 375, 30 O. C. 7, the court held that while the Workmen's Compensation Law of Ohio may have some extraterritorial operation, the Industrial Commission of Ohio is not liable to pay compensation for the death of a workman occurring outside the state when he was neither hired in Ohio nor employed to work there, even though he was in the employ of a principal who had complied with the Workmen's Compensation Law. In *Industrial Commission v. Gardinio,* 119 Ohio St. 539, 164 N. E. 758 (1929) — where the Plaintiff made a contract in Ohio which was fully executed in Pennsylvania, the court refused compensation because of its lack of jurisdiction due to the fact that no part of the contract was to be performed in Ohio. The natural implication may be made that if any part of the contract was to be performed in Ohio the court would have assumed jurisdiction and would have granted the Plaintiff the relief sought. In *Hall v. Industrial Commission,* 131 Ohio St. 416, 3 N. E. 2d 367 (1936), the court held that injuries sustained outside Ohio by a porter, who was an Ohio resident and who was hired in Ohio by a bus company having its office and principal place of business in Ohio, on a bus operated in interstate commerce within and beyond Ohio were compensable under the Ohio Workmen's Compensation Law, notwithstanding that premiums were assessed only for the portion of work done within Ohio, where Congress has not preempted the field by enactment of legislation relating thereto.

The conclusion to be reached is best stated in the words of Justice Van Devanter in his pointed opinion in *Sultan Railway & Timber Co. v. Department of Labor and Industries, supra,* wherein he stated: "It is well settled by our decisions that where the employment, although maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

Ronald Rejent.

EMPLOYMENT CONTRACTS—VALIDITY OF RESTRICTIVE COVENANTS THEREIN.—Plaintiff employer sued to enjoin a violation of a restrictive promise made in an employment contract. The plaintiff corporation engaged in general arboricultural work in the state of Massachusetts, and carried on its business throughout a large area of New England. When the defendant commenced employment with the plaintiff he signed a contract containing the following restrictive clause:

"If the employment of the (defendant) shall be terminated for any cause whatsoever he will not for a period of three years from the date of such termination engage in any of the New England states in the same or any similar line of business as that carried on by the (plaintiff), either by himself or as an agent or as servant of any individual, firm or corporation engaged in such line or similar line of business."

The defendant had been a sales supervisor for the plaintiff and while in business for himself the greater part of his work had been solicited from the territory covered by him as a representative of the complainant.

The final decree enjoined the defendant from engaging in the same or similar line of business as that pursued by the former employer for the time stipulated in the contract beginning with the cessation of the employment relationship and including the territory covered "intensively" by the solicitors of the complainant. *New England Tree Expert Co. v. Russell,* 28 N. E. 2d 997 (Mass., 1940).

This decree modified the territorial restriction contained in the agreement of employment. Yet, the area covered "intensively" by the plaintiff was found to be more extensive than that territory solicited by the defendant in his capacity as sales representative for the named complainant.

That this is a contract in restraint of trade is evident, and it raises the question whether contracts in restraint of trade are invalid? In one of the earliest reported English cases on this point it was held conclusively that such contracts were void. This opinion was rendered in the *Dyer's Case* in the year, 1415. Sometime later the English courts recognized a promise not to compete in the same town with the vendee of a business. This is ancillary to the sale of a business which was passed upon in 1620. In the next century, the case of *Mitchell v. Reynolds,* 1 P. Wms. 181. (1711), examined the question of restraint more closely and decided contracts in general restraint were void and those in partial restraint valid, if upon good and adequate consideration. On this point, the court said: "The true reasons for the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, first to the party for the loss of his livelihood and the subsistence of his family, and secondly to the public, by depriving it of an exclusive member. . . . Thirdly, because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit on the other."

With regard to the first theory, *Hill v. Central West Public Service Co.,* 37 Fed. 2d 451 (1930), held the covenant as to the extent of the territory was reasonably enforceable as between the competeing ice companies. The court said:

"For the protection of the appellant from subjecting himself to a restraint which is unreasonable, it is not necessary that he be enabled to escape compliance with his agreement in so far as the restraint of trade provided for is reasonable."

An interesting point is raised in this regard by the court's opinion in *Diamond Match Co. v. Roeber,* 106 N. Y. 473, 13 N. E. 419 (1887). There it was stated:

"When the restraint is general but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there

seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? . . . To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry."

This statement of the court explains the use of the terms general and partial. The more general and unlimited the restriction imposed by the contractual stipulation, the less freedom which is accorded the promisor to gain a livelihood for himself and his family, and the greater the burden upon the public. In addition, the effective use of the extending provisions by the promisee has a limit which is more closely approached as the protection to the employer or vendor becomes more assured.

The effect of the terms general or partial is adequately expressed by the term reasonable. The great social interest of the vendee or employer may be adequately protected under the rule of reasonableness. If the protection is reasonable it will be adequate. Yet there are two parties to be considered and each is entitled to the proper legal consideration. The rule of reasonableness then assumes the problem of balancing social interests. The burden imposed upon one cannot be out of proportion to the benefit conferred upon others.

Presuming legitimate interests are being protected, there are two methods of approach in reaching a reasonable conclusion regarding these contracts which restrain the trade of men. One emphasizes the impropriety of requiring a promise greater in extent than is required for the needs of the promisee, since thereby the promisor would be injured without any corresponding advantage to the promisee. The other is chiefly concerned with the injury to the public — not that arising directly from the injury to the promisor, but that arising from lack of competition and the resultant tendency toward a partial monopoly owing to the withdrawal of the promisor from the field of endeavor. Whether the court in this case intended to or not it did consider the problem of public policy in rendering its decision.

The court in *Lanzit v. J. W. Sefton Mfg. Co.,* 184 Ill. 326, 56 N. E. 393 (1900), commented on public policy in this manner:

"The question whether the restraint is of greater extent than is necessary to protect the purchaser is not the only test to determine the validity of such a contract. The interest and welfare of the public are of paramount importance, and such a contract may be violative of public policy and void because of the restraint upon the seller, although in extent it may not be unreasonable when considered merely with reference to the extent of the business of the purchaser and the protection intended to be secured to him."

It would seem to be illogical for the courts to consider a contract in restraint of trade without examining the effect it may have on public interests. This is so, for agreements in contravention of public policy are illegal and the universal rule is that illegal contracts are completely unenforceable. The interest in regard to contracts in restraint of trade is to determine its validity and, therefore, if public policy is such a decisive element it must not be ignored.

Furthermore contracts in restraint of trade are not *contra bona mores,* and hence not within the rule that if invalid in part the invalidity necessarily affects and avoids the contract in *toto.* The rule is well settled that such agreements are divisible and when such an agreement contains a stipulation capable of being construed separately one part of which is void because in restraint of trade, while

the other is not, the latter will be given effect and enforced. *Monongahela River Consolidated Coal & Coke Co. v. Jutte,* 210 Pa. 288, 59 A. 1088 (1904).

While contemplating the problem involved in giving effect to the valid and reasonable restrictions of a trade contract will the courts draw a distinction between dividing an unreasonable covenant itself and separating distinctly unreasonably covenants from remaining valid stipulations?

Some courts will hold that where a restriction is not only unreasonable, but is also indivisible, they will not further consider its validity and will adjudge the contract unenforceable. In *Konski v. Peet,* 1 ch. 530, W. N. 98 (1915), where an employee agreed not to solicit customers of the employer after the termination of the contract of employment, the court held such restriction as indivisible and inseparable and because of its unreasonableness in *toto,* unenforceable.

In *Roberts v. Lemont,* 73 Neb. 365, 102 N. W. 770 (1905), the promisor agreed to sell his insurance business including good-will to his competitor, Roberts, and to quit the business making no limitations as to time. The theory of the law relied upon for decisions regarding an interpretation of such a clause is the traditional one promulgated by *Mitchel v. Reynolds, supra.* There was proposed in that case the distinction between general and partial restraints of trade. Any restraint which is unlimited being general and void as unreasonable and against public policy. While any restraint which is partial, if reasonable, will be enforced. The fact that the stipulation in respect to time or territorial extent is unlimited would not necessarily bind the court to interpret the terms as relating to the greatest extent possible. A reasonable interpretation could be placed thereon. The courts which refuse to do so rule, in effect, that they will not rewrite the contract of the disputing parties.

In *Martin v. Hawley,* 50 S. W. 2d 1105 (Tex. Civ. App., 1932), the covenant did not specifically define any territory in which the promisor was to be denied the liberty of employment. In the opinion of the court the restriction to territory was much larger than reasonably necessary to secure the vendee of the business. The covenant and contract were invalid. The court refused to read any reasonable restriction into the contract, "nor any other restriction which does not clearly appear on the face of the restrictive covenant."

Cropper v. Davis, 243 Fed. 310 (1917), on the other hand, interpreted the restrictive covenant which failed to limit the territory expressly as being that encompassed by the employer's business, it being impossible to ascertain such by evidence.

An interesting discussion on this point is found in *Gibbs v. Baltimore Gas Co.,* 130 U. S. 396, 409, 9 Sup. Ct. 553 (1889). Speaking of the general rule as propounded in *Mitchel v. Reynolds, supra,* it states; ". . . as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."

Where the business of the vendor included part of New York and part of New Jersey and the restriction in the contract of sale included the entire territory of both states, the contract being otherwise valid, the court took it upon itself to reasonably interpret that covenant so that the interests of both parties would be effectively protected. The territory encompassed by the business when the contract of sale was executed was found to be the proper limit of restriction. Under this decision, divisibility is only considered as a matter of convention and custom,

practically, it is rendered ineffective as a guide to invalidity. The court, in effect, rewrote the excessive restraining covenant. *John T. Stanley Co. v. Lagomarsino,* 53 Fed. 2d 112 (1931). This court apparently decided in accordance with the principle that whenever possible courts will interpret the contract so as to uphold it.

In *Moore & H. Hardware Co. v. Towers Hardware Co.,* 87 Ala. 206, 6 So. 41 (1889), the court ruled in a similar vein. "The meaning of a contract of this character, however, is not to be found solely from a consideration of its expressed terms. Courts look to all the circumstances surrounding the parties, and attendant upon the transaction, and from a consideration of these circumstances, in connection with the expressions of the undertaking, they will first construe the contract, and then proceed to pass upon its reasonableness as thus construed." . . . If, when so construed "it becomes specific as to time, space and character of the dealing intended to be restrained, and is reasonable and valid" it will, of course, be enforced.

The argument of another court expressly declared that general restraint will often be construed according to the intent of the parties. The entire subject matter of the contract was considered, the situation of the parties, the nature and extent of the business, the purpose to be accomplished by the restriction, and all the surrounding circumstances to which the parties must be supposed to have referred in making it. If the contract is then found to be validly restricting trade it will be duly enforced. *Buck v. Coward,* 122 Mich. 530, 81 N. W. 328 (1899).

Modern methods of business which resulted from the vastly improved modes of transportation and communication have greatly changed the reasonable conception of a general restraint. In consequence thereof, the rule, although presently applicable appears to have been disrupted.

Such is as it should be for in a problem where the rule of reasonableness is so often applied and so inextricably entwined in all of its decisions, the courts should not be so blind as to permit written form to confuse and disrupt their just adjudication. Adequate and effective written expression is often difficult in attainment under the circumstances which arise in forming contracts restraining trade. The modern decisions which follow the reasonable trend toward the reasonable end do not find mere grammatical form to be conclusive when the mind can divide and separate a covenant or the covenants of a contract in restraint of trade.

James G. McGoldrick.

EXTENT OF EQUITABLE JURISDICTION—UNFAIR COMPETITION.—Plaintiff asked for a preliminary injunction to restrain defendant from broadcasting play-by-play reports and descriptions of baseball games played by the "Pirates," a professional baseball team owned by Pittsburgh Athletic Company, both at its home baseball park, known as "Forbes Field," and at baseball parks in other cities. Plaintiff had sold an exclusive right to broadcast its baseball games to General Mills Incorporated. Defendant, a local broadcasting station, was obtaining a view of the plaintiff's baseball games from a vantage point situated outside of the plaintiff's baseball park. From this said vantage point, the defendant was broadcasting the play-by-play description of the plaintiff's baseball games to the defendant's listeners. The plaintiff sought an injunction to restrain the defendant from said broadcasts. Held: the plaintiff, by its creation of the baseball game, its control over the park, and its restriction of the dissemination of news therefrom, had a property right in such news and a right to control the use thereof for a reasonable time following the games. Thus, the defendant's acts amounted to unfair com-

petition and were restrained. *Pittsburgh Athletic Co. et al v. K. Q. V. Broadcatsing Co.*, 24 F. Supp. 490 (1938).

During the past few years in this country, there has been somewhat of a fusion of Equity and Law in the courts. Today, many of the courts do not respect the fine lines of distinction between equitable relief and common law relief that once stood as firm barriers which absolutely prevented any transgression by equity into the realm of common law jurisdiction. Due to the complexity of business relations and a broadening desire by the courts to render justice through the most adequate remedies possible, equity courts have broadened their scope, and in many cases ridden "rough-shod" into the realm of common law jurisdiction. The purpose of this writing, however, is not to discuss the relative merits or demerits of such moves on the part of our chancery jurisdiction, but rather to discuss the means by which the equity courts have justified these moves. To further this end we must turn to the decisions of the courts.

In the principal case of *Pittsburgh Athletic Co. v. K. Q. V. Broadcasting Co., supra,* the court maintained that the communication of news by the plaintiff or its agents did not amount to a general publication of news and thus the defendant did not have the right to broadcast it on the ground that it is common news or has been generally publicized. For support of this argument, one must turn to the so-called "Ticker Cases." In the case of *Board of Trade of Chicago v. Christie Grain and Stock Co.*, 198 U. S. 236, 25 S. Ct. 637, 49 L. Ed. 1031 (1905), the court makes the following interesting observation: "The use and distribution of the continuous quotations of prices on sales of grain and provisions for future delivery which are collected by the Chicago Board of Trade and which can't be obtained by those so using and distributing them without a known breach of the confidential terms on which they are communicated by the Board of Trade to its customers, may be enjoined . . . the communication of quotations of prices on the sales of grain and provisions for future delivery, collected by it, which it might have refrained from communicating to anyone, do not affect the monopoly or amount to an attempt at monopoly, and aren't contracts in restraint of trade."

One encounters an interesting statement in support of our argument made by Judge Van Devanter. "A board of trade which has a right of property in market quotations collected in its exchange does not surrender or dedicate them to the public by permitting subscribers, to whom they are communicated upon condition that they shall not be made public, to post them upon blackboards in their places of business, where the posting is done for the advantage of the subscribers, and not for the public, and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value." *McDearmott Commission Co. v. Board of Trade of Chicago,* 146 F. 961, 7 L. R. A. (N. S.) 889, 8 Am. Cas. 759 (1906). In one of the later "ticker cases" it was held: An exchange may protect by injunction its right to quotations which it collects. Further, the exchange may furnish the quotations to one and refuse another. In other words, the exchange has an exclusive right to its quotations. *Moore v. New York Cotton Exchange,* 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370 (1923). To the same effect see *Hunt v. New York Cotton Exchange,* 205 U. S. 322, 27 S. Ct. 529, 51 L. Ed. 821 (1930).

One of the strongest bases the chancery courts have found for granting an injunction where private and social interests are invaded is that the defendant had created unfair competition by its act. Before we attempt to analyze the cases which involve this principle, it may be well to do a bit of research in order to further comprehend what the courts understand when they speak of unfair competition. Unfair competition has been defined as follows: "It consists in passing off or attempting to pass off, on the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of

a trade or business in such a manner that there is either an express or implied representation to that effect. In fact, it has been said that it is nothing but a convenient name for the doctrine that no one should be allowed to sell his goods as those of another . . . Ordinarily, unfair competition is found only where one person is palming off his goods as those of another . . ." 63 C. J. p. 324, par. 21. Another definition states "Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor . . ." 26 R. C. L. p. 875, par. 53. Still another definition: "Unfair competition, a term which may be applied generally to all dishonest or fraudulent rivalry in trade and commerce, but is particularly applied in the courts of equity . . . to the practice of endeavoring to substitute one's own goods or products in the markets for those of another, having an established reputation and extensive sale, by means of imitating or counterfeiting the name, title, size, shape, or distinctive peculiarities of the article or the shape, color, label, wrapper, or general appearance of the package, or other such simulations, the imitation being carried far enough to mislead the general public or deceive an unwary purchaser, and yet not amounting to an absolute counterfeit or to the infringement of a trademark or trade name." BLACK'S LAW DICTIONARY.

Now, with this grounding in the authorities' interpretation of the concepts of unfair competition we may turn to the cases in which equity courts have applied the rules of unfair competition as a basis for enjoining against such acts.

In re Debs, 158 U. S. 564, 593, 15 S. Ct. 900, 39 L. Ed. 1092 (1895) held: Equity has the power to restrain one from obstruction of artificial highways for the passage of inter-state commerce and the transmission of the mails. Also see: *In re Sawyer,* 124 U. S. 200, 210, 8 S. Ct. 482, 31 L. Ed. 402 (1888). One of the outstanding cases on the feature of unfair competition is *International News Service v. Associated Press,* 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. A. 293 (1918). In this case the court enjoined the International News Service from copying news from bulletin boards and early editions of the Associated Press newspapers, and selling such news so long as it had commercial value to the Associated Press. As a basis for this decision the Supreme Court said:

". . . Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the right of either as against the public.

"In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . (citations); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired . . . (citations). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

Then, in the case of the *Twentieth Century Sporting Club v. Trans-radio Press Service,* 165 Misc. 71, 300 N. Y. S. 159 (1937), plaintiff acquired an exclusive right to broadcast the boxing match of Louis vs. Farr. The defendant obtained news "tips" from the plaintiff and submitted them to the public purporting that these "tips" were obtained from an independent investigation. Held: the "tips" were obtained from the plaintiff and were exclusive property of the plaintiff, thus, defendant act was enjoined as it amounted to unfair competition. Then, let us consider the *Associated Press v. K. V. O. S. Inc.,* 80 F. (2d) 575 (1935), a pre-

liminary injunction was granted to restrain defendant from appropriating and broadcasting news gathered by the Associated Press on the ground that the broadcasting station was in competition with the Associated Press in the business of publication of news for profit. The defendant contended it was not unfairly competing with the plaintiff for the defendant gained no compensation for its reports. The court held: No actual pecuniary compensation was necessary, the fact that the defendant gained good will by these broadcasts was enough to show competition. Also see: *Waring v. W. D. A. S. Station Inc.,* 327 Pa. 433, 194 A. 631 (1937); *Madison Square Garden Corp. v. Universal Pictures Co. Inc., et al,* 255 App. Div. 459, 7 N. Y. S. 2d 845 (1938); *R. C. A. Mfg. Co. v. Whiteman,* 28 F. Supp. 787 (1939).

Having reviewed the cases where chancery courts have seen fit to enjoin parties where these parties were guilty of unfair competition. Now, let us turn to the cases where the equity courts do not arrive at the same conclusions as we have previously reviewed. In the case of *Sports and General Press Agency, Limited v. "Our Dogs" Pub. Co. Limited,* 2 K. B. 880 (1916), plaintiff granted an exclusive right to take pictures on its premises. The defendant took pictures of the plaintiff's dog show from a point outside the dog show grounds. The injunction was denied. It must be said, however, that this case is an English case and in England the question of unfair competition is not considered. In another case from Australia, *Victoria Park Racing, etc. v. Taylor,* 37 S. R. 322, New South Wales (1936), plaintiff owned a race course to which spectators were admitted only on the condition that they would not disclose the results of the races during the day of the races, plaintiff also refused to sell broadcast rights. Defendant observed the races from a point outside of the park and described these games over a broadcasting station while they were being run. Held: Injunction denied because there was no trespass on plaintiff's race track, and no nuisance created by defendant. Again, it must be said this was an English court and such courts do not respect the concept of unfair competition.

We turn now from the English cases to the American cases in point. In the case, *Associated Press v. K. V. O. S. Inc.,* 9 F. Supp. 279 (1934). The district court refused to enjoin the defendant radio station from broadcasting *verbatim* Associated Press news reports, or condensation thereof, obtained from copies of newspapers purchased in the open markets but before the reports had lost their news value. In its opinion the court said:

"Proper protection of complainants' business, news, service, contracts and invested capital can't justify withholding from the public the more speedy and more extensive dissemination of news through the improved instrumentalities of defendant radio station and others similarly situated, even when news reports broadcast by defendants or others gratuitously to their radio listeners have been taken from sources originated or controlled by complainants, if the reports have already been dedicated to the information of the public in a publicly distributed issue of complainant's member newspaper, unless said communication is in violation of contract or well defined general rule of conduct, or positive law."

It was further said in the same opinion that there was no unfair competition in this case because: "Taking by a radio station of news reports from newspaper issues regularly distributed and broadcasting of such reports without compensation or direct profit therefor doesn't constitute unfair competition by the radio station with news gathering and dissemination for profit by news gathering agency or its member newspapers, since the fact that the radio station competes for business profit with newspapers in advertising field does not make radio and newspapers competitors for profit in dissemination of news."

In the same opinion, the *Communication Act,* 47 U. S. C. A. § 605 (1934) was rejected as inapplicable. The said act states "And no person not authorized

by sender shall intercept and divulge or publish the existence, contents, substance, purports, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." This American case was subsequently overruled however, in *Associated Press v. K: V. O. S. Inc.* (1935), *supra.*

In another important American case, *National Exhibition Co. v. Teleflash, Inc.*, 24 F. Supp. 488 (1936), plaintiff asserted that it had an exclusive right to the play-by-play description of a baseball game while it is in progress. It was claimed that the defendant was disseminating the said news of the baseball games during the progress of the baseball game and thus interfering with the exclusive rights of the plaintiff. The injunction was denied. In denial of an injunction, the court was of the opinion that there was no unfair competition and the court said: "It is not sufficient to constitute unfair competition that the plaintiff had title to the game. In addition, it must have exclusive right to describe it, play-by-play, while in progress. . . . Plainly, as I see it, there was no competition, much less unfair competition. . . ." It is evident that this case is in direct conflict with the principal case of *Pittsburgh Athletic Co. v. K. Q. V. Broadcasting Co., supra.* It is impossible to rationalize the two cases, but from the weight of authority as previously discussed in this article, the writer submits that the principal case of *Pittsburgh Athletic Co. v. K. Q. V. Broadcasting Co., supra* seems to be the soundest in principle. And, from the two cases, it seems obvious that where there is unfair competition, equity will restrain the acts which create this unfair competition.

Thus, one is able to appreciate the cases of unfair competition where the courts of equity have seen fit to intervene and render more swift and more adequate remedies than the common law courts could have possibly accomplished. It will readily be seen that this extension of the equity courts jurisdiction into cases involving private and social interests was brought to be a reality due to the need for greater expediency of justice in our ever complicated society. So, the writer submits that the trend for our chancery division is for an even broader and more far reaching scope of jurisdiction in the future.

James H. Neu.

INJUNCTION—RIGHT TO ENJOIN FORMER EMPLOYEE FROM SOLICITING COMPLAINANT'S CUSTOMERS.—Complainants were engaged in the box-lunch business. They sold to factory workmen, principally, and distributed their lunches each day, sometimes being allowed to enter the factories to do so. The defendants were two former salesmen of the complainant who now have a competing box-lunch business of their own. They used the same method of selling and distributing and sometimes sold in the same factories in which the complainants had been in the habit of soliciting. Complainants sought to enjoin defendants from soliciting or selling at any factories, to any customers or at any stops the complainants were in the habit of making. The court held that the defendants could not be enjoined. *Haut v. Rossbach,* 128 N. J. Eq. 77, 15 A. 2d 277 (1940).

Vice-Chancellor Bigelow applied the general rule that unless prohibited by a valid contract, a former employee may compete with his late employer and still remain within the law. This is the general rule in most jurisdictions today, but in *Newark Cleaning and Dye Works v. Gross,* 97 N. J. Eq. 406, 128 A. 789 (1925), cited by the court in the principal case, Vice-Chancellor Backes took exception to the rule by his observation "that there are cases where courts have interfered

to protect the owner of a business 'against invasion upon list and route customers by former drivers and solicitors, where the customer is latent or the field potential'." This exception was applied in the case where the complainant ran a business of exterminating insect and rodent pests. The defendant acquired a list of the complainant's customers while in the complainant's employment and used the list after leaving the complainant's employment for his own benefit. The court enjoined the defendant saying that the list of complainant's customers, their names and addresses, were a property right of complainant, valuable to him, because they were expensive to acquire and compile. *Abalene Exterminating Co. v. Oser,* 125 N. J. Eq. 329, 5 A. 2d 738, 739 (1939).

At first blush, there appears a conflict between the two cases reviewed but this difficulty can be explained away after closer observation of the cases. First of all, we must observe that the remedy by injunction must be used with great discretion and only to avoid irreparable damage or threatened injury. Whether remedy by injunction will be given or denied a complainant where his former employee is now competing with him by solicitation of his customers and where no restrictive covenants or expressed agreement exists between the two, will depend largely on the facts and circumstances of each particular case. As Vice-Chancellor Bigelow says in the principal case, "sound public policy encourages employees to seek better jobs from other employers or to go into business for themselves." This freedom of trade and commerce must be protected. It is essential to healthy business transactions. But the employer must be protected also. His business must not be injured to any great extent. If an employee learns the names of established customers of the employer, customers of an exclusive class, the employee upon entering business for himself must not be allowed to solicit those customers who have cost the employer much expense to acquire.

The early cases and recent decisions are in apparent conflict upon this point but an equitable compromise has been reached in many states between the question of whether the employer's right to protection or the employee's right to compete should prevail.

In an earlier case the driver of a laundry company received laundry, made collections, and solicited business for the company on a certain route for three years. Before and after quitting its employ he solicited business for himself from customers he learned of while with the company. The complainant sought to enjoin this practice. The court held the defendant could not be enjoined from such solicitation, as the list of such customers of the company is not a "trade secret." (One judge dissenting.) *Fulton Grand Laundry Co. v. Johnson,* 140 Md. 359, 117 A. 753 (1922). From this case, by a negative inference, it can be seen that if the listing of the customer's names is a matter of confidence or a trade secret, the action of the employee is enjoinable. Where a bakery company furnishing an automobile and guaranteeing certain returns to one who sells their products, and aiding him in building up their business in a particular district, acquires a property right in the list of customers procured in the district, it can be protected by an injunction restraining driver from soliciting orders for another company from dealers who have been purchasers through him of the first company. *Mackechnie Bread Co. v. Huber,* 60 Cal. App. 539, 213 P. 285 (1923). In this case it is seen that where the property rights of an employer in a "list" of customers are infringed the employee can be enjoined from soliciting the customers. In a recent Michigan case a former employee of a manufacturer of bakery machinery had the right to enter into the business of manufacturing machinery for bakeries in competition with his former employer so long as he did not violate or threaten to violate the employment contract between them requiring employee not to divulge manufacturer's discoveries. *Dutch Cookie Machine Co. v. Vande Verde,* 289 Mich. 272, 286 N. W. 612 (1939). It can be seen that this case turns on the restrictive provisions of a contract and that as long as the employee does not divulge the

trade secret of his former employer he may manufacture machines similar to those of his former employer. The general rule will apply where the field of customers is potential or where the customer must be hunted out. Evidently in this case the chances of acquiring users and buyers of the machinery were lucrative and the field potential for the manufacturers of the particular type of bakery machinery so that the court thought it equitable that new business should compete with the employer. Where the former employer is a manufacturer or wholesaler who deals with jobbers or retailers, the names of the jobbers cannot be considered a "trade secret" and the general rule will apply. For example, it was held that where the complainant was in the window cleaning business and a former employee, in the same business for himself, solicited complainant's customers whose names he learned while in the employment of the complainant, the former employer could not successfully have the defendant enjoined in the absence of any restrictive contract between them. *Lewitter v. Adler,* 101 N. J. Eq. 74, 137 A. 541 (1927).

In an Ohio Case, *French Bros. Bauer Co. v. Townsend Bros. Milk Co.,* 21 Ohio App. 177, 152 N. E. 675 (1925), the courts syllabus reads "where a dairy business, conducted under owner's name, was sold to the plaintiff corporation, which thereafter included seller's name, "Townsend" in its corporate title, and subsequently defendants, who were sons of seller, left plaintiffs employ and engaged in competing business under name of "Townsend Bros. Milk Co." and with aid of several former drivers and other employees of plaintiff solicited and secured many of plaintiff's customers, held that plaintiff, having spent large sums in advertising the name "Townsend" to designate its products, was entitled to an injunction restraining the defendants from employing any of plaintiff's former employees who were formerly or at present employed by plaintiff to work over plaintiff's trade routes or from employing employees to solicit plaintiff's customers served by them while employed by plaintiff, notwithstanding the absence of use of written list of customers." Judge Cushing, dissenting, said there was no reason for issuing an injunction where the defendants did not violate any contract or take with them lists of customers or trade secrets of plaintiff. This case is superseded by a later Ohio decision where the sole question was whether an injunction will lie to restrain defendants from "soliciting, gathering or hauling milk from the customers or producers," along the route previously worked by the defendants as the plaintiff's employees. It was decided the defendant-employees would not be enjoined, Judge Matthias citing the case of *Fulton Grand Laundry v. Johnson, supra,* which stated that under a contrary rule than that of the Ohio case, "a traveling salesman, everytime he changed employers, if in a like business, would be compelled to give up all the friends and business acquaintances made during the previous employment. Such a rule would tend to destroy the freedom of employees, and reduce them to a condition of industrial servitude." *Curry v. Marquart,* 133 Ohio St. 77, 11 N. E. 2d 868 (1937).

There is one notable exception to the general rule that former employees may solicit business from their former employer's customers and that concerns the use of a "list" of names of the customers obtained while in the employment of the former employer. It seems a matter of equity and fair play in the law to restrain a former employee from using a list of customers, or a record pertaining to outlets of his former employer, especially where the former employer has gone to expense in acquiring the list. Where the employee uses the list he has procured while in the former employer's business, it is generally held that equity will enjoin such use, since the list is considered a true property right of the employer. California decisions state the law that the list of employer's names of customers are "trade secrets" and cannot be divulged by an employee. The customers should not, therefore, be solicited by the employee when he has quit his former employers business. In a 1933 California case summarized in 126 A. L. R. 767, it was held "that the plaintiff dairy company was entitled to an injunction restraining a former

employee who had served the plaintiff's customers in a certain territory as a route man, where it appeared that shortly after the defendant left the employ of the plaintiff to go with a rival company, a number of plaintiff's customers in such territory gave their patronage to the rival company and that the defendant had solicited their trade. The court stated that the allowance of an injunction was not improper where it only prohibited the defendant from soliciting customers, served by him while an employee of the plaintiff, and did not interfere with the rights of third persons, since it did not prohibit him from receiving unsolicited patronage from such customers. *Golden State Milk Products Co. v. Brown,* 217 Cal. 570, 20 P. 2d 657 (1933).

Also in *Dairy Dale Co. v. Azevedo,* 211 Cal. 344, 295 P. 10 (1931), another milk route situation, a similar decision was given on the basis that the names, addresses and friendships of an employer's customers are "trade secrets" and an employee can't equitably divulge or use them for his own benefit. And in *Brenner v. Stavinsky,* 184 Okla. 509, 88 P. 2d 613 (1939), the court said in regards the use of a list of customers of a former employer, "Harmony does not prevail as the grounds upon which this exception is recognized, but the most common view is that a list of customers built up through years of effort in a line of business where such a list constitutes an important asset of business is a species of property in the nature of or comparable to a trade secret, and that where an employee obtains such a list through confidence placed in him or surreptitiously he may be restrained from using it. This court would be loath to say, however, that the use by a former employee of his memory independent of any compiled list could be restrained in the absence of a contract to the contrary." In effect, the writer can see no real difference in the court's distinction between the use of a list on paper or in writing and the use of pure memory. The court merely places a premium on an employee's memory when it is retentive. It is the writer's conviction that the granting or denying of an injunction should be placed on a broader basis than the distinction as to whether names are in the form of writing or carried in the memory. The court goes on to say ". . . of course equity will not interfere with the right of defendants to do business with these customers, but may forbid the initiation of solicitation of business by the use of the lists surreptitiously compiled by them."

William F. Walsh in his work A TREATISE ON EQUITY states the general rule with citations of cases in accordance and contrary to it. He says "it is easy to say that disclosure, (of business secrets, such as a list of customers' names, price lists, or trade formulas and the like, inserted by present writer), to be enjoinable must be unfair, dishonest, unjust. It is not easy to apply any definite test by which these qualities may be determined. The matter should be decided by balancing the right of the employee to sell his labor and to realize on the knowledge and skill which his experience has given him as against the similar right of the employer to make profits from his business, so that each may enjoy his right in the fullest measure, subject to the duty of each not unreasonably to interfere with the right of the other." WALSH ON EQUITY, 1930 ed., p. 228.

An example in applying the principle of Professor Walsh would be the beauty parlor business where a hair goods shop is run in conjunction with it. The beauty operators should not be permitted to solicit the hair goods customers after leaving the shop owners employ, but *should* be allowed to solicit the customers who frequent the shop for permanent waves, haircuts, marcels, manicures and the like. The reason for this is that everyone knows, as a matter of observation that women beautify themselves in beauty parlors and the field for acquiring new customers in this business is a potential one, whereas in the hair goods trade there is a more secretive and select group of customers. The customers wear false hair, toupees, wigs and transformations and the like, and it is not a matter of public knowledge who these customers are. The field of hair goods customers is less

potential, harder to develop, and requires more attention. To permit an employee of a beauty and hair goods shop to use a "list" or use the names of customers he has retained in his memory to solicit established hair goods customers after quitting the employ of the shop owner is against justice and equity as it is permitting the employee to use a situation of advantage to himself to which he has not contributed in bringing about, and which has cost the shop owner much expense, time, and labor to develop.

It is the writer's belief that the foundation on which the cases should be based is the principle that a former employee should not be allowed to use to his own gain and to his former employer's loss a position of advantage which arose naturally from their former relationship.

William J. Syring.

MASTER AND SERVANT—LIABILITIES FOR INJURIES TO THIRD PERSONS—SERVANT EMPLOYED BY OR UNDER CONTROL OF THIRD PERSONS.—Plaintiff's decedent, Don Yeager, was an employee of the Rust Engineering Company, an independent contractor, doing certain work for the defendant on the construction of a new mill. Defendant's building in which the accident occurred was some 600 to 700 feet in length east to west, and about 75 feet in width north and south. Near the north wall and about 200 feet west of the east wall was a pit in the floor, approximately 30 feet long and 20 feet wide. The pit was four feet below the floor level and had a barricade around it about three feet high. The pit was to be used as a base for a machine. At the time of his injury which resulted in his death, Yeager was sitting in this pit chipping concrete. On the north and south wall of this building, about 25 feet high, was a crane track which ran the entire length of the building. On the track was an overhead crane, operated by electricity. The crane had on it a cab or control room situated under the structure of the crane and at the south end of it. The crane extended across the width of the building by means of a steel frame. On this frame was a "trolley" which was a movable carriage running back and forth on the crane frame. The crane proper ran east and west. The carriage or trolley moved north and south. On the day of the accident, defendant's rigger crew was engaged in raising a large pipe, weighing about a ton, to the wall of the building. They fastened a set of blocks or falls to the girders of the roof, above the crane track, and connected the other end of the blocks to the pipe by means of a sling line. This operation was taking place about 20 feet east of the pit where Yeager was working and in line with it. The rigger crew raised the pipe into the air, but since the man power was insufficient to raise the pipe with one set of blocks, another set was to be employed in order to double the leverage. The rope holding the pipe was snubbed around a housing until a second set of blocks could be secured. While the pipe was thus suspended, the crane, without warning, was operated towards the west end of the mill, and in so doing struck the rope, carried the pipe somewhat forward till the rope broke, the pipe falling and striking the plaintiff's decedent causing his death shortly thereafter.

The Rust Engineering Company, in doing its work under its contract with the defendant, frequently needed the use of a crane, and there had been some arrangement by which the Rust Company could use in their work, as independent contractors, the crane. For a considerable time prior to the accident the craneman was hauling concrete from north to south on the extreme east end of the mill for the Rust Company. It was on one of these trips that the accident occurred. *Manchester v. Youngstown Sheet & Tube Company,* 18 Ohio Opinions 503 (1937).

The lower court held in favor of the plaintiff and this holding was affirmed by the court of appeals. The decision turned on the issue of the exact status of the crane operator at the time of the accident.

The defendant claimed that the crane operator was, at the time of the accident, an employee of the Rust Company, the independent contractor, by reason of an agreement between the Rust Company and the defendant, that should the Rust Company need the use of this crane in its construction work, the defendant would supply it upon request, and that the Rust Company was given the exclusive right to use such crane until it had finished with it.

This contention was denied by the court because the evidence showed that the defendant paid the crane operator for all his services. The Rust Company could not have discharged him. The Rust Company could not use the crane operator for any other purpose than the running of the crane, could not compel him to work overtime, and he could leave the Rust Company work on order of the defendant for the reason that that there was no legal obligation on the part of the defendant to carry out this arrangement if it desired not to do so.

The court, in denying the contention of the defendant, based their decision on the rule of law which makes complete "control" of the tort-feasor the test of determining his employment relationship.

Defendant's liability, if it existed at all, would be predicated upon the doctrine of *respondeat superior,* which found a lucid expression by Chief Justice Shaw in the case of *Farewell v. Boston and Worchester Railroad Corporation,* 4 Metcalf (Mass.,) 49 (1842), who said in substance that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a "great principle of social duty," adopted "from general considerations of policy and security."

However, there is a clear limitation to the extent of this rule. In *Guy v. Donald,* 203 U. S. 399, 27 Sup. Ct. Rep. 63, 51 L. Ed. 245 (1906), the court said: "The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work *or that of some other,* the master is not answerable for his negligence in the performance of it." This is defined further in *Standard Oil Company v. Anderson,* 212 U. S. 215, 29 Sup. Ct. Rep. 252. 53 L. Ed. 480 (1909), wherein the court said: "One in the general service of another may be so transferred to the services of a third person as to become the latter's servant with all the legal consequences of the new relation; but to change the relation and relieve the master requires more than the mere fact that the servant is sent to do work pointed out by such third person who has made a bargain with the master for his services."

In the case of *Chamberlain v. Lee,* 148 Tenn. 637, 257 S. W. 415 (1924), a servant of an independent contractor undertook to make some repairs to an elevator in a building owned by a third person. The elevator operator, servant of the building owner, was told to operate the elevator in such a manner as he might be directed by the servant of the independent contractor. During the operation of the elevator, the servant of the independent contractor was injured and brought suit and recovered from the building owners. Liability was predicated upon the proposition that although the elevator operator, the owners' servant, was directed to place himself for certain purposes under the control of the independent contractor, the owner had not surrendered control of the servant. In its opinion the court said that it was not a case of lending a servant. The servant was put under the control of the plaintiff only for the purpose of moving the elevator up and down while the particular job was being done. The elevator car was put under the

control of the plaintiff for the time, but it was put under his control along with its attendant, who remained in the services of the defendants. There was nothing to show that the plaintiff could have discharged the boy and certainly had no right to use this boy for any purpose other than running the elevator up and down. Nor could the plaintiff have required the boy to work longer than his regular hours under his contract with the defendants. "In order to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, the original master must resign full control of the servant for the time being."

In *Peters v. United Studios Inc.*, 98 Cal. App. 373, 277 P. 156 (1929), the court said: "When a master hires out, under a rental agreement, the services of employee for operation of an instrumentality owned by the master, together with use of the instrumentality, without relinquishing power to discharge servant, legal presumption is that, although hirer directs servant where to go or what to do in performance of work, the servant as operator of instrumentality remains, in absence of agreement to the contrary, servant of general employer, and negligence of servant constitutes that of owner of instrumentality. (Citing cases.)

"However, the general employer may lend his servant together with an instrumentality in such a manner as to render the person to whom the servant is loaned the special master *pro hac vice*, and hence relieve the general employer from liability for the servant's negligence in the operation of the instrumentality. (Citing cases.)

"But, to escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of the third person; and it is necessary to distinguish between the authoritative direction and control and mere suggestions as to details of the necessary cooperation where the work furnished is part of a larger operation. (Citing cases.)"

The weight of authority with which the instant case is in accord was aptly summarized by the learned editor of CORPUS JURIS, wherein he said: "The test is whether, in the particular service in which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." 39 C. J., Master and Servant, § 669.

Anthony M. Bernard.

SCHOOLS—VALIDITY OF SALARY PAYMENTS TO TEACHERS WEARING RELIGIOUS GARB WHILE TEACHING.—The state, on the relation of complainant taxpayers, charged the defendants, who had been successive treasurers of the School City of Vincennes, with having improperly and in violation of their bonds, paid out large amounts of money from the school funds to aid certain private parochial schools in the city of Vincennes. The alleged improper disbursement of the funds consisted in the payment by the treasurers of teachers' salaries to members of religious organizations of Roman Catholic Sisters and teaching Brothers. Such salaries were paid under an agreement which was reached after the parochial school authorities had decided to discontinue all parochial schools within the City of Vincennes. To lessen the burden upon the public school system which the discontinuance would cause, the public school trustees decided to take over the parochial school buildings and operate them as public schools. The authorities of the parochial schools agreed to permit the free use of such buildings provided that the schools were staffed by teaching Sisters or Brothers who met the requirements set for certification as a public school teacher. All such Sisters and Brothers were to be chosen by the Superintendent of the Vincennes City Schools, and they were to

be paid the same salary as that paid to lay-teachers. The teaching Sisters and Brothers wore crucifixes and the religious garb of their order, and also in some of the school rooms were pictures of Jesus Christ, The Holy Family, in addition to pictures of George Washington and other American Statesmen. The trial court's decision upholding the legality of the payments to the Sisters and Brothers was affirmed by the supreme court on appeal. *State ex rel. Johnson v. Boyd, Same v. Viets, Same v. Krack,* 28 N. E. 256 (Ind., 1940).

The legal problems involved in the principal case comprise but a small part of the greater and more controversial legal question concerning the legality of public aid to private or sectarian schools. The interesting questions of the legality of state aid to parochial schools by the payment of the parochial teacher's salary, or by furnishing free text books or free transportation to the parochial school pupils are all excluded from this discussion because of the court's determination that the schools involved were public schools although conducted in buildings owned by the parochial authorities.

Plaintiff's contention which was based on the Constitutional prohibition against drawing public money "for the benefit of any religious or theological institution" (Indiana Const., article 1, section 6) was found to be erroneous upon the defendants' showing that the religious teachers did all their teaching in public schools, and not in denominational institutions. In this regard the court further held that the fact that no one of the religious teachers retained the salary for his or her personal use but turned it over to his or her religious superior had no bearing on the legality of the payment in the first instance.

The legality of the payment by the defendants was strengthened by the existence of an Indiana Statute giving wide powers to the local school trustees including considerable discretion in selecting and employing teachers and in furnishing and equipping schools. BURNS IND. STATS. ANN. § 28-2410.

In a similar case the main question brought to the court was whether the exclusion of a Sister of Charity from employment as a teacher because she wore a religious garb while teaching in a public school would be a violation of the religious liberty guaranteed in the Bill of Rights of the Constitution of Pennsylvania (Bill of Rights, Article 1), and whether the wearing of such religious garb and insignia by the teacher constituted sectarian teaching. The court held that the exclusion of such teachers from the public schools would be a violation of the religious liberty guaranteed to them in the constitution, and that the wearing of the religious garb did not constitute sectarian teaching. *Hysong v. School District of Gallitzin Borough,* 164 Pa. 629, 30 A. 482, 26 L. R. A. 203 (1894). In reference to the above case the court said that the religious belief of many teachers, all over the Commonwealth was indicated by their apparel. However, in 1895 the legislature of Pennsylvania passed an act prohibiting the wearing of any religious garb in any public school and making liable to fine any board of directors who should violate the provision. (PURDON'S PENNSYLVANIA STATUTES, Title 24, Sections 1129, 1130 [Laws of Pennsylvania, 1895]). The statute prohibited the teacher from wearing a religious garb only "in said school or whilst engaged in the performance of his or her duty" as a teacher. The constitutionality of the act was upheld fifteen years later in the case of *Commonwealth v. Herr,* 229 Pa. St. 132 (1910).

Similar laws governing the garb of teachers were passed in Nebraska (COMPILED STATUTES OF NEBRASKA, 1929, Chapter 79, Section 1417), and in Oregon (OREGON CODE, 1930, Section 35-2406, Law of 1923). In New York the state Supreme Court upheld the constitutionality of a state superintendent's order prohibiting the teachers in any of the public schools in the state from wearing any distinctive religious garb while teaching. *O'Connor v. Hendrick,* 184 N. Y. 421 (1906).

In the case of *Gerhardt v. Heid,* 66 N. D. 444, 267 N. W. 127 (1936), the court found that the employment as teachers in the common schools of North Dakota of nuns, members of a religious society of the Roman Catholic church who were duly qualified as teachers under the laws of the state of North Dakota, was not violative of the North Dakota Constitution (CONST. §§ 147, 152). The court further found that what particular teachers of those who possess the qualifications to teach shall be employed, was a matter for the trustees of the school district to determine and is not ordinarily a matter for judicial consideration. Also, that "the fact that the teachers contributed a material portion of their earnings to the religious order of which they are members was not violative of the Constitution. A person in the employ of the state or any of its subdivisions is not inhibited from contributing money, which he or she earned by service so performed, for the support of some religious body of which he or she is a member. To deny the right to make such contribution would in itself constitute a denial of that right of religious liberty which the Constitution guarantees."

It is encouraging to know that although religious bigotry is flourishing in other lands, the Indiana Supreme Court, in deciding that the wearing of a religious garb by a teacher in a public school was not of itself sufficient to render illegal the payment of such teacher's salary from public funds as long as the teacher did not impart sectarian instruction, adopted the more logical and better reasoned rule as did Pennsylvania and North Dakota.

Joseph T. Pawlowski.

TELEGRAPHS AND TELEPHONES—LIABILITY OF A TELEGRAPH COMPANY FOR TRANSMITTING A DEFAMATORY MESSAGE.—In 1936, the plaintiff became a candidate for both the office of United States Senator from Massachusetts, and the office of Vice-President of the United States on the Union Party ticket. The plaintiff had been advised to become a candidate for both of the above mentioned offices by the Reverend Charles E. Coughlin. On September 30, 1936, an unidentified person sent a telegram from Boston to Father Coughlin in Royal Oak, Michigan, that contained statements, obviously defamatory, concerning the plaintiff. The message was delivered by an employee of the defendant to Father Coughlin, personally; this was the only publication relied upon by the plaintiff. The plaintiff brought an action in tort for libel against the telegraph company. The defendant contended that it was privileged to send the said message and relied principally on the defense of privilege. The trial court returned a verdict for the defendant, and the only question on appeal was whether the trial court erred in refusing to rule as a matter of law that the defendant was not privileged in transmitting and delivering the said message to Father Coughlin. This court, in affirming the decision of the lower court and holding the trial judge not in error for refusing to rule favorably to the plaintiff on the above question, said, "Our conclusion is that if the telegraph company is ever to be held liable for the routine transmission of a defamatory message, it could only be in the necessarily rare cases where the transmitting agent of the telegraph company happened to know that the message was spurious or that the sender was acting not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another. In the present case it can not be said that the clerks who handled the message to Father Coughlin knew or had reason to know that the purported sender was not privileged to send it." *O'Brien v. Western Union Telegraph Company,* 113 F. 2d 539 (1940).

The number of cases involving a telegraph company's liability for the transmission of a defamatory message are surprisingly few. This would seem to indicate that, as the court said in *Flynn v. Reinke,* 199 Wis. 124, 225 N. W. 742, 63 A. L. R.

1113 (1929), ". . . first the security of moral character is not greatly threatened by the usual and ordinary conduct of the telegraph business, and, second, that judicial thought upon the question is but in the formative period. . . ."

The Wisconsin court's finding "that judicial thought upon the question is but in the formative period" is supported by an examination of recent decisions. The courts have granted telegraph companies ever increasing latitude in the dissemination of libels.

The most liberal rule is stated in section 612 of the AMERICAN LAW INSTITUTE'S RESTATEMENT OF TORTS. "A public utility whose duty is to transmit messages for the public is privileged to transmit a message although it is obviously defamatory, unless the agents who transmit it know or have reason to know that the sender is not privileged to send it."

Under the above rule it would seem that the telegraph company could be aware that a message was libelous in content, and even know of its falsity, but if there was no reason to suspect the sender to be unprivileged, the telegraph company would face no liability. This rule has not been followed to the letter in the two most recent decisions, *O'Brien v. Western Union Telegraph Company, supra,* and *Klein v. Western Union Telegraph Company,* 13 N. Y. S. 2d 441, 257 App. Div. 336 (1939), but it has possibly influenced the courts, to some extent, in their granting of a privilege to telegraph companies.

In *Klein v. Western Union Telegraph Company, supra,* the telegraph company was held to have a conditional or qualified privilege in transmitting and delivering a libelous message. Therein the court said, "Defendant is a public service corporation licensed to perform a service connected with the public interest. It operates under statutes and rules of law subjecting it to penalties and damages for discrimination and negligent transmission of messages. In such circumstances individual rights to some extent must give way to the general good. We are of the opinion that ordinarily such a company in accepting, transmitting and delivering messages is entitled to a qualified privilege. This rebuts any presumption of malice from the fact that the message is libelous *per se* as between sender and party mentioned therein and, in order to justify a recovery, the party libeled must furnish evidence of actual or express malice or bad faith on the part of the carrier." Cases apparently in accord with the above decision are: *Flynn v. Reinke, supra; Western Union Telegraph Company v. Brown,* 294 F. 167 (1923); *Grisham v. Western Union Telegraph Company,* 238 Mo. 480, 142 S. W. 271, 37 L. R. A. (N. S.) 861, Ann. Cas. 1913A, 535 (1911); *Nye v. Western Union Telegraph Company,* 104 F. 628 (1900).

Sound public policy demands that on certain occasions defamatory statements shall be privileged. In *Blakeslee v. Carroll,* 64 Conn. 223, 29 Atl. 473, 475, 25 L. R. A. 106 (1894), the court said, "These occasions are usually divided into two classes, — those absolutely privileged, and those conditionally privileged." Professor Cooley, quoting from *Blakeslee v. Carroll, supra,* said, "The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly and with express malice, impose no liability; while such words spoken upon an occasion only conditionally privileged impose such liability if spoken with what is called express malice." Throckmorton's Cooley, A TREATISE OF THE LAW OF TORTS (1930), § 172, p. 356.

Since it would probably be on a rare occasion that express malice could be proved against a telegraph company for sending a defamatory message, the academic division of privilege into absolute and conditional would not seem too important to our question. As the court said in *Flynn v. Reinke, supra,* "Malice is an essential ingredient of actionable libel. Malice may be either actual or implied. To say that a telegraph company is prompted by actual malice towards

the recipient of a message transmitted over its wires in the ordinary course of business is mere fatuity."

One of those rare occasions where actual malice could be proved against a telegraph company was in *Paton v. Great Northwestern Telegraph Company of Canada,* 141 Minn. 430, 170 N. W. 511 (1919) wherein there was proof of ill-will between the defendant's operator and the plaintiff. Here evidence of such bad feeling was made a question for the jury on the issue of malice, and the telegraph company was held liable for defamation.

Prior to recent decisions, the usually recognized rule was that telegraph companies were civilly liable for the transmission of a message defamatory on its face. This rule seemed to be followed in *Paton v. Great Northwestern Telegraph Company, supra; Monson v. Lathrop,* 96 Wis. 386, 71 N. W. 596, 65 Am. St. R. 54 (1897) *dictum; Peterson v. Western Union Telegraph Company,* 75 Minn. 368, 77 N. W. 985, 43 L. R. A. 581, 74 Am. St. R. 502 (1899); and possibly in *Western Union Telegraph Company v. Cashman,* 149 F. 367, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693 (1906).

It has been held that a libelous meaning given to a telegram must be a reasonable one. As in *Rogers v. Postal Telegraph-Cable Company of Massachusetts,* 265 Mass. 544, 164 N. E. 463 (1929), wherein an unidentified woman sent a telegram to the plaintiff saying, "Are you still here come see me need some money Rose," the unreasonable meaning given to the message by the plaintiff's distressed wife did not render the telegraph company liable. Rose might have been the plaintiff's wife, sister or daughter so far as the telegraph company could reasonably be expected to know. And so if the message is capable of innocent construction, the telegraph company will not be held liable. This rule seems to be followed in: *Gray v. Western Union Telegraph Company,* 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. R. 259 (1891) *dictum; Western Union Telegraph Company v. Ferguson,* 57 Ind. 495 (1877) *dictum; Stockman v. Western Union Telegraph Company,* 10 Kan. App. 580, 63 P. 658 (1901); *Grisham v. Western Union Telegraph Company, supra;* and *Nye v. Western Union Telegraph Company, supra.* See annotation in 63 A. L. R. 1118.

Returning to the principal case, the court very practically justifies the granting of a privilege to telegraph companies. Speed is the essence of the telegraph service. The court said, "If the telegraph companies are to handle such a volume of business expeditiously, it is obvious that their agents cannot spend much time pondering the contents of the messages with a view to determining whether they bear a defamatory meaning, and if so whether the sender might nevertheless be privileged. The effect of putting such a burden upon telegraph companies could only result in delayed transmission of, and in some cases refusal to transmit, messages which the courts after protracted litigation might ultimately determine to have been properly offered for transmission and which the sender was entitled to have dispatched promptly even though defamatory matter was contained therein.

"Manifestly the telegraph company's privilege cannot be restricted to cases in which the sender in fact was privileged, as often he may be. It must be broader than that, and the cases so hold. *Nye v. Western Union Telegraph Company, supra; Western Union Telegraph Company v. Brown, supra; Klein v. Western Union Telegraph Company, supra.* See *Flynn v. Reinke, supra; Young B. Smith, Liability of a Telegraph Company for Transmitting a Defamatory Message,* 20 COL. L. REV. 30, 369 (1920)."

In conclusion then, it would seem that if a telegraph company is to be held liable for transmitting a defamatory message, it can only be when the company had knowledge that the sender was not privileged, or when it happened to know that the message was false and sent in bad faith.

Robert K. Rodibaugh.