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Monopolies - Suppression of Competition - Use of Third Party Technique

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statutory provisions for such reservation,[4] and others holding that it is not essential that the body in control of sales should be given express authorization for the inclusion of the reservation.[5] Determination as to the existence of this power necessarily involves the construction of the authorizing statute to determine the legislative intent.

The final construction of a statute rests with the courts,[6] but the construction by the executive charged with the duty of execution is to be considered and given weight,[7] especially when such construction is in accord with previous decisions.[8] In the instant case an interpretation of the statute by the State Land Department that such reservation was permissible was apparently not in harmony with previous judicial decisions.[9]

It is desirable that the legislature in passing acts of this nature indicate their intent with clarity for the intent of the legislature is to be ascertained primarily from the language used in the statute.[10] It is illustrative that in a recent Wyoming case, a statute reading, "the state shall convey title in fee simple", was held not to establish that title to such land when sold must include all minerals;[11] in a Colorado case the statute read approximately the same, but it was held that the State Board of Land Commissioners had no power to reserve the mineral rights in such conveyance and such reservation was void.[12]

Since the instant case was decided, the Arizona legislature has attempted to make their law more definite by the adoption of a statute providing for proportionate reservation of mineral rights in all sales of state owned land.[13] The newly adopted statute is similar to that of North Dakota.[14]

TED CAMRUD.

MONOPOLIES — SUPPRESSION OF COMPETITION — USE OF THIRD PARTY TECHNIQUE. — Defendants, a group of eastern railroads, engaged a public relations firm for the purpose of creating public resentment against the long-

4. See Walpole v. State Land Com'rs., 62 Colo. 554, 163 Pac 848 (1917); Hugh v. Thornton, 155 Minn. 432, 193 N.W. 723 (1923); State v. McKelvie, 111 Neb. 224, 196 N.W. 110 (1923).

5. See Terry v. Midwest Refining Co., 64 F.2d 428 (10th Cir. 1933); State *ex rel.* Otto v. Field, 31 N.M. 130, 241 Pac. 1027 (1925); State *ex rel.* Cross v. Board of Land Com'rs, 50 Wyo. 184, 58 P.2d 423 (1946).

6. *E. g.*, Twaits v. State Board of Equalization, 93 Cal. App. 2d 796, 210 P.2d 40, 42 (1949) (dictum).

7. See, *e. g.*, State v. Davenport, 61 Ariz. 355, 149 P.2d 360 (1944).

8. See Prichard v. Southern Pac. Co., 9 Cal. App. 2d 704, 51 P.2d 428 (1935).

9. See Campbell v. Flying V. Cattle Co., 25 Ariz. 557, 220 Pac. 417 (1923). The state suggested that the instant case is not controlled by the earlier case, for the reason that in the prior case the notice of sale did not recite that such reservation would be made, but the *Campbell* case held it is immaterial that purchaser knew the patent contained reservations, since the law did not authorize the state to impose such a condition in making the sale.

10. See, *e. g.*, Garrison v. Luke, 52 Ariz. 50, 78 P.2d 1120, 1122 (1938) (dictum). See also State v. California Co. 56 N.W.2d 762 (N.D. 1953); Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137 (1951) (holding reservation of minerals by the county in a deed after tax sale was invalid because of conflicting statutes).

11. State *ex rel.* Cross v. Board of Land Comm'rs., 50 Wyo. 181, 58 P.2d 423 (1953).

12. Walpole v. State Land Comm'rs., 62 Colo. 554, 163 Pac. 848 (1917).

13. Ariz. Rev. Stat. § 37-231 (1957) "All sales, grants, deeds or patents to any state lands shall be subject to and shall contain a reservation to the state of an undivided one-sixteenth of all oil, gases, and other hydrocarbon substances, coal or stone, metals, minerals, . . .".

14. N. D. Rev. Code § 38-0901 (1943) "In every transfer of land . . . by the state of North Dakota . . . fifty per cent of all oil, natural gas, or minerals which may be found on or underlying such land shall be reserved to the state of North Dakota . . .".

haul trucking industry. The public relations firm paid (or created) various organizations or engaged persons, who were apparently independent of the controversy, to actively campaign against the truckers. The role of the railroads was never disclosed to the public. This is known as the "third party technique".[1] The public generally accepted the statements of these "independent" third parties with the result that legislation unfavorable to the trucking industry was enacted in several states. Plaintiffs, members of the long-haul trucking industry, brought this action under the Sherman and Clayton Anti-Trust Acts for conspiracy in restraint of trade. The defendants counterclaimed alleging that the truckers had used the same technique against the railroads. Both the plaintiffs and the defendants contended the other was attempting to monopolize the long-haul business. The District Court *held* that the concerted action of the railroads through the third party technique was a conspiracy aimed *directly* at injuring the business of the truckers and was, therefore, a conspiracy in restraint of trade under the anti-trust acts. As the use of the technique by the truckers was aimed *directly* at helping their own business, and only *indirectly* at injuring that of the railroads, their employment of the technique was legal. *Noerr Motor Freight v. Eastern R.R. Pres. Conf.*, 155 F. Supp. 768 (E.D. Penn. 1957).

The use of the third party technique in business is not new. It is a well known fact that the statements of "independent" parties are more persuasive than are similar statements made by an interested party. Many groups and persons attempt to take advantage of this fact by establishing secret relationships with apparently disinterested third parties, who in return for favors will publicly aid and abet the cause for which their services have been purchased. The legal implications of this technique are analagous to fraud. As a false statement is not actionable unless a party relies and act upon it to his damage (it then becoming fraud),[2] so also is the third party technique actionable only when it can be collaterally attacked as designed to accomplish an unlawful end.[3] The employment of the technique in itself does not create a liability in the user except where provided by statute. Thus, nondisclosure of a "principle" through established registration procedures in-

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1. The following are several examples of use of the "third party technique" by the railroads in the instant case: (1) The officers of one organization were charged with being in conspiracy with the railroads. They sent a letter to every editor in the state denying the charge—the stationery and stamps were paid for by the railroads. (2) Articles by distinguished authors were printed in *Everybody's Digest, American Magazine, Harper's, Reader's Digest, Saturday Evening Post, National Grange Monthly, Parade, People, Country Gentleman,* and others. Each of these articles condemned the trucking industry. Each was authored by a "ghost writer" paid by the railroad, or, at best, based upon statistics supplied by the railroads. (3) A New York clubwoman executive was paid $13,000 in a short period of time to campaign against truckers. Wishing to have her appear as an expert in the field of transportation, the public relations firm had a pamphlet written which bore her name as authoress. (4) A retiring college professor, who it was thought would "be very glad to have someone else do his research for him", was provided with the "kit" of statistical information prepared by railroad heirlings. Unknown to the professor, every speech, letter, or news release delivered in his name was edited by the public relations firm, and on one occasion by a railroad official. (5) An outstanding and apparently disinterested Princeton professor was chairman of a committee which made recommendations to the Governor of New Jersey with respect to taxes in the State. He worked closely with railroad men and was instrumental in gaining passage of a weight-distance tax on truckers. In none of the above instances was the part of the railroads disclosed.

2. Restatement, Torts, § 525 (1938).

3. See United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626, 674 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

volves criminal aspects regarding lobbyists,[4] foreign controlled military and political organizations,[5] and all Communist "front" organizations.[6] The Federal Communcations Commission also requires that broadcasting stations announce the name of any person or organization that pays, either directly or indirectly, for a broadcast.[7] In this manner it is presumably possible for the public to obtain some degree of knowledge regarding the underwriters of these various groups or individuals.

A business utilizing the technique in honest competition—toward a legal end—without attempting to *directly* harm a competitor's business incurs no liability.[8] The end sought, or that which must necessarily result, must be actionable. If the end result is the creation of a monopoly, the use of the technique may be attacked as a violation of anti-trust statutes.[9] In other instances the use may create an actionable interference with prospective advantage,[10] or it may be unfair competition.[11] Another disadvantageous feature of the technique is the danger of running afoul of the Internal Revenue Department. A business which takes a deduction for advertising or other expense for the cost of a campaign of this nature runs the risk that such a deduction would not be allowed as being an expenditure of money for an illegal purpose.[12]

It is apparent that if the technique is to be used effectively, the public must remain ignorant of the true source of the information and propaganda which is being disseminated. The public, however, is entitled to know the true supplier of such information in order that they may make intelligent appraisals of vital subjects, and may know when material put before them is biased. As one judge pointed out, "[T]he only conceivable reason for anonymity of political broadcasting" (or for that matter any dissemination of information) "is a purpose of deception, and that purpose is enough to validate a requirement of identification."[13] It appears that the public interest demands that a legislative attempt be made to relieve some of the more flagrant abuses of the technique as represented by this case.

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MUNICIPAL CORPORATIONS — TORTS — LIABILITY FOR NEGLIGENCE IN EXERCISE OF GOVERNMENTAL FUNCTION. — Plaintiff's husband was jailed for drunkeness and died of suffocation as a result of a fire during the absence of the jailer. In an action for wrongful death against the city, the Supreme

4. Legislative Reorganization Act of 1946, 60 Stat. 841, 2 U.S.C. § 267 (1952).
5. 62 Stat. 808 (1948), 18 U.S.C. § 2386 (B) (1) (1952); 52 Stat. 632 (1938), 22 U.S.C. § 612 (1952).
6. Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. § 786 (b) (1952).
7. 48 Stat. 1089 (1934), 47 U.S.C. § 317 (1952).
8. It must be understood, however, that where a combination is formed it is the actual result which governs and not the intent of the parties forming that combination. See United States v. Columbia Steel Co., 334 U.S. 495 (1948).
9. *Cf.* American Tobacco Co. v. United States, 328 U.S. 781 (1946); Nash v. United States, 229 U.S. 373 (1913).
10. Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309 (N.D. N. Y. 1912).
11. Even though not amounting to legal fraud. *Cf.* Federal Trade Comm'n. v. Algoma Lumber Co., 291 U.S. 67 (1934).
12. Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941); Great Northern Ry. Co. v. Commissioner, 40 F.2d 372 (8th Cir. 1930), *cert. denied*, 282 U.S. 855 (1930).
13. Communist Party of the United States v. Subversive Activities Control Board, 223 F.2d 531, 556 (D.C. Cir. 1954), *rev'd for other reasons*, 351 U.S. 115 (1956).