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Note and Comment

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NOTE AND COMMENT

THE DOCTRINE OF UNFAIR TRADE.—The decision of the Circuit Court of Appeals of the Second Circuit, in *Rushmore* v. *Manhattan Screw & Stamping Works*, 163 Fed. 939, has been criticized apparently because it is assumed to be a departure from precedent and an extension of the doctrine of unfair trade farther than it should be carried. The doctrine of unfair trade is very simple, indeed; it is that no one has a right to sell his goods as the goods of another. *Reddaway* v. *Banham* [1896], A. C. 199; *Shaver* v. *Heller*, 108 Fed. 821. The principle is perfectly general and without exception. *Saxlehner* v. *Apollinaris Co.* [1897], 1 Ch. 893, 14 R. P. C. 645, 652. It makes no difference by what means a particular trader's goods are identified, whether by a personal, geographical or descriptive name, a form of receptacle, a style or color of label or by the appearance or configuration of the goods themselves, if it is shown as a fact that any of these things perform the function of identification (which is always a matter of evidence in the particular case), duplication of the particular identifying element by a rival trader, under such circumstances as to render deception of purchasers a probable consequence, will be enjoined. *Hires* v. *Consumers Co.*, 100 Fed. 809; *Meyer* v. *Bull*, 58 Fed. 884; *Mills Co.* v. *Eagle*, 86 Fed. 608.

The extent of the relief is dependent upon the necessities of the situation as shown by the evidence in the particular case. *Reddaway* v. *Banham* [1896], A. C. 199, 13 R. P. C. 218; *Powell* v. *Birmingham Vinegar Co.* [1897], A. C. 710, 14 R. P. C. 720, 727.

The only difference between unfair trading by duplication of an arbitrary name or symbol and that accomplished by imitation of form of package, label or style, configuration of goods or the deceptive use of personal, geographical or descriptive name, is that the arbitrary name or sign can have no significance except as pointing to the origin of the goods. Its province is to denote the commercial origin of the product, or it has no function whatever. Its use by another is therefore presumptively fraudulent and calculated to deceive. But in the case of the imitation of a form of package, color, size or appearance of label or general style, configuration of goods or the use of descriptive, personal or geographical names, evidence must be adduced to satisfy the court that these, besides their ordinary significance or utility, possess a secondary or additional function of identifying the origin of the goods, and when this proof is made the legal consequences invariably follow (*Reddaway* v. *Banham* [1896], A. C. 199, 13 R. P. C. 218, 224, 228), and the use will be restricted, or, if the facts of the case warrant the holding that no honest use by the second trader is possible, absolute restraint will be imposed. *Montgomery* v. *Thompson* [1891], A. C. 217, 8 R. P. C. 361. *Sheffield King Milling Co.* v. *Sheffield Mill & Elevator Co.*, 117 N. W. 447, 450.

The facts in *Rushmore* v. *Manhattan Screw & Stamping Co.*, 163 Fed. 939, were simple. Complainant was a manufacturer of automobile headlights of a peculiar and distinctive shape. Defendant produced a lamp which was a substantial and unnecessary duplicate of this shape, and, as was found by the court below, this was "the unnecessary imitation of a non-functional part of his well known lamp." Complainant's lamp was known as the Rushmore Lamp and was designated as "Flare Front." Defendant attached to its lamp a plate containing the word Phoebus and its corporate name, as manufacturer. Defendant also used, as applied to its lamps, the name "Flare Front." With respect to the name it was held that the evidence adduced did not establish the secondary meaning of the words "Flare Front," and the order of the court below restraining their use by defendant was reversed; the injunction against the duplication of the visual appearance of the lamps was affirmed.

It seems to be assumed by those who have criticized the ruling in this case that there is involved some novel application of the unfair trade doctrine. As a matter of fact, there are numerous cases in which relief more or less complete has been granted against the deceptive imitation of the form of an article: *Rushmore* v. *Saxon*, 158 Fed. 499 (involving the Rushmore automobile lamp); *Sterling Remedy Co.* v. *Spermine Medical Co.*, 112 Fed. 1000 (shape of a cathartic tablet); *Frost* v. *Estes*, 156 Fed. 677 (clasp of a hose supporter); *Globe Co.* v. *Brown*, 121 Fed. 90 (filing case); *Fox* v. *Glynn*, 78 N. E. 89; *Fox* v. *Hathaway*, 85 N. E. 417 (visual appearance of a loaf of bread); *Buck's Stove Co.* v. *Kiechle*, 76 Fed. 758 (white enamel oven

lining for stoves); *Elliott* v. *Hodgson*, 19 R. P. C. 518 (shape of a cigar); *Edison* v. *Gladstone*, 58 At. 391 (plates for electric batteries); *Muller* v. *McDonald*, 164 Fed. 1001, 1004 (stop and waste cocks); *Scriven* v. *North*, 134 Fed. 366 (seams in jean underdrawers): *Victor Co.* v. *Armstrong*, 134 Fed. 366 (talking machine records); *Yale & Towne* v. *Adler*, 154 Fed. 37 (padlocks); *Bunker* v. *Kenna, Price & Steuart*, Am. Trade Mark Cas. 883 (spiral springs for rocking chairs).

There is nothing sacred in the form of an article, there is no reason why any particular form should be permitted to be used under all circumstances, or why the means of promoting deception should be enjoined when consisting of technical trade marks, labels and names, and tolerated when accomplished in other ways.

In *Garrett* v. *Garrett*, 78 Fed. 472, Judge SAGE said (477):

"It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver."

In *Weinstock* v. *Marks*, 109 Cal. 529, 42 Pac. 142, which was a case where a competitor imitated the external appearance of complainant's department store. Judge GAROUTTE said (145):

"It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way."

* * * * *

"If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, 'If you cheat and

defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?' Equity will not concern itself about the means by which fraud is done. It is the result arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent."

The mere addition of the defendant's name (which was done in *Rushmore* v. *Manhattan Screw & Stamping Co.*) is obviously not a sufficient differentiation, for many persons who know an article and can identify it by some distinctive feature may not know the name of the maker or have in mind his personality. *Wotherspoon* v. *Currie,* L. R. 5 H. L. 508; *Bass* v. *Feigenspan,* 96 Fed. 206; *Lever* v. *Goodwin,* 4 R. P. C. 492, 506; *Powell* v. *Birmingham* [1897], A. C. 710.

This discussion heretofore has ignored the element of fraudulent purpose. An actual wrongful intent is no more an indispensable element in these cases than in any other case of tort. A man is presumed to intend the natural consequences of his acts. *Manitowoc Co.* v. *Numsen,* 93 Fed. 196; *Cuervo* v. *Owl Cigar Co.,* 68 Fed. 541, 542; *Rushmore* v. *Saxon,* 158 Fed. 499, 505. In the case immediately under discussion (*Rushmore* v. *Manhattan Screw & Stamping Co.*) there was distinct evidence of fraudulent intent on the part of defendant to palm off his lamps as the complainant's. The court expressly found that there was in the makeup of defendant's lamp the "unnecessary imitation of non-functional parts" of complainant's well known lamp. This is of itself significant evidence of a fraudulent purpose on the part of defendant to enable its lamp to be passed off as complainant's (*Singer Co.* v. *June,* 163 U. S. 169, 202), and while an actual fraudulent intent is not essential, its existence greatly simplifies the proof that the result is calculated to deceive (*Cellular Clothing Co.* v. *Maxton & Murray* [1899], A. C. 326, 16 R. P. C. 397, 405), for the courts are disposed to credit a person who intends to pass off his goods as another's with enough astuteness to adopt means sufficient to accomplish his purpose. *Slasenger* v. *Feltham,* 6 R. P. C. 531, 537; *Enoch Morgan's Sons* v. *Ward,* 152 Fed. 690, 693.

EDWARD S. ROGERS.

VALUING PROPERTY AND FRANCHISES OF PUBLIC SERVICE CORPORATIONS FOR FIXING RATES.—The Supreme Court of the United States has recently decided two important cases relating to the proper valuation of the property of public service corporations for the purpose of fixing rates to be charged for their services. These are *Knoxville* v. *Knoxville Water Company,* 211 U. S. —, 29 S. C. 148, and *Willcox* v. *Consolidated Gas Co.,* — U. S. —, 29 S. C. 192, both decided January 4, 1909.

In the first case a master had found the value of the company's property

to be $608,427, including, in addition to the tangible property, $10,000 for "organization, promotion," etc., and $60,000 for "going concern," because it was in successful operation; the gross income to be $88,481; operating expenses, $34,750; that the new rates would reduce the gross income to $70,857, and leave the net income $36,106, or $400 less than 6 per cent on the total valuation; and that 8 per cent, including 2 per cent for depreciation, was the minimum net return to which the company was entitled.

This finding was confirmed by the trial court, and it was contended that the findings of the master, confirmed by the court, were conclusive in the Supreme Court unless they were without support in the evidence or were founded upon erroneous views of law. The court, by Justice MOODY, says: The purpose of the suit is to arrest the operation of a law on the ground that it is void; the law here is a municipal ordinance, deriving its authority from the legislature, and must be regarded as an exercise of legislative power. While the courts can, on constitutional grounds, refuse to enforce such legislation, such power ought to be exercised only in the clearest cases; and where invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. In view of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though confirmed by the trial court. The power is best safeguarded by preserving to the court complete freedom in dealing with the facts, and nothing less than this is demanded by the respect due from the judicial to the legislative authority.

As to the $70,000 for "organization" and "going concern" included in the valuation, the court says: "We express no opinion as to the propriety of including these, * * * but leave the question to be decided when it necessarily arises. We assume, without deciding, that these items were properly added in this case." Deducting these, the value of the tangible property would be $538,427, which was determined by the master by ascertaining what it would cost to reproduce the existing plant as a new plant, and without allowing anything for depreciation. The city claimed there had been depreciation to the amount of $118,000, and the company admitted a depreciation of $77,000. The court said "it is clear that some substantial allowance for depreciation ought to have been made," exactly how much it is unnecessary to determine, for if only $50,000 are allowed, the estimated net earnings would return 6½ per cent on such corrected valuation.

Where the ordinance has not gone into operation, because enjoined, and its effect, if enforced, cannot be certainly known, and the company prefers "to go into court with the claim that the ordinance is unconstitutional," it must be prepared to show to the satisfaction of the court that the ordinance would be so confiscatory in its effect as to violate the Constitution of the United States, citing and affirming to same effect: *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 S. C. Rep. 441; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 S. C. Rep. 571; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 S. C. Rep. 804. Here the company is certain to receive substantially 6 per cent, or 4 per cent after allowing 2 per cent for depreciation, and we do not

feel called upon to determine whether this would amount to confiscation, or not, where the case rests upon speculation as to results, and the valuation was based upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties, and where the city authorities acted in good faith and tried, without success, to obtain from the company a statement of its property, capitalization and earnings. The courts should not have the whole burden of saving property from confiscation, but the bodies to whom the legislative power has been delegated ought to do their part, and the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based.

Further, in considering depreciation, this was stated to be *complete,* or such part of the plant as had, by destruction or obsolescence, perished as useful in operation, and *incomplete,* or such impairment in value as the parts still in use had suffered.—and it was contended that "in fixing the value of the plant, upon which the company was entitled to earn a reasonable return, the amounts of complete and incomplete depreciation should be added to the present value of the surviving parts. The court refused to approve this method, and we think properly refused. * * * Before coming to the question of profit at all the Company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. * * * It is entitled to see that from earnings the value of the property invested is kept unimpaired so that at the end of any given term of years the original investment remains as it was at the beginning. * * * If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or omission to exact proper prices for output the fault is its own, and the true value of the property then employed cannot be enhanced by a consideration of the errors in management which have been committed in the past." With this should be compared: *Redlands L., Etc., Water Co.* v. *Redlands,* 121 Cal. 363, 53 Pac. 791; and *Cedar Rapids Water Co.* v. *Cedar Rapids,* 118 Ia. 234, 91 N. W. 1081.

In the second, the gas case, the court reiterates that, before it will enjoin, the rates must be so unreasonable as to be equivalent, if enforced, "to the taking of property for public use without such compensation as is just, both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. The case ought to be a clear one before the courts ought to be asked to interfere. * * * especially before there has been any actual experience of the practical result of such rates."

Prior to 1884 there had been seven companies organized to furnish gas to the city and citizens of New York, each of which had been granted, as a gratuity, extensive and valuable franchises to lay pipes in the streets in certain portions of the city. In 1884 a law was passed permitting the consolidation of these companies, upon terms to be mutually agreed upon, and to issue stock in an amount not more than the fair aggregate value of the property, franchises and rights of the companies to be consolidated. Six of

the companies consolidated, and the other one went out of business. The tangible property was valued at $30,000,000 (round figures) and franchises at $7,781,000, and stock of the consolidated company to the sum of these was issued in exchange for the stock of the various companies, and the property transferred to the new company.

In 1906 the legislature of New York passed a law limiting the price of gas sold to private consumers to 80 cents per 1,000 cubic feet. The company sought to enjoin the enforcement of this rate because it was so low as to be confiscatory. A master found the value of the tangible property of the company to be $47,831,435; franchise, $12,000,000; the net income for 1905, under the old rates, to be $5,881,192; and the probable income under the new rates to be $3,030,000,—or considerably less than 6 per cent on the total value of tangible property and franchises,—$59,831,435. Upon these findings the circuit court entered a decree permanently enjoining the enforcement of the rates.

The master arrived at the value of the franchise by this proportion: $30,000,000 tangible property (in 1884) is to $7,781,000, franchise (in 1884) as $47,000,000 tangible property (in 1905) is to $12,000,000 franchise (in 1905). The Supreme Court, by Mr. Justice PECKHAM, says: "We cannot, in any view of the case, concur in that finding." The court, however, allowed the valuation of $7,781,000 of the franchise at the time of consolidation to stand. In 1885 a senate committee had, after investigation of the consolidation, reported that the companies had, prior to consolidation, earned dividends of 16 per cent upon their capital stock, and 25 per cent upon the money actually paid in; that they had been free from legislative regulation during this period; that they had an agreement among themselves fixing rates; that the people had paid the rates without protest; that the rates may have been too high, but they were not illegal; and that the valuation of the franchises computed upon dividends from these rates was not more than their fair aggregate value.

For more than twenty years the stock had been dealt in, and its validity had always been recognized; so the court held that this valuation ought to be accepted, but this decision "can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us." So, too, "the fact that the state has taxed the company upon its franchises at a greater value than is awarded them here is not material," for those taxes were properly treated as part of the operating expenses to be paid out of earnings before the net amount applicable to dividends could be arrived at, and that value probably will be largely reduced if the new rates go into operation.

The master combined the franchise value with that of "good will" and estimated the total at $20,000,000: the company had a monopoly in fact; the consumer must take gas from it or go without, for he cannot get gas anywhere else. "The court below excluded that item, and we concur in that action," says the Supreme Court.

The value of the property is to be determined as of the time when the inquiry is made regarding the rates; if it has increased in value since it was

acquired, the company is entitled to the benefit of such increase, as a general rule, though there may possibly be an exception where the property may have increased so enormously as to render a rate permitting a reasonable return upon such increased value unjust to the public,—a question left for further consideration when it should arise.

As to the rate of compensation for the use of the property, the court says: "There is no particular rate which must in all cases and in all parts of the country be regarded as sufficient; it must depend greatly upon circumstances and locality; the amount of risk is a most important factor, and the rate usually realized upon investments of a similar nature in that locality is another; the less the risk the less right to unusual returns. The risk here is almost a minimum, for the company monopolizes the gas service of the largest city in America; it seems as certain as anything of the kind can be that the demand will increase; an interest in such business is as near safe as can be imagined with regard to any private manufacturing business. Under such circumstances a return of 6 per cent upon the fair valuation would not be confiscatory; and, still further, where the large mass of the property is real estate, the value of which can be ascertained only by the varying opinions of expert witnesses who differ greatly in their estimates; and where increased consumption at the lower rate might result in increased earnings, without proportionally increasing cost of furnishing; and where the margin between possible confiscation and valid regulation is so narrow as here we cannot say that the rates are insufficient, upon the valuation corrected as indicated. "The company has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory;" but if, by the test of actual operation, the company does not obtain a fair return, it ought to have an opportunity of again presenting its case to court, and so the decree below is reversed and the bill dismissed without prejudice. See *Central of Ga. Ry.* v. *R. R. Com. Ala.*, 161 Fed. 925, 992.

The foregoing cases make more definite what perhaps has already been implied in former decisions of the Supreme Court in regard to the method of treating depreciation or increase in the value of property, the rate of compensation, and the uncertainty of estimates of value. They, however, leave the treatment of franchises still uncertain. *Brunswick* v. *Maine Water Co.*, 99 Me. 371, 59 Atl. 537; *Kennebec W. District* v. *Waterville*, 97 Me. 220, 54 Atl. 6, 60 L. R. A. 856; *Spring Valley W. W.* v. *San Francisco*, 124 Fed. 574; *San Diego W. Co.* v. *San Diego*, 118 Cal. 556; 62 Am. St. R. 261, 38 L. R. A. 460; *Consolidated Gas Co.* v. *New York*, 157 Fed. 849, 872. They also proceed along lines that indicate much greater caution in setting aside schedules of rates as confiscatory, based upon the idea that the earnings will be decreased by the same percentage that rates are decreased, without considering the probable effect upon increased patronage. Legislation regulating rates should provide for carefully valuing the property after full disclosure is made; fixing the rates at such a figure as to yield a fair income, considering the risk, upon the value of the property then being used; putting the rates into immediate effect, and testing the effect for a year or

more by actual operation, allowing the municipal corporation fixing the rates, during the test, to give bond to make good any deficit in the amount necessary for fair compensation, with interest, and to raise the sum necessary therefor by tax, or by a charge against the consumers and their property of their proportion of the deficit, after full and complete report by the company. Or in case the company seeks an injunction, on the ground the rates, if enforced, will be confiscatory, the courts should require the company to give bond to refund to those who pay, after the injunction is issued, the amounts improperly collected, in case the court should find after final hearing that the rates established were valid. Only in some such way can such matters be adjusted with fairness to all concerned, and, as the court says, it would be of lasting benefit if public service companies would meet the public officers half way in an effort to secure and consider the exact information necessary to determine with any degree of certainty what is right and fair in the particular case. H. L. W.

RIGHT OF THE INTERSTATE COMMERCE COMMISSION TO ADDUCE TESTIMONY. —The recent decision of the United States Supreme Court, limiting the power of the Interstate Commerce Commission to compel the presence and to require the testimony of an unwilling witness, has excited unusual interest, not only in professional circles, but generally throughout the country.

In November, 1906, the Commission of its own motion made an order, reciting the authority of the act to regulate commerce (Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), and authorizing an investigation and inquiry into and concerning "certain consolidations and combinations subject to the act," with a view to ascertaining "whether such consolidations and combinations result in violation of said act or tend to defeat its purposes." A hearing was duly instituted, and during the course of the inquiry the appellant Harriman was called by the Commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the executive committee of the Union Pacific Railroad Company, the relations between which company and certain other railroads were the subject of investigation. It developed in the course of the hearing that certain blocks of stock of these other companies had been acquired by the Union Pacific. Harriman was asked several questions designed to discover whether he or any other directors of the road had any interest in the stock so acquired. All questions of this nature, by advice of counsel, he declined to answer. From a decree of the circuit court, granting a petition of the Commission to compel an answer, Harriman appealed. *Held* (Mr. Justice DAY, Mr. Justice HARLAN and Mr. Justice MCKENNA, dissenting), that witnesses cannot be compelled to testify before the Interstate Commerce Commission except in connection with complaints for violation of the Interstate Commerce Act, or with investigation by the Commission of subjects that might have been made the object of complaint. *Edward H. Harriman* v. *Interstate Commerce Commission* (1908), 29 Sup. Ct. 115.

Power is conferred upon the Commission, under § 12 of the act as

amended March 2, 1889, and February 10, 1891 (3 U. S. Comp. Stat. 1901, p. 3162), to inquire into the management of the business of all common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and to carry out the objects for which it was created. It is further provided by the same section that the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all books and documents relating to any matter under investigation, from any place in the United States.

Mr. Justice HOLMES, for the court, in the main opinion, reasons that since § 13 of the act provides that parties having a grievance against a carrier shall file a complaint with the Commission, and prescribes generally how an inquiry shall be instituted, and that since § 14 makes it the duty of the Commission, whenever investigation shall be made, "to make a report which shall include findings of facts, etc.," these specific provisions operate to exclude the inference of any broader power in § 12. Hence, that the power of the Commission to adduce testimony is limited to cases where complaint is actually made or might have been made,—"where the investigation concerns a specific breach of the law."

Mr. Justice DAY, in a vigorous dissenting opinion, characterizes this construction of the act as, in effect, "entirely reforming the act of Congress, substituting for it, by judicial construction, a much narrower act than Congress intended to pass. and did, in fact. pass." He interprets the sections and provisions of the act referred to in the majority opinion as constituting "two kinds of investigation, one under § 12, upon the initiative of the Commission, without written complaint; the other under § 13, where investigation and orders are made upon complaint."

In the interpretation of the provisions of the Interstate Commerce Act it has been held that "the act is drawn upon broad lines and will be construed in the same manner." *Interstate Commerce Commission* v. *East Tennessee, etc., R. R. Co.*, 85 Fed. 107. A perusal of former opinions of the supreme court justifies that assertion. Thus, in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, the court had under consideration that part of the act which provides for an investigation by the Commission on its own motion. With reference to the decision in the principal case, the following is a pertinent excerpt from that opinion: "All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules." The same doctrine was affirmed in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T.*

P. R. Co., 167 U. S. 479, 506, 17 Sup. Ct. 896. "It (the Commission) is charged with the duty of inquiring into the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel full and complete information as to the manner in which such carriers are transacting their business."

In the light of these former decisions, and with that provision of the act in mind that the Commission "may institute any inquiry on its own motion, in the same manner and to the same effect as though complaint had been made," there would appear to be weight in Mr. Justice Day's contention that the construction put upon the act by the majority of the court "defeats its purpose." At all events, there can be no doubt that the effect of the decision is to materially abridge the power, and perhaps the efficiency, of the Commission. Since the defect in the act is a want of power, however, and not an unconstitutional delegation of it, it may be remedied by Congressional action.

It is interesting to note, in this connection, the attitude of the Commission itself with reference to the effect of the doctrine thus laid down by the supreme court. In the twenty-second annual report of the Interstate Commerce Commission, transmitted to Congress January 11, 1909, the following comment appears:

"This Commission, in administering this power of investigation, which it has assumed to exercise in the past, has repeatedly held that the private dealings of individuals in private matters could not be inquired into. It has, however, ruled that it might inquire to the fullest extent into the operations of railroads and the officers of railroads. The Union Pacific Railroad is not a private enterprise—it is a public servant, discharging, as the agent of the government, a public function. Its stocks are worthless except as they derive value from the charges which are imposed upon the public for the rendering of this public service. In the opinion of this Commission, when Mr. Harriman assumes control of the Union Pacific Railroad he ceases to be a private individual to that extent and can no longer claim protection, which, as a private person engaged in a strictly private pursuit, he might insist upon. It was our opinion that he might properly be required to state whether as an individual he had sold to the Union Pacific, which he controlled, stocks belonging to himself, and, if so, that he should further be required to state what profit he had individually made out of this transaction. If this gentleman is allowed to accumulate from the manipulation of these public agencies vast sums of money which must finally come from the body of the people, we think he is so far a trustee of the people that he cannot object to stating the manner in which these accumulations have been made."

It will be observed that the Commission insists upon the view which has characterized the tone of its public utterances since its origin,—that one of its most important functions is to act in an advisory capacity with reference to remedial legislation by Congress along the lines of interstate commerce. Without further assistance from Congress itself, however, this view is apparently not destined to receive unqualified judicial approval.

E. A. M.

RULE IN SHELLEY'S CASE CONTROLS ESTATE CREATED BY DEED TO TRUSTEE. —In the case of *McFall* v. *Kirkpatrick et al.* (1908), — Ill. —, 86 N. E. 139, the Supreme Court of Illinois had difficulty in deciding whether the rule in Shelley's Case would apply. The facts of this case were that a deed of bargain and sale with full covenants of warranty was made to a trustee to pay the rents and profits to Mrs. Houston during her natural life; a subsequent clause provided "Thirdly—in trust to convey the said land to such person or persons as * * * the said E. J. Houston by her last will * * * (may direct). And it is hereby expressly declared by the parties that upon the decease of the said E. J. Houston the said trusts shall cease and determine, and the land and premises above described shall belong in fee simple absolute to such person or persons as the said E. J. Houston shall as aforesaid direct and appoint, and in default of such appointment then to her heirs and assigns to her and their use forever." After the execution of this deed Mrs. Houston and her husband executed a warranty deed for the premises to Kirkpatrick, who by a bill in equity quieted the title of the trustee to the premises.

In spite of this conveyance to Kirkpatrick, Mrs. Houston in her last will devised the estate in fee simple to McFall, who brought an action of ejectment against Kirkpatrick. The court held, with three judges dissenting, that the action was not maintainable. The case turned on the construction of the clause of the deed given supra; the majority opinion was to the effect that by the deed Mrs. Houston took an equitable life estate and the heirs an equitable remainder. Under this construction the rule in Shelley's Case made the estate of the beneficiary a fee-simple. The power of appointment was appendant to this estate; her conveyance by full warranty deed destroyed the power, because it was incident to the estate. The subsequent attempt to exercise the power in favor of the plaintiff was therefore void and the action not maintainable.

The dissenting judges thought that the estate given to the heirs was legal, and that owing to the difference in the nature of the life estate and that in remainder, the rule in Shelley's Case did not apply. They believed that Mrs. Houston had only a life estate and that her power of appointment to the fee was in gross; if this belief was correct, the attempt to convey the fee did not divest her of the power of appointment. *Gaskins* v. *Finks*, 90 Va. 384. The devise conveyed the equitable title to the plaintiff, and as the trust became passive at the death of Mrs. Houston it was executed by the statute of uses investing the plaintiff with the legal title.

As the clause upon which this case hinges is worded peculiarly there is little authority exactly in point. The theory of the majority opinion is sustained by *Ralston* v. *Waln et al.*, 44 Pa. St. 279; *Sprague* v. *Sprague*, 13 R. I. 701; by the dicta in *Mott* v. *Buxton*, 7 Ves. Jr. (Eng.) 201, and *Lawrence* v. *Lawrence*, 181 Ill. 248, 54 N. E. 918. PERRY, TRUSTS, Ed. 2, Vol. 1, § 305, gives the rule that "If any * * * power be imposed on the trustee as * * * to convey the estate, * * * the trusts or uses remain mere equitable estates." HILL, TRUSTEES, p. 232, is to the same effect.

The majority opinion went pretty far in construing the third clause to

require a conveyance to the heirs in case the power of appointment was not exercised; but even with that construction, this decision is contrary to the principles in *Williams* v. *Mears*, 2 Disn. (Ohio) 604, and *Adams* v. *Guerard*, 29 Ga. 651, 76 Am. Dec. 624, though in accord with the weight of authority. The dissenting opinion said that the heirs would have succeeded to the estate by force of the deed of trust without any other conveyance. Under this interpretation the estate of the heirs would be legal, and the rule in Shelley's Case could not apply. KALES, FUTURE INTEREST, § 129; *Ryan et al.* v. *Allen*, 120 Ill. 648. F. O.

THE RIGHT OF THE GARNISHEE TO DISPOSE OF GOODS IN HIS POSSESSION WHILE THE LITIGATION IS PENDING.—The plaintiffs were rice growers and had delivered a large quantity of rice to a milling company under a contract with the latter to mill and prepare the rice for market and sell the same. The plaintiffs were sued and the milling company summoned as garnishee. The latter refused to proceed with the milling and sale of the rice, believing that the effect of the garnishment summons was to suspend their rights under their contract with the plaintiffs. Finally the court ordered the company to proceed with the sale, but in the meantime the price of rice had declined, and a loss ensued. The garnishment proved to be wrongful, and the plaintiffs brought suit against the surety on the garnishment bond to recover the amount lost through the decline in the price during the pendency of the garnishment proceedings. *Held*, that the milling company was bound to proceed with their contract regardless of the garnishment; that the garnishing creditor was merely substituted to the rights of the principal debtor under the contract; that, therefore, the loss was caused by the failure of the milling company to fulfill its obligation, and was not proximately caused by the wrongful garnishment. *Moore & Bridgeman* v. *United States Fidelity & Guaranty Co.* (1908), — Tex. Civ. App. —, 113 S. W. 947.

This case involves a question upon which it is very difficult to find cases directly in point. In fact, the two cases cited as authority in the principal case, *Mensing* v. *Engelke*, 67 Tex. 532, 4 S. W. 202, and *McClellan* v. *Routh*, 15 Tex. Civ. App. 344, 39 S. W. 607, appear, so far as is disclosed by the report of the principal case, to involve a state of facts very different from that here involved. The former involved a garnishment where the goods were already subject to a pledge, while, in the latter, equities of a similar nature were involved. As to pledges and preëxisting mortgages, it is held that the rights of the garnishing creditor are subsequent thereto. *Cooley* v. *Minnesota, Etc., Ry. Co.*, 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609. But such is not the question in this case.

The principal case involves the question whether a garnishee having in his possession goods of another under a contract to prepare and market the same is at liberty to proceed under his contract and dispose of such goods after being summoned as garnishee, or whether he shall hold such goods to await the result of the suit and is excused from performance of his contract until the garnishment proceeding is determined. Upon this question there is a conflict of authority.

There is a line of cases which hold that the service of a garnishment summons creates no specific lien upon the goods of the debtor in the hands of the garnishee, but simply makes the garnishee personally liable in case he disposes of the goods while the proceeding is pending. *McGarry* v. *Lewis Coal Co.*, 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522; *Corning* v. *Records*, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178; *Maxwell* v. *Bank of New Richmond*, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

McGarry v. *Lewis Coal Co.*, supra, contains a quotation from DRAKE, ATTACHMENT, Ed. 4, § 453, "that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value."

Then there are cases holding that the service of the garnishment summons will not be allowed to interfere with the contractual rights existing between the defendant in the garnishment and the garnishee. *Wall* v. *Norfolk, Etc., R. Co.*, 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948; *Baldwin* v. *Great Northern Railway Co.*, 81 Minn. 247, 83 N. W. 986, 51 L. R. A. (O. S.) 640. The former of these two cases might better, as it seems to us, have been decided on the ground that cars belonging to a railroad company, or other property being used in a public or quasi-public business, are not the subject of garnishment, rather than on the ground on which it was actually decided, viz., that a traffic arrangement or contract between the railroads could not be interfered with.

Of course the subject of garnishment is regulated largely by statute, and these statutes undoubtedly had some influence on the foregoing decisions, but we think that it may be said that these decisions are contrary to the weight of authority and to the majority of statutes on the subject.

It is often said that a garnishee is, in a way, an officer of the court and holds the goods of the debtor in his hands as such officer, and subject to the control of the court. Generally, officers of the court have no right or authority to dispose of property in their hands while the cause is pending, and there is no apparent reason why an exception should be made in the case of the garnishee.

Many cases hold that the goods of the debtor in the possession of the garnishee are, from the service of the garnishment summons, in *custodia legis*, and that the garnishee has no right to dispose of them, but rather should hold them to await the determination by the court of the rights of the parties. *Brashear* v. *West et al.*, 7 Pet. 608, 622; *Focke et al.* v. *Blum et al.*, 82 Tex. 436, 17 S. W. 770; *Beamer et al.* v. *Winter et al.*, 41 Kan. 596, 21 Pac. 1078; *Carter et al.* v. *Koshland*, 13 Or. 615, 12 Pac. 58; *Barton et al.* v. *Spencer et al.*, 3 Okl. 270, 41 Pac. 605; *Erskine* v. *Staley*, 12 Leigh (Va.) 406, 425; *Dunning* v. *Bailey et al.*, 120 Ia. 729, 95 N. W. 248; *Northfield Knife Co.* v. *Shapleigh*, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224; ROOD, GARNISHMENT, § 194.

Furthermore, it has been said that persons do not generally get possession of the chattels of others except by virtue of a contract between them, and that if the rights of the parties under the contract are to be held to be superior

to the rights of the garnishing creditor, then garnishment amounts to nothing as a remedy. These courts accordingly hold that the service of the garnishment summons relieves the garnishee from his obligation to proceed with the performance of his contract until the rights of the parties are determined by the court. *Landa* v. *Holck*, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459; *First Nat. Bank of Davenport* v. *The Davenport & St. Paul R. Co.*, 45 Ia. 120; *Adams* v. *Scott*. 104 Mass. 164; *Cook* v. *Coleman*, 167 Mass. 414, 45 N. E. 913, 57 Am. St. Rep. 465.

Other cases hold that if the garnishee does dispose of the goods in his possession belonging to the debtor, then he acts at his peril and must answer for the value of the goods. *Lee & Anderson* v. *Louisville & N. R. Co. et al.*, 2 Ga. App. 337, 58 S. E. 520; *Aldrich* v. *Woodcock and Trustees*, 10 N. H. 99; *Dow* v. *Taylor*, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

It seems rather inconsistent to say that the garnishee must perform his contract, and then say that he must answer for the value of the goods upon the determination of the garnishment proceeding, for the contract may have required that the goods be disposed of at a time when their full value could not be realized. Yet it would seem that the garnishee must answer for this loss and must account to the garnishing creditor for the full value of the goods.

In view of the above authorities we think that the better rule, and the rule supported by the weight of authority, is that the service of the garnishment summons relieves the garnishee from his obligation to proceed with the performance of his contract until the court shall determine the rights of the parties to the proceeding, and that, in fact, it is the duty of the garnishee to hold the goods in his possession to await the determination of the court. J. F. B.

THE POLICE POWER, BILLBOARDS AND SKY SIGNS.—The building code of the City of New York, § 144, provides that any sign or advertising device, supported or attached, over or above any building, etc., shall be deemed a "sky sign," and prohibits such signs from being constructed more than nine feet above the front wall of any building at any part. The relator sought to erect a sign on a building to a greater height than allowed by the ordinance, and applied for a writ of mandamus to compel defendant, the superintendent of streets of the City of New York, to consider an application for a permit. *Held*, that the ordinance constituted a "taking of property without compensation." *People ex rel. M. Wineburgh Advertising Co.* v. *Murphy*, 113 N. Y. Supp. 855.

This decision is in accord with the weight of authority, but that there is a good argument on the other side appears from the fact that in the lower court the justice decided in favor of the constitutionality of the ordinance, and in this court the justices are divided three to two; that numerous ordinances of like nature have been passed in other cities, and that the circuit court of the United States for the southern district of California decided in favor of the constitutionality of a similar ordinance, forbidding

the erection of billboards to a greater height than six feet above the surface of the ground. In *Re Wilshire,* 103 Fed. 620, the decision is based upon the fact that the ordinance puts an arbitrary limit upon the height of sky signs, no matter how safely and strongly built, and braced, and approves of those ordinances, and the cases in support thereof, which limit the erection of signs or billboards to a certain height without a permit first obtained. *Rochester* v. *West,* 164 N. Y. 510; *Whitmier & Filbrick* v. *Buffalo,* 118 Fed. 773.

When municipalities pass ordinances forbidding the erection of sky signs or billboards over a certain height, or to be built within a certain distance from the sidewalk, they are exercising the police power granted to them by the state; and more particularly the power to provide for the public safety. Whether these ordinances will stand under the constitutional provisions that private property must not be appropriated to a public use without just compensation must depend upon whether they are reasonable, i. e., whether they do "in some plain, appreciable and appropriate manner tend towards the accomplishment of the object (public safety) for which the power is exercised."

Prohibitory "billboard ordinances" have been declared invalid because they fixed a maximum height or forbade the placing of billboards or other structures used for advertising purposes within a certain distance from the sidewalk, regardless of stability of structure. *City of Passaic* v. *Paterson Bill Posting Co., 72* N. J. L. 285; *Crawford* v. *City of Topeka,* 51 Kan. 756; *City of Chicago* v. *The Gunning System,* 114 Ill. App. 377; *City of Chicago* v. *The Gunning System,* 214 Ill. 628. The reasoning of these and the principal case appears in the main to be correct. Prohibitory billboard and sky sign ordinances have been passed because of the fragile structure of the ordinary billboard or sky sign, and that some kind of protective legislation is necessary is manifest. However, the magnitude of the advertising business at the present day should, if there were no other reason, entitle this question to a careful consideration.

While the ordinary billboard is a flimsy structure, there is needed no great flight of the imagination to conceive of an advertising company that would be willing, if it could find a vacant lot peculiarly desirable, say opposite a baseball park or theater, to erect a sign as safe and secure as the average business block and pay well for the privilege. To place an arbitrary limit of six or nine feet upon such a structure would appear to be a blow at the business of advertising rather than a public safety measure.

An interesting phase of this question is brought up by what might be termed "æsthetic legislation." Ordinances and park commissioners' rules have been passed seeking to keep the billboard out of the residence districts and away from the boulevards and public parks. These ordinances have universally been condemned as infringements of property rights. *City of Chicago* v. *The Gunning System,* 114 Ill. App. 377; *City of St. Louis* v. *Hill,* 116 Mo. 527; *Commonwealth* v. *Boston Advertising Co.,* 188 Mass. 348. See 4 MICH. LAW REV. 385.

We concur in the prophecy of the learned judge who said "the time will

come * * * when the beauty created by the expenditure of millions of the public funds will not be allowed to be disfigured by vast billboards portraying the virtues of particular brands of whiskeys, or of medicines which work while you sleep." (See FREUND, POLICE POWER, § 182.) M. F. S.

HOW FAR THE RECORD OF VOTING MACHINES IS CONCLUSIVE.—In People *ex rel. Deister* v. *Wintermute*, — N. Y. —, 86 N. E. 818 (1909), the Court of Appeals of New Work expresses itself upon a few troublesome phases of the law relative to voting machines. The main question before the court was as to how far the record of voting machines is conclusive. But before considering this question we notice first another and even more interesting aspect of the case bearing upon the constitutionality of the use of these machines. Although upon this latter point the court was regrettably non-committal, the fair inference from the opinion is that it regards the use of voting machines as constitutional.

The voting machine is not yet beyond the experimental stage. It has still to prove its raison d'être. Just as the Australian ballot was contested and primary elections, so now the voting machine in its turn is being assailed as an innovation upon the letter of the law. The objection was first raised that voting by machine was not a "ballot" within the terms of the constitution providing for voting by ballot. But the courts promptly met this objection with the argument that although a vote by machine is admittedly not a ballot in the literal sense, the constitution does not employ the term literally, but only for the purpose of designating a method of conducting elections which would insure secrecy and the integrity of the ballot. *In re McTammany* (1897), 19 R. I. 729, 36 L. R. A. 547; *Detroit* v. *Inspectors of Election*, 139 Mich. 548, 69 L. R. A. 184; *Linch* v. *Mallory*, 215 Ill. 574, 74 N. E. 723; *United States Standard Voting Machine Co.* v. *Hobson*, 132 Ia. 38, 7 L. R. A. (N. S.) 512, and particularly *Elwell* v. *Comstock*, 99 Minn. 261, 7 L. R. A. 621; see also note to this latter case. That a vote by machine is a ballot, then, seems pretty well settled. Is it, however, a "written ballot" within the constitutional provisions requiring such? This question seemed to have perplexed the Massachusetts Supreme Court in *In re House Bill*, 178 Mass. 605, 54 L. R. A. 430, where the judges divided upon it. It is now settled, however, in Massachusetts at least, that a vote by machine does not meet the constitutional requirement of a written vote. *Nichols* v. *Minton*, 196 Mass. 410, 82 N. E. 50, 12 L. R. A. (N. S.) 280.

This much at least can be gathered from these various decisions: That if the voting machine can effectuate the main purpose of the constitution its use will be approved and upheld by the court. Clearly, the cardinal purpose of the constitution in regard to elections is to secure a free and honest expression of choice at the polls with ample opportunity to the elector to vote a secret ballot. In so far as voting by machine fails to afford these privileges it is unconstitutional. Thus in *Helme* v. *Election Commissioners*, 113 N. W. 6, 149 Mich. 391, it was held that voting machines could not be used which did not afford the voter opportunity to vote for any desired combination of candidates unless in so doing he discloses his inten-

tion not to vote his party ticket. Now the infirmity of the machines in question in the principal case was of this order. The mechanism of the machine was not so perfect but that a "click" caused by the movements of the lever employed when the elector went out of the straight party column indicated to bystanders that he had voted a "split" ticket. Whether or not such a device insures that absolute secrecy which the law requires is the question that the court on proper proceedings being brought will have to determine.

As has already been said, the court was also called upon to determine the conclusiveness of the record made by the machine. It was asked to pass upon the question as to whether relator could offer in evidence the testimony of fifty-one electors to the effect that they had voted for him for sheriff, whereas the machines registered only twenty-seven votes for him. Reversing the decision of the appellate division, the court decided that the record returned by the machine could be varied by competent legal proof that voters did vote for either candidate to a number in excess of that registered by the machines (BARTLETT, CHASE and GRAY, JJ., dissenting).

In this latter respect the case is a close one. If the majority opinion is strong and convincing, the same thing may be said of that of the minority. And, in the absence of other rulings on the point involved, we cannot view the decision as unshakable. In its favor it has the powerful argument that a mere failure of a machine to work correctly should not defeat one's constitutional right to vote. But on the other hand it might be said that this right to vote is under our system not untrammeled, and so where the law in order to secure against the frauds and frailties of mankind, and to ensure greater secrecy, has substituted a mechanical for a human agency in the preparation, reception and counting of ballots the court might well hold the return conclusive. In the old system of paper ballots it seems to have been a settled doctrine that the canvass could be impeached. *People ex rel. Judson* v. *Thacher,* 55 N. Y. 525; *State* v. *Rosenthal,* 123 Wis. 442, 102 N. W. 49; *Lane* v. *Bailey,* 29 Mont. 548, 75 Pac. 191; *Edwards* v. *Logan,* 24 Ky. Law Rep. 1099, 70 S. W. 852; *Windes* v. *Nelson,* 159 Mo. 51, 60 S. W. 129. But there the act of voting and that of canvassing were entirely separate. How is it in this new system where the inspectors are required to read, record and return "the result as shown by the counter numbers" of the machine? Would it not seem that the act of voting and that of registering the vote cast were blended so as to constitute a single indivisible thing? We have the answer in this decision. Interpreted it would read "the registry by the machine is simply a substitute for the canvass, and since the latter can be impeached so also can the former." S. F. D.