Case Western Reserve Law Review

Volume 20 | Issue 1 | Article 12

1968

Cases Noted

Case Western Reserve University Law Review

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Recommended Citation
Case Western Reserve University Law Review, *Cases Noted*, 20 Case W. Rsrv. L. Rev. 308 (1968)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol20/iss1/12

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CASES NOTED

BANKRUPTCY

ASSIGNMENT AND DISTRIBUTION OF ESTATES — PROPERTY CAPABLE OF TRANSFER — *Reichert v. General Ins. Co.*, 69 Cal. Rptr. 321, 442 P.2d 377 (1968).— After a fire in the plaintiff's motel, his insurance company refused to reimburse him for his loss. Plaintiff was forced into bankruptcy and later brought suit for damages. Construing section 70 of the Bankruptcy Act, 11 U.S.C. § 110 (1964), the California Supreme Court held that the right of an insured to bring suit against his insurer for failure to comply with the fire insurance contract passed to his trustee in bankruptcy, and consequently could not later be asserted by the bankrupt.

This decision affirms the general principle that rights of action based on contract and property, including rights of action, which could have been transferred or assigned prior to bankruptcy, pass to the trustee. The court here found that the cause of action arose prior to bankruptcy at the time of the breach of contract. The dissent argued that the cause of action arose at the time of bankruptcy rather than at the time of breach.

COMMERCE

POWER TO REGULATE — POLLUTION — *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968).— The Attorney General of the United States brought suit against the Bishop Processing Company for alleged violation of the Air Quality Act of 1967 (Clean Air Act), 42 U.S.C.A. § 1857 (Supp. 1968). The court held that the Clean Air Act constituted a valid exercise of congressional power within the scope of the commerce clause since movement of pollutants across state lines both qualified as interstate commerce and had a substantial affect on it. The decision affirms past constitutional construction that commerce power may be exercised to achieve socially desirable objectives, although economic considerations may be absent.

CRIMINAL LAW

COMPELLING ACCUSED TO INCRIMINATE HIMSELF — ADMISSIBILITY OF EVIDENCE — *City of Piqua v. Hinger*, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1968).— Defendant was convicted of driving while under the influence of intoxicating liquor, a misdemeanor. He appealed on the ground that motion pictures made of his performance of various physical tests such as writing his name and address and picking up a coin were taken prior to his being apprised of his constitutional rights. The appellate court reversed. In restoring the judgment of the trial court and reversing the appellate court, the Supreme Court of Ohio held that the admission into evidence of such tests and film did not violate the protection afforded testimonial and communicative acts under the fifth amendment, since they constituted "real or physical evidence."

In narrowing the scope of testimonial and communicative acts and widening that of real or physical evidence, this decision may signal the necessity for a new category for motion pictures, which do not conveniently fit into either group.

PUBLIC DRUNKENNESS — CHRONIC ALCOHOLISM AS A DEFENSE — *Powell*

v. Texas, 392 U.S. 514 (1968).— Appellant appealed from a conviction of public drunkenness. A psychiatrist testified that appellant was a chronic alcoholic, who had a compulsion to drink and who could not control his behavior once a state of intoxication was reached. In affirming the conviction, the Supreme Court held that criminally punishing acts committed because of a compulsion symptomatic of a disease did not violate the cruel and unusual punishment clause.

Appellant was unable to successfully compare his case with *Robinson v. California*, 370 U.S. 660 (1962), where it was held cruel and unusual punishment to criminally penalize the status of drug addiction. The Court distinguished *Robinson* as encompassing only cases where no *actus reus* had occurred and not encompassing merely involuntarily acts. The Court thus affirmed the prevailing view that appearances in public by a chronic alcoholic constitute guilty acts.

DIVORCE

MODIFICATION OF ORDER — REDUCTION OF SUPPORT — *Peters v. Peters*, 14 Ohio St. 2d 268, 237 N.E.2d 902 (1968).— Plaintiff and defendant were divorced by decree which incorporated a separation agreement that gave custody of their minor children to the plaintiff mother with defendant father agreeing to pay for their support. The decree contained no language reserving to the court jurisdiction over the amount of support to be paid. Defendant subsequently filed a motion to reduce this amount. The court of appeals affirmed the denial of the motion and relied on *Tullis v. Tullis*, 138 Ohio St. 187, 34 N.E.2d 212 (1941), stating that the trial court's failure to retain jurisdiction over the amount of support precluded it from reducing the amount. The Ohio Supreme Court reversed, holding that the court's jurisdiction with respect to the support of minor children continues, notwithstanding the absence of any express reservation in the divorce decree or the amount of support specified.

In so ruling the court specifically overruled *Tullis* and reaffirmed the position that in determining the amount to be paid for the support of minor children, the figure may be subsequently revised upward or downward by the trial court, as the children's welfare dictates.

INSURANCE

PROXIMATE CAUSE — FIRE LOSS — *Frontis v. Milwaukee Ins. Co.*, ---- Conn. ----, 242 A.2d 749 (1968).— Plaintiff, owner of a four story commercial building bounded by a common party wall, was ordered to remove the top two stories by the city building inspector. The inspector's order was precipitated by a fire which destroyed the top three stories of the adjoining building, rendering the party wall incapable of supporting the lateral thrust of plaintiff's third and fourth stories. Plaintiff removed the top two stories, placed a roof on the second story and claimed damages under his fire insurance policy.

The Connecticut Supreme Court, in affirming the trial court's decision for the plaintiff, rejected the insurer's contention that the building inspector was the direct cause of the plaintiff's loss and, consequently, held that the civil authority exclusion clause should apply. The court noted that the fire, and not the building inspector, caused the weakness in the party wall. The inspector's function was that of expert recognition of danger to the public safety. This Connecticut Supreme Court decision is an extension of the

prevailing trend of interpreting ambiguous insurance policy clauses in favor of the insured.

INTERNAL REVENUE

DEDUCTIONS AND EXEMPTIONS — EMPLOYEE PLANS — *Ed and Jim Fleitz, Inc.*, 50 T.C. No. 35 (May 26, 1968).— Taxpayer corporation instituted a profit sharing plan limited to its three salaried employees. The deduction by the corporation of its contributions to the plan were disallowed by the Commissioner. In a suit contesting the Commissioner's action, the Tax Court held that corporate contributions to a "salaried only" profit sharing plan were not deductible where the plan discriminated in favor of officers, stockholders, and salaried employees. This decision affirmed the Commissioner's prior position that in order for corporate contributions to a profit sharing plan to qualify as a deductible business expense, the plan must either cover a specified minimum percentage of all employees or must not be discriminatory in operation in favor of officers, shareholders, supervisors, or highly paid employees.

DEPRECIATION — INTANGIBLE PROPERTY — *Alfred H. Thoms*, 50 T.C. No. 24 (June 6, 1968).— Petitioner purchased a going casualty insurance business, including goodwill and the lists of expired policyholders, for $10,500. He attempted to amortize this amount over a 14-month period by means of depreciation deductions, on the theory that the entire $10,500 could be attributed to the expiration lists — these lists being treated as capital assets as well as intangible property. The deduction was denied on the ground that petitioner was unable to sustain the burden of proving that the lists were not an integral part of the goodwill and that they had a definite useful life.

The case affirms the general rule that, in the absence of special circumstances, if a definite amount of the purchase price is not allocated to goodwill, no depreciation deduction will be allowed where the asset has no readily ascertainable useful life.

LABOR RELATIONS

UNFAIR LABOR PRACTICES — PICKETING OF GATES RESERVED FOR NEUTRAL PARTIES — *Nashville Building and Construction Trades Council*, 172 N.L.R.B. No. 105 (1968).— As general contractor, the charging party entered into a contract with both union and nonunion subcontractors to erect a shopping center. The respondent union protested the hiring of nonunion subcontractors and picketed the job site. The general contractor reserved two entrances to the shopping center: one for the "neutral" or union subcontractors and one for the nonunion subcontractors. The National Labor Relations Board found that the respondent violated section 158(b)(4)(B) of the Labor Management Relations Act, 29 U.S.C. § 141 (1964), by picketing the gate reserved for the "neutral" or union subcontractors.

In reversing the trial examiner, the Board reaffirmed the policy established in the *Moore Dry Dock* case, 92 N.L.R.B. 547 (1950), and prohibited pickets from arbitrarily interferring with the activities of neutral parties.

LIBEL AND SLANDER

JUDICIAL PROCEEDINGS — STATEMENT OF COUNSEL — *Theiss v. Scherer*,

396 F.2d 647 (6th Cir. 1968).— Defendant-attorney sent a letter directly to plaintiff's attorney concerning the administration of an estate. In the letter he allegedly made libelous statements imputing degrading motives to the plaintiff who was contesting the will. In addition, copies of the letter were sent by the defendant to other parties having a financial interest in the probate action. The court of appeals affirmed the lower court's decision that such material was absolutely privileged since the letter was written in reference to impending litigation, and sent exclusively to parties having a direct financial interest in the outcome of the contest.

The holding in this case is in accord with decisions of other circuit courts seeking to give an attorney freedom to conduct litigation without fear of unwarranted libel suits by the adverse parties. The opinion indicates that even a known false or malicious statement in these circumstances would be absolutely privileged.

MONOPOLIES

ACTIONS FOR DAMAGES BY COMBINATIONS OR MONOPOLIES — CONDITIONS PRECEDENT AND DEFENSES — *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).— Plaintiffs, who operated muffler dealerships under sales agreements with one defendant, sought treble damages for losses sustained because of a conspiracy between all defendants which violated the antitrust laws. Plaintiffs attacked portions of the sales agreement as illegal restraints of trade. Defendants, who were awarded summary judgment in a federal district court, contended that plaintiffs had voluntarily participated in the violations. A circuit court of appeals affirmed on the theory that plaintiffs' suit was barred by the doctrine of *in pari delicto*. The Supreme Court reversed and remanded, holding that the doctrine was not a valid defense to antitrust actions.

In this case the Court delivered the *coup de grace* to a doctrine which it had increasingly avoided. Thus, the Court raised the level of protection afforded the private antitrust action as a servant of public purpose.

MUNICIPAL CORPORATIONS

TORTS — IMMUNITY — *Riss v. City of New York*, 37 U.S.L.W. 2069 (N.Y. July 2, 1968).— Plaintiff, threatened by a rejected suitor, requested special police protection. The police refused, and she subsequently sued the city after being injured by her former suitor. In holding that the city was not liable for denying special police protection, the court reasoned that it was not a part of the judicial function to review discretionary executive decisions involving the deployment of police protection. Although the trend is towards holding a municipal corporation liable for its torts, the principle that a city cannot be held liable in the deployment of a limited resource, police protection, was upheld in this decision.

TORTS — NATURE AND GROUNDS OF LIABILITY — *City of Lexington v. Yank*, 430 S.W.2d ---- (Ky. Ct. App. 1968).— Plaintiff, a passenger in an automobile stopped by a Lexington police officer for failing to observe a traffic signal, made certain comments which incensed the officer who subsequently struck him. This action was brought against the city of Lexington, alleging the liability of the municipality for the tortious acts of its police officer. The court, in holding for the plaintiff, reasoned that when the city separates an individual from the general public and deals with him as an individual, the same tort rules apply as between two private individuals.

In reiterating its abrogation of the municipal immunity doctrine, first stated in *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. Ct. App. 1965), the Kentucky Court of Appeals has stayed within the growing minority of courts which hold this doctrine to be obsolete.

PERSONAL PROPERTY

FINDING LOST GOODS — TITLE — *Hurley v. City of Niagara Falls*, 30 App. Div. 2d 89, ____ N.E.2d ____, 289 N.Y.S.2d 889 (1968).— Appellant, hired to build a recreation room in respondents' basement, found $4990 in bills hidden behind a wooden block. Respondents had been unaware of the money, but claimed the sum under the common law rule that, although lost property found in public places belongs to the finder if the true owner is not located, items found on private premises belong to the owner of the land. Holding for appellant-finder, the court stated that article 7-B of the New York Personal Property Law, N.Y. PERS. PROP. LAW, §§ 251-58 (McKinney 1962), was intended to abolish all common law distinctions concerning lost property, including the public place/private place distinction.

The decision is an enlightened step toward cleansing personal property law of outdated distinctions based on legal fictions — distinctions which still survive in most jurisdictions.

PROCEDURE

JOINDER — ACTIONS FOR TORT — *Ryan v. Mackolin*, 14 Ohio St. 2d 213, 237 N.E.2d 377 (1968).— Plaintiff suffered a back injury from a rear-end collision. Five months later the injury was complicated by a second collision. Under OHIO REV. CODE § 2307.191, which parallels rule 20(a) of the FED. R. CIV. P., plaintiff attempted joinder of defendants, arguing that the two collisions constituted a "series of occurrences." The Ohio Supreme Court held that joinder was proper. This is a case of first impression in Ohio due to the changes in procedure since the enactment of section 2307.191. The court's holding follows the trend toward liberal construction of rule 20(a) in the federal courts permitting joinder in tort actions to eliminate multiple litigation.

SECURITIES

BROKER-DEALER — LIABILITY FOR CHURNING INVESTMENT ACCOUNT — *Stevens v. Abbott, Proctor & Paine*, CCH FED. SEC. L. REP. ¶ 92,257 (D. C. Va. Aug. 6, 1968).— Plaintiff brought an action for damages under rule 10b-5 of the Security Exchange Act of 1934, 15 U.S.C. § 78(j) (1964), charging that defendant-broker's churning of her investment account over a 6-year period resulted in a substantial reduction in the value of her portfolio. Plaintiff sought to recover the capital gains tax she had paid, plus the commissions paid to broker, as well as the loss of her portfolio's market value. In holding the defendant liable, the district court included as damages recovery for the capital gains tax attributable solely to defendant's fraudulent conduct, as well as the traditional damage measure of the broker's commission.

The majority rule of limiting churning damages to the broker's profit was developed in cases involving trading accounts in which the courts theorized that the loss of market value was an assumed risk. While this court's novel rule as to damages for churning an investment account expands

the established rule, it rejects damages for lost value of the portfolio. It would appear that if churning results in total dissipation of the investment portfolio, the plaintiff could nevertheless recover only the broker's commission.

SOCIAL SECURITY

STATUTORY INTERPRETATION — THE "SUBSTITUTE FATHER" — *King v. Smith*, 392 U.S. 309 (1968).— Appellants brought this appeal in order to determine the validity of Alabama's "Substitute Father" regulation under the Social Security Act, 42 U.S.C. § 301 (1964). This regulation denies ADC payments to the children of a mother who cohabitates with any single or able-bodied man. A three-judge panel found the regulation to be inconsistent with the act. The Supreme Court affirmed, holding that the regulation was unrelated to need because the actual financial situation of the family was irrelevant in determining the existence of a substitute father, and that Congress intended the word "parent" to include only those persons with a legal duty of support.

In so holding, the Court acknowledged the intent of Congress, as reflected in the 1961, 1962, and 1968 amendments to the act, that immorality and illegitimacy should be dealt with through rehabilitation and not by measures which punish the dependent children.

TAXATION

NATURE AND EXTENT OF POWER — NATIONAL BANKS — *First Agricultural Nat'l Bank v. State Tax Comm'r*, 392 U.S. 339 (1968).— Respondent bank brought suit against the State Tax Commissioner of Massachusetts for declaratory relief from the state's recently enacted sales and use tax. In holding that the bank is not exempt from the tax under the statute, the Supreme Judicial Court of Massachusetts upheld the state's contention that the taxes were applicable to the bank's purchases of tangible personal property for its own use. The Supreme Court, in reversing, held that a state may not tax a national bank unless authorized to do so by Congress.

Although the dissent made a forceful argument that with the advent of the Federal Reserve System the national banks are no longer federal instrumentalities and therefore not immune from state taxation, the holding of the majority followed the proposition firmly established by former Supreme Court decisions that without congressional action to the contrary, national banks are immune from state taxation.

TORTS

CONTRACTORS — LIABILITY AFTER COMPLETION AND ACCEPTANCE OF WORK — *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968).— Plaintiff, an infant, was burned by an exposed radiator pipe in his parents' apartment. Although plaintiff's parents had lived in the apartment for a number of years, they had not complained about the pipe. Predicating liability in negligence, the court found that the plaintiff's petition stated a cause of action against the contractor who had installed the heating sysem. The "patent/latent" distinction as to the obviousness of a danger was relegated to a consideration on the issue of the contractor's negligence, and was not treated as a definitive rule of law.

The liability of contractors, once sheltered by the concept of privity, is

approaching the strictness of products' liability of manufacturers. This decision, following the present trend of the law, extends the tort liability of the building contractor.

WILLS

CONSTRUCTION — INTENTION OF TESTATOR — *First Nat'l Bank v. Gaines*, 15 Ohio Misc. 109 (P. Ct. 1967).— Testator's will provided that 10 years after the death of his wife, the trustee shall convert the estate into cash and distribute the proceeds to certain named persons or, if they be deceased, to their issue. Testator's wife died in 1965, and the heirs apparent of the estate petitioned plaintiff, trustee, for a distribution of the assets in excess of those necessary to administer the estate until 1975. In finding that the heirs apparent had no present right to distribution, the court held that the general rule of construction favoring an early vesting of estates must be subrogated to the testator's clearly expressed intention that the estate shall not vest for a specified term of years. The decision is consistent with past Ohio decisions as well as with the results reached in virtual unanimity in other jurisdictions.

WORKMEN'S COMPENSATION

COLLATERAL ESTOPPEL — APPLICATION OF JUDICIAL DETERMINATIONS TO ADMINISTRATIVE PROCEEDINGS — *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968).— Plaintiff, a dockworker, sued the owner of the ship on which he was working for injuries received on the job. The shipowner impleaded plaintiff's employer as a third party defendant. Concluding that plaintiff sustained no injury, the jury held for the defendants. Subsequently, plaintiff instituted proceedings under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964). His employer's motion to dismiss the claim on the grounds of collateral estoppel was denied by the hearings commissioner. Affirming the commissioner's decision, the fifth circuit held that the lower standard of proof in compensation proceedings made it easier to establish a claim there than in court and that a workman's failure to convince a jury should not preclude him from attempting to convince a commissioner.

This case of first impression applies to administrative proceedings a principle familiar in criminal-civil cases — that the party with the burden of proof is not estopped to raise in a civil proceeding an issue it lost in a criminal case, because of the lesser standard of proof in civil matters.