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Recent Decisions

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a part of the will, where there is no reference in the will to identify or incorporate it but state that such evidence must be received with caution.[50] A marginal insertion, although not connected with the will properly, or if it extends below the signature of the testator, will not invalidate the will if it merely declares a distribution which the law would decree if the provision were omitted.[51] Also, a signature in or after the attestation clause, but following the testimonium clause, if intended to be a subscription of the will, will satisfy the statute.[52] This is on the theory that the attestation clause is not strictly a part of the will but a certificate thereto which the signature may precede or follow. But the contrary view will prevail if the signature is for the purpose of the attestation clause only and there was no intention that it operate as a subscription.[53]

Eli M. Abraham.

RECENT DECISIONS

LIBEL AND SLANDER—CRIMINAL LIABILITY—DEFENSES—PRIVILEGE.—The Appellant was convicted of sending libelous matter through the mails, in violation of Section 212 of the Criminal Code. He had mailed two postal cards, one of which stated that a candidate for election to the city council of Los Angeles had been dismissed as manager of student affairs at the University of California at Los Angeles because of gross mismanagement of finances, and the other stated that he was "dismissed as manager of student affairs when the body found itself without funds . . . and facing a deficit of $126,000.00." This was held, on appeal to the Circuit Court of Appeals, Ninth Circuit, not to be nonmailable matter within the statute, since it did not charge embezzlement or impute embezzlement or misapplication. *McKnight v. United States,* 78 Fed. (2d) 931 (C. C. A. 9th, 1935).

In reference to the first card, the court said that the language did not *per se* come within the inhibition of section 212, because "'One may be a mismanager without being dishonest.' . . Persons of highest repute are known to be poor managers of business affairs." With respect to the second card, the court said that the depletion of the funds might have resulted from legitimate and necessary uses to which the money was put or for which obligations were incurred; and that the charge of depletion and incurring a deficit amounted, at most, to a simple charge of mismanagement. The court added: ". . . since the cards do not *per se* offend the statute, the charge that they were libelous . . . must be considered in the light of the well-settled rule that the publication of truthful information regarding candidates for public office is for the interest of the public and, therefore, privileged."

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50 In re Swire's Estate, *op. cit. supra* note 35. In this case the marginal writing was *clause 9* of the will, and it was above the testator's signature.

51 In re Gibson's Estate, 113 N. Y. S. 266, 128 App. Div. 769 (1908).

52 In re Dutcher's Estate, 172 Cal. 488, 157 Pac. 242 (1916); Lucas v. Brown, 187 Ky. 502, 219 S. W. 796 (1920); In re Young's Will, 141 N. W. 226 (Wis. 1913).

53 In re Rudolph's Will, 167 N. Y. S. 760, 180 App. Div. 486 (1917); Sears v. Sears, *op. cit. supra* note 24.

An *innuendo* can interpret but not enlarge the sense of expressions beyond their usual acceptance and meaning. This is the rule in both civil and criminal actions. 2 WHARTON'S CRIMINAL LAW (12th ed.) § 2001; 1 COOLEY ON TORTS (3rd ed.) 414, 415. In the principal case the government contended that the cards were libelous because they conveyed to the mind of the recipient the idea that the candidate was guilty of theft of the money of the University. But the Circuit Court of Appeals said: " 'The statute alone creates and defines the crime, and the government cannot, by suggestion, *innuendo,* averment, or charge, add to its provisions . . .' "

There is a conflict of authority on the extent of the privilege of electors to inform other electors as to the conduct of candidates for public office. One view is that opinions may be expressed freely when based on actual facts; but false statements of the facts on which the opinion is based are actionable. HARPER, LAW OF TORTS § 249; *Dauphiny v. Buhne,* 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136 (1908); *Jones v. Townsend,* 21 Fla. 431, 58 Am. Rep. 676 (1885); *Eikhoff v. Gilbert,* 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451 (1900); *Upton v. Hume,* 24 Ore. 421, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863 (1893); *Nevada State Journal Pub. Co. v. Henderson,* 294 Fed. 60 (C. C. A. 9th, 1924); *Post Pub. Co. v. Hallam,* 59 Fed. 530 (C. C. A. 6th, 1893). This view applies in the case of newspaper libel. *Davis v. Shepstone,* 11 A. C. 187 (1886); *Jones v. Townsend, supra;* 10 COL. L. REV. 778, 779. The fact that the publication may reach noninterested persons is not the basis of the rule in the case of newspapers. 10 COL. L. REV. 778, 780, citing *Aldrich v. Press Printing Co.,* 9 Minn. 133 (1864). The minority view is that the discussion of candidates for public office is privileged even though it involves a misrepresentation of fact, so long as the publisher is actuated by good motives. HARPER, LAW OF TORTS § 249; *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390 BOHLEN, CASES ON TORTS (3rd ed.) 819 (1908). See Van Vechten Veeder, *Freedom of Public Discussion,* 23 HARV. L. REV. 413.

The extent of the privilege is the same in both civil and criminal actions. As was said in *Coleman v. MacLennan, supra*: "It is the occasion which gives rise to the privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded."

In *United States v. Shepard,* Fed. Cas. No. 16, 273 (E. D. Mich. 1870), the court said: ". . . state laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of Congress or by constitutional provision. . . . We have said the common law governs in criminal cases in the United States courts . . ." While there appears to be no authority on the subject, it would seem that the same principle should govern in defining the offense named in the statute. In *Knowles v. United States,* 170 Fed. 409 (C. C. A. 8th, 1909), the court, in construing a federal statute making it a misdemeanor to mail any obscene, lewd, or lascivious paper or writing, said: "The word 'obscene' should be given in this statute fully as broad a significance as it had at common law."

Since the statute involved in the principal case does not define defamatory matter, and since the statute is to be construed in the light of the common law, the question arises as to whether the majority rule on privilege or the minority rule is applicable. The court indicates that the majority rule controls.

Thomas G. Proctor.

STATUTE OF LIMITATIONS—SUBSTITUTION OF PARTIES AFTER EXPIRATION.—The recent case of *Van Der Stegen v. Neuss, Hesslein & Co.*, 270 N. Y. 55, 200 N. E. 577 (1936), presents an interesting and important question of the right of the trustee or curator in bankruptcy to be substituted for the bankrupt after the statute of limitations had run in a cause of action instituted by the bankrupt before the period of limitations had elapsed. The plaintiff, Van Der Stegen, was engaged in selling eggs on the world market and on January 30, 1920, contracted with the defendant, the Neuss, Hesslein & Co., Inc., at its branch in Shanghai, China, for the sale of a quantity of eggs. A short time thereafter the defendant breached the contract. On June 20, 1920, Van Der Stegen brought suit against the defendant in the United States Court for China at Shanghai and recovered judgment. This judgment was reversed upon the appeal of the defendant to the United States Circuit Court on jurisdictional grounds. The merits of the cause were not considered and it was conceded that the plaintiff was entitled to judgment upon the merits. This action was commenced upon the same cause by Van Der Stegen on February 16, 1926, which was three months and eleven days before the six-year period of limitations expired. During the pendency of this suit the plaintiff was adjudicated a bankrupt by the Belgium Consular Court in Shanghai. Then on September 10, 1926, which was more than three months after the expiration of the six-year statute of limitation, the curators or trustees in bankruptcy moved to be substituted for the bankrupt as plaintiffs. This motion was denied by the lower court but the Appellate Division reversed the denial and brought the curators in as added parties plaintiff. The defendants maintained that the curators should not have benn substituted because they were merely the assignees of Van Der Stegen's rights and therefore their claim is a separate, distinct, and independent cause of action. The Court of Appeals of New York failed to sustain the defendant's contention. The court said that the defendant's argument was too strict a construction. It held that the trustees' claim was not a new cause of action but that their interest was merely a continuation of the right of the bankrupt, Van Der Stegen, which the trustees were enforcing as the legal and proper representatives. The general principle of law derived from the case is that the parties to an action which was commenced within the period of limitations can be substituted after the running of the statute, provided the cause of action is not changed.

There is a long line of cases holding that a party in a representative capacity can be substituted by himself, as an individual, or vice versa, after the statute of limitations has run, if the cause of action remains the same. For example, in the case of *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953 (1910), the plaintiff instituted the action in his individual capacity but after the period of limitation had expired he moved to amend the complaint so that he could be made plaintiff as administrator. The court allowed the motion. Again in *M., K. & T. Ry. Co. v. Wulf*, 226 U. S. 570 (1912), the plaintiff brought a timely suit in her individual capacity for the death of a son. As the Federal Employer's Liability Act provided that such an action could be brought only by the personal representative of the deceased, the plaintiff petitioned the court to allow an amendment to the complaint so that she could be made plaintiff as administrator in place of in her individual capacity. Even though the substitution was requested after the statute of limitations had expired, the court permitted the amendment. The following cases also allowed the substitution of the same party in different capacities after the period of limitations had run: *Beresh v. Supreme Lodge Knights of Honor*, 255 Ill. 122, 99 N. E. 349 (1912); *Foster-Holcomb Inv. Co. v. Little Rock Pub. Co.*, 236 S. W. 597 (Ark. 1922); *Cox v. San Joaquin Light & Power Corp.*, 166 Pac. 578 (Cal. 1917); *Nashville, C. & St. L. Ry. Co. v. Anderson*, 185 S. W. 677 (Tenn. 1916).

Many authorities have upheld the proposition that a new and distinct party can be substituted as plaintiff or defendant after the running of the statute of limitations if the claim is not thereby altered. In *Weldon v. United States,* 65 Fed. (2d) 748 (C. C. A. 1st, 1933), an injured workman elected to take the benefits of the Workmen's Compensation Act. By such election he automatically assigned his claim for such injury to his employer. After receiving compensation the employee brought suit against the United States for unlawfully causing the injury. Subsequent to the expiration of the two-year period of limitation the employer moved to be substituted as plaintiff. The appellate court reversed the decision of the lower courts refusing to allow the substitution, and such reversal was affirmed by the Supreme Court. In *Service v. Farmington Sav. Bank,* 62 Pac. 670 (Kan. 1900), the court permitted the substitution of the purchaser of a note for the original payee after the period of limitation had become exhausted. Therein the court held in general that as the substitution of the buyer of the note did not in fact change the nature or the identity of the action originally brought against the defendants, the statute of limitations could not apply. Directly following this principle are the following decisions: *In re General Rolling Stock Co.,* L. R. 7 Ch. App. 646 (1872); *McDonald v. State of Nebraska,* 101 Fed. 171 (C. C. A. 8th, 1900); *Houghland v. Avery Coal & Mining Co.,* 93 N. E. 40 (Ill. 1910); *Missouri, K. & T. Ry. Co. v. Hunter,* 216 S. W. 1107 (Tex. Civ. App. 1919); *Manistee Mill Co. v. Hobdy,* 51 So. 871 (Ala. 1909); *Muir v. City of Pocatello,* 212 Pac. 345 (Idaho, 1922).

The fundamental reason for this well-established principle is that the substitution does not change the cause of action. Inasmuch as the amendment does not result in the institution of a new cause of action, there is no interval of time before the substitution for the statute of limitation to intervene. The defendant having been served and notified of the nature of the claim at the commencement of the action has no right whatsoever to object to the substitution. In commenting upon the reason for the decision of the United States Supreme Court in the case of *New York Central & H. R. R. Co. v. Kinney,* 260 U. S. 340 (1922), Justice Holmes said: "When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist . . ."

John S. Montedonico.

TORTS—DUTY OF OCCUPIER OF PREMISES WITH RESPECT TO ACTS DONE OFF THE PREMISES WHICH RESULT IN INJURY TO ONE ON THE PREMISES.—A recent New York case introduces a limitation on the immunity of an occupier of premises for damages to a trespasser that seems never to have been applied before. In *Ehret v. Village of Scarsdale,* 269 N. Y. 198, 199 N. E. 56 (1935), the defendant, while laying a pipe drain, negligently damaged a gas main beneath the street and not upon his premises; he inclosed the injured main in the pipe drain. A year later, the gas escaping from the main, flowed along the pipe drain and into the defendant's vacant house. The plaintiff's intestate, a trespasser there, was asphyxiated. Held, that the defendant was liable since the rule of immunity of an occupier of premises for damages suffered by a trespasser does not extend to an act or omission done off the premises which results in injury to a trespasser on the premises. On the contrary, this rule of immunity appears to have been ap-

plied only to cases where a trespasser sought to enforce liability upon a landowner or occupier of premises for an act or omission by him, upon his own land which causes danger to persons coming upon his land.

As a general rule, it may be stated that a trespasser must take the premises as he finds them. The landowner is under no obligation to see that they are in a safe condition for his presence there. *Susquehanna Power Co. v. Jeffress,* 159 Md. 465, 150 Atl. 788 (1930); RESTATEMENT OF THE LAW OF TORTS (1934) § 333. He owes the trespasser no duty of affirmative care, and is only bound to refrain from wilful and wanton acts. CHAPIN ON TORTS § 106; *Mendelowitz v. Neisner,* 258 N. Y. 181, 179 N. E. 378 (1932); *Hoberg v. Collins, Lavery & Co.,* 80 N. J. Law 425, 78 Atl. 166 (1910). But if the presence of the trespasser is known, or under the circumstances should have been known, to the owner or occupier of the premises, an obligation arises to use due care with respect to such trespasser as to activities conducted on the premises. CHAPIN ON TORTS § 106; *Hector Mining Co. v. Robertson,* 22 Colo. 491, 45 Pac. 406 (1896). The law does not overlook the status of a trespasser as a human being, in allowing an owner or occupier of premises to exercise the right which he has as such owner or possessor to use his land as he sees fit. For that reason, the occupier of premises owes to a trespasser the duty not to set traps or pitfalls to injure him, or not to carry on activities without due care towards the trespasser, when the latter's presence is known of or should have been known of. *Bird v. Holbrook,* 4 Bing. 628, 130 Eng. Rep. 911 (1828). The reasons for this duty have been stated by Bohlen and Burns, in a recent article, as follows: "One who puts himself in a position of danger, however wrongfully, does not thereby forfeit all right to safety. It has never been held that contributory fault, whether of inadvertance or of deliberate choice to encounter unnecessarily a known danger, is a defense against one who takes advantage of another's carelessness or temerity to inflict an intentional injury upon him. A trespasser, even if he knows of the setting of spring guns, is merely braving a danger and is not deliberately encountering a certainity of injury. His trespass expresses no such willingness to be injured as to make it amount to the giving of consent thereto." Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices* (1926) 35 YALE L. JOUR. 525, 537, 538.

The basis of exemption from liability to a trespasser, with the aforementioned exceptions, is founded upon the landowner's privilege, as possessor, and not upon the fact that the trespasser, as such, is a wrongdoer. Thus, the law in effect recognizes the possessor as privileged to ignore the actual probability that others will trespass upon his land and that their safety will depend upon its condition and the manner in which the possessor carries on his activities thereon. See RESTATEMENT OF THE LAW OF TORTS (1934) § 333.

Although a person trespassing upon the property of another is a wrongdoer, there are certain rights and privileges which he enjoys. As will be noted, the law grants these rights and privileges to a trespasser, because of his position as a human being, and because they will not place a strict legal right above the value of human life. An owner or occupier of premises may not use dangerous or unnecessary instruments for the protection of his property against trespassers. A ferocious animal comes within the classification of a dangerous instrument, so that a trespasser has the right of protection therefrom. So it has been held that the owner of a ferocious dog is liable if the dog is permitted to run at large on his owners premises and a trespasser is thereby bitten. *Woolf v. Chalker,* 31 Conn. 121, 81 Am. Dec. 175 (1862); *Meibus v. Dodge,* 38 Wis. 300 (1875).

There are some instances where the private right to the exclusive possession of one's property must yield to the common welfare and private necessity. When

an invasion of the interests in property is made for the purpose of saving the actor's life or property from a harm which is greatly disproportionate to that which will accrue to the other's property from the invasion, the actor is privileged to invade the premises to save such life or property. *Ploof v. Putnam,* 81 Vt. 471, 71 Atl. 188 (1908). This privilege to make an otherwise wrongful entry upon the premises of another is subject to the limitation that the actor is liable for any actual loss caused by such invasion. *Vincent v. Lake Erie Transportation Co.,* 109 Minn. 456, 124 N. W. 221 (1910). It is therefore an incomplete privilege; yet, it does exist.

The landowner or occupier of premises may defend his property against trespassers who interfere with the possession of such property. If the trespasser is already upon the premises, the owner or occupier thereof may use reasonable force to eject him, after first making a request to the trespasser to leave, or if under such circumstances that a request would be dangerous or futile, such request is excused. *Tipswood v. Potter,* 31 Idaho 509, 174 Pac. 133 (1918); *Gungrich v. Anderson,* 189 Mich. 144, 155 N. W. 379 (1915). Even in ejecting a trespasser from one's land, he is entitled to some protection, for the owner or occupier of premises may not use more force than is necessary, and he may not take life or inflict serious bodily injury on a trespasser in ejecting him, unless in self-defense or to prevent a felony. *People v. Doud,* 223 Mich. 120, 193 N. W. 884 (1923).

Where trespassers constantly intrude upon a limited area, the owner or occupier of the premises who knows, or from facts within his knowledge should know, of their presence, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving serious bodily harm or a risk of death, in a reasonable manner with due regard for their safety. RESTATEMENT OF THE LAW OF TORTS (1934) § 334; *Herrick v. Wixom,* 121 Mich. 384, 80 N. W. 117 (1899). This duty to constant trespassers upon a given area is also extended to artificial conditions likely to cause serious bodily harm or death. The occupier of premises owes to such persons the duty to protect them from artificial conditions by reasonable warning. *Meyer v. Menominee & Marinette Light & Traction Co.,* 151 Wis. 279, 138 N. W. 1008 (1912).

The rule of immunity from liability for injury to trespassers caused by the condition of the premises is limited to the occupier of such premises, and it does not extend to third persons, also trespassing on the same property. One person should not be allowed to defend his wrongful act by showing that the party injured was engaged in doing something, which, as to a third person, was unlawful. The rule exempting the landowner from liability to trespassers injured through the condition of the premises is but the expression of the policy of the law to impose no duty upon the occupant of land to guard against such risks toward such persons. HARPER ON TORTS § 90. Thus, the rule having its basis on the right of ownership and possession, a third person, himself a trespasser, would not come within this rule of immunity from liability, and would be liable to a trespasser on the land for risks incident to the condition of the premises. *Humphrey v. Twin State Gas and Electric Co.,* 100 Vt. 414, 139 Atl. 440 (1927).

The Alabama Supreme Court has expressed itself on this subject in the dictum in *Alabama Fuel & Iron Co. v. Bush,* 204 Ala. 658, 86 South. 541 (1920), reaching a slightly different result. In that case the defendant negligently permitted his horse to run away on a highway, resulting in injury to the plaintiff, who was a trespasser on the defendant's land. The court held that the fact that the owner or occupier of premises does the negligent act off his land does not increase his duty to a trespasser on his premises, and the rule of immunity from liability would therefore apply. But in that case the injury resulted immediately and