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COMMENT.

RIGHT OF PROPERTY IN NEWS.

That the creative faculty of equity jurisprudence is constantly modifying old doctrines and inventing new ones is exemplified by the important principle just established by the U. S. Circuit Court of Appeals in *The National Tel. News Co. v. Western Union Tel. Co.*, 35 Chi. Legal News 89 (Nov. 1, 1902). There, Judge Grosscup holds that the Western Union Telegraph Co. has a right of property in the news which it gathers, and that such right of property does not cease when the news is published on the tickers rented to its patrons. This is a step in advance of all former decisions on similar subjects; one that is destined to prove of far-reaching consequence.

From *Macklin v. Richardson*, Ambler 694 [1770], holding that the author of a work while it is unpublished has a right of property in the same, and *Donaldson v. Becket*, 4 Burr. 2408, note, [1774], that there is no right at common law after publication, to the present time the courts have been gradually seeking a means to protect an author's right of property in his mental concepts. The American cases from the beginning have uniformly and consistently held that after publication the only rights of an author were those secured to him by the copyright statutes. *Wheaton v. Peters*, 8 Pet. 591; *Stowe v. Thomas*, Fed. Cas. No. 13514; *Boucicault v. Wood*, Fed.

Cas. No. 1693. And all the cases in point with the principal case rely upon what constitutes a publication, not going to the extent of declaring that even after publication a right of property exists. *Kelly v. Morris*, 1 L. R. [Eq.] 697 [1866], was a case where a rival directory publisher was restrained from using the lists of the complainant, on the ground of infringing a right of property therein; and in *Cox v. Land & Water Journal Co.*, 9 L. R. [Eq.] 324 [1869], Vice Chancellor Malins said: "It is clear that, in this case, the getting the names of the masters of the hunts, the number of hounds, etc., is information open to all who seek to obtain it; but they must get it at their own expense, as the result of their own labor, and they are not to be entitled to the results of the labors undergone by others." These two cases very nearly approach the doctrine of the principal case, yet they do not apply the rule quite so broadly. In the cases directly in point the decisions all turn upon the fact of publication, although recognizing a right of property in the news gathered. In *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 194 [1876], enjoining the appropriation of news from the stock tickers of the defendant, Van Brunt, J., declares that it would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another. Nevertheless, the decision recognizes a distinction between a general and unrestricted publication which works a forfeiture of the right, and a qualified or limited publication which has no such result. To the same effect are the two English cases on the subject. *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, is a case of much importance. It was ruled that information furnished to subscribers for their private use, of stock transactions by means of a ticker was an unpublished manuscript and to be protected accordingly. This collecting together of materials so as to give knowledge of all that is done on the stock exchange is something which can be sold. It is property, and being sold to the plaintiffs, it was their property. This decision was affirmed the following year in a similar case involving the piracy of race track news. *Exchange Tel. Co. v. Central News Co.*, [1897] 2 Ch. 48; 66 L. J. Ch. 672; 76 L. T. 591; 45 W. R. 595.

In the principal case, the appellant had been appropriating *vi et armis* the news appearing upon appellee's tape and distributing the same over their own wires to their own patrons. The information was clearly not subject to copyright, *Mott Iron Works v. Clow*, 82 Fed. 316, and yet was of great value and constituted property. It was the service, and not authorship or the work of the publisher that caused the news to acquire a commercial value. Accordingly equity has the right to restrain a violation of this property-right. The opinion of the court is certainly a precedent-maker and one that will be quoted with approval. It shows clearly that equity is adapting itself to the greater and greater complexity of business affairs, and providing remedies wherever justice and fair-dealing require; that, consonant with the progress of modern conditions, equity will uphold its great maxim of "no right without a remedy." The court

well says: "Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, can not be made to fit the relations of the public and this dissimilar class of servants? Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon a career than by affirming the order appealed from."

CONSTITUTIONALITY OF TEXAS ANTI-TRUST LAWS.

The development of large combinations has been so rapid within the past few years that courts and legislatures have interfered to curb what seemed to them a dangerous tendency. Of all states Texas has made the most strenuous efforts to drive all trusts and combinations beyond her boundaries. The stringency of her laws has, it has been said, enabled her treasury to profit from penalties as New Jersey has harvested fees from charters. In particular the controversies a number of months ago with corporations affiliated with the Standard Oil Co. may be recalled from the wide discussion and editorial comment elicited.

Texas, however, has experienced no inconsiderable difficulty in retaining the legislative intent, in the several anti-trust enactments, to reach particular restraints of trade while discriminating in favor of certain classes and associations—farmers, stockmen, laborers.

In view of the special prominence given the Federal Anti-Trust Law, the "Sherman Act" of 1890 (26 Stat. L. 209), by the Northern Securities cases, the recent decision of *State ex rel. Attorney-General v. Shippers' Compress & Warehouse Co.*, 69 S. W. 58, declaring the Texas Anti-Trust Act of 1895 (Rev. St. 1895 arts. 5313-14) unconstitutional, is of interest. With some reluctance, it would seem, the court followed the Illinois case of *Connolly v. Pipe Co.* (22 Sup. Ct. Rep. 431), and held that by excepting "agricultural products and live stock while in the hands of the producer or raiser," the act prohibiting restrictions to trade or commerce or of aids to commerce was repugnant to the provisions of the 14th Amendment of the United States Constitution with respect to equal protection of laws. On the same ground the lower court held the Anti-Trust laws of 1889 and 1895 unconstitutional in the related case of *State ex rel. Attorney-General v. Waters-Pierce Oil Co.*, 67 S. W. 1057, reversing its opinion rendered in *Waters-Pierce Oil Co. v. State*, 44 S. W. 936.

Illustrating the tendency to relax the vigor of the doctrine that all contracts in restraint of trade are void irrespective of circumstances, the court in the *Shippers' Compress & Warehouse Co.* case,

supra, also held that the securing, on the same day, of six cotton compresses located in different parts of the state does not show that the object was restriction of trade; nor do such acts show restraint of aids to commerce where the price for compressing cotton is, in effect, regulated by the railroad commission, and cotton required to be compressed at the nearest press. (Cf. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Dueber Watch-Case Mfg. Co. v. Howard Watch & Clock Co. et al*, 66 Fed. 637; *U. S. v. Nelson*, 52 Fed. 646.)

In this connection it is instructive to compare the attitude of the United States Supreme Court in the railroad freight pooling case (*U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290) with the reasoning in the decision on the sugar refineries case (*U. S. v. Knight Co.*, 156 U. S. 1). In the former the Court declared that the Federal Anti-Trust act was not limited to "unreasonable" restraints of trade, but that it includes as well reasonable interstate contracts of such restraint which might have been valid at common law. (But see *Eddy on Combinations*, sec. 800 and exceptions cited.) In the refineries case it was held that it is not contrary to the provisions of the Federal Act for a corporation engaged in the manufacture and sale of a staple article to purchase the plants of competitors, situated and doing business in different states, with the admitted object of controlling the manufacture and sale of the particular commodity.

BENEFICIARY'S INTEREST IN A LIFE INSURANCE POLICY.

During the last year the highest court in two states has considered the nature of the beneficiary's interest in a life insurance policy payable to him "if surviving" the insured. Each case was complicated by the fact that the insured and the beneficiary perished in a common disaster.

In the first case, *Hildebrant v. Ames* (Tex. Civ. App. 1902), 66 S. W. 128, the court held that the interest of the beneficiary, under such a policy, was in the nature of an express trust; that the beneficiary could not call upon the trustee to execute the trust until the contingency of the beneficiary surviving the insured had happened; that since there was no evidence or presumption as to survivorship it was impossible to prove the happening of the contingency and therefore the trust failed and the money due under the policy went to the personal representatives of the insured. In the later case of *U. S. Casualty Co. v. Kacer*, 69 S. W. 372, the Supreme Court of Missouri takes a different view, holding that the interest of the beneficiary is an absolutely vested interest and that the insertion, in the policy, of the words "if surviving" does not change the nature of the interest but merely makes it liable to be divested by the happening of a condition subsequent. After taking this position the court logically draws the conclusion that since there is no proof that the condition subsequent did happen, the vested interest of the

beneficiary cannot be divested and his personal representatives will take to the exclusion of the personal representatives of the insured. In the two earlier cases of *Fuller v. Linzee*, 135 Mass. 468, and *Cowman v. Rogers*, 73 Md. 403, the same complication of facts were present, but as these earlier cases are in the same conflict as exists between the two later cases they furnish little assistance to this discussion.

From this brief citation of the cases involving the question of the beneficiary's interest complicated by the question of survivorship it is evident, that in attempting to select the better rule, three points must be considered: First, the law of survivorship; second, the nature of the interest which the beneficiary takes in the ordinary policy of life insurance, and third, the effect which the insertion in the policy of the words "if surviving" has upon that interest. Where lives are lost in a common disaster, and no evidence is forthcoming to show survivorship almost every state holds to the rule that the law will neither presume the prior decease of one person, nor that they all died simultaneously. The result is that one whose right or interest is contingent upon survivorship, unless he can establish it by actual evidence, must fail. *In re Wilbur*, 51 L. R. A. 863.

As to the second point, the majority of the recent cases follow the rule in *Central Bank v. Hume*, 128 U. S. 195, that the policy, and the money to become due under it, belong, the moment it is issued, to the person named in it as the beneficiary and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. There are cases which hold that the insured, where the beneficiary dies before him, may appoint a new beneficiary, but although these are exceptional cases they cannot be said to favor the trust theory, for many of them hold that if the insured does not, during his lifetime, appoint a new beneficiary then the personal representative of the first beneficiary will take whereas, under the trust theory, at the death of the first beneficiary, during the lifetime of the insured, the policy would revert and could under no circumstances go to the representatives of the first beneficiary. *Gamb's v. Insurance Co.*, 50 Mo. 44.

Certain conditions, such as the rights of a creditor who has been made beneficiary, exist to-day which were not present to any considerable extent when some of the early decisions were rendered. If the interest of the beneficiary were not vested the creditor who is made beneficiary would receive security only provided it could be proved that he survived the insured.

It has been argued that the trust theory carries out the intention of the insured, but this is true only in certain cases. If the wife was the beneficiary and died before her husband, the insured, then, under the trust theory, the policy would revert to the husband and be liable for his debts, whereas, if the wife's interest is vested, upon her death before that of the insured, it would go to her children rather than to the creditors of the husband.

If then the interest of the beneficiary is a vested interest what effect has the insertion, in the policy, of the words "if surviving?" Under the trust theory these words would have no effect for immediately upon the death of the beneficiary, before the insured, the policy without the words "if surviving" would revert in the insured. But if the interest of the beneficiary is vested, the insertion of these words makes the vested estate liable to be divested by the happening of the condition subsequent. Where the insured and beneficiary perish in a common disaster and no evidence can be produced to show survivorship then since the personal representatives of the insured cannot prove that the condition has happened the interest of the beneficiary cannot be divested.

Because the operation of this rule, affirmed in *U. S. Casualty Co. v. Kacer, supra*, does not in every case carry out the intentions of the insured is not a sufficient reason for adopting the trust view of the beneficiary's interest.

READING THE BIBLE IN COMMON SCHOOLS.

Is reading the Bible in a public school a violation of the provision usually found in the State constitutions declaring that every one has the right to worship God according to the dictates of his own conscience? Does reading the Bible in a public school make the school a "place of worship" which no one may be compelled to support? Is the Bible sectarian? All of these three very interesting questions were recently decided in the affirmative in the case of *State v. Scheve*, 91 N. W. 846. The authorities have decided both ways upon each of these points. And even in this case, while all were agreed that the reading of the Bible, accompanied by singing and praying, according to the usages of the so-called "Orthodox Evangelical Churches," was contrary to a constitutional provision against the giving of sectarian instruction in public schools (which can not be denied), the court divided on these three questions stated.

The majority of the court in this case rely mainly upon *State v. District Board*, 76 Wis. 177, but go a great deal farther. For while the Wisconsin case is authority for the decision that the reading of the Bible in such an instance as this, makes the public school a "place of worship," and that the indiscriminate reading of the Bible violates the constitutional provision in question, it holds that only portions of the Bible are sectarian; that the reading of portions other than these is constitutional; and that a text-book founded upon such other non-sectarian portions, or upon the principles of the Bible as a whole, is a lawful text-book.

The position of the court on the question as to whether the reading of the Bible in a public school makes the school a "place of worship," seems to us to be untenable. To hold with the court in this case and with the Wisconsin case, is placing a strained construction upon the provision in question. The manifest object of the constitutional provisions concerning the maintaining of "places of

worship," is not to prevent religious worship in public buildings, but to prevent an increase of the burden of taxation for the purpose of making the people support places used distinctively for religious worship. In support of this view see *Moore v. Moore*, 64 Ia. 367. Following the cases just referred to we see no escape from the conclusion that we are violating the spirit of our constitutions when we provide chaplains and permit them to pray (usually according to the usages of some particular sect), in our legislative halls; and again, when we suffer religious services to be held in our penal institutions. For these places are supported by the public, and according to the cases cited these acts make them "places of worship." Obviously these cases go too far.

On the general question as to whether the religious liberty clauses which are substantially the same in most of our State constitutions are intended to entirely exclude the Bible from the public schools—the earlier cases are not in harmony with these more recent. Thus *Donohue v. Richards*, 38 Me. 376, decided that a requirement by a school committee that the Protestant version of the Bible should be read in the public schools of their town by every pupil who was able to read, did not violate a provision in the Constitution of Maine, that no one should be "hurt, molested or restrained in person, liberty or estate, for his religious professions or sentiments," and further that a law is not unconstitutional merely because it requires one to do something which is against his conscience. *Spiller v. Woburn*, 12 Allen 127, goes farther still. In that case it was decided that it is competent for a school committee to order that school be opened each morning with reading from the Bible and prayer, and that the pupils bow their heads while prayer was being offered. The court held that such an order was not contrary to a clause in the Constitution of Massachusetts protecting every one in the worship of God "according to the manner and season most agreeable to the dictates of his own conscience"; that a pupil may be excluded for not complying with the order; and that such exclusion did not violate a statute providing that no one should be excluded from the public schools on account of his religious beliefs.

There is some doubt as to whether these cases decided in the earlier part of last century will continue to be very generally followed, as there is a growing tendency (of which the case under comment is evidence), on part of the courts to adopt an interpretation of this class of constitutional provisions which will give the largest possible freedom in the exercise of religious belief.

NEGLECT IN PRINTING COPYRIGHT NOTICE.

The liability for publishing a copyrighted story taken from a newspaper which by inadvertance had published it without a notice of the copyright, has been passed upon under varying circumstances in a number of the Eastern States and in England.

However, until very recently the Western courts have not been called upon to decide this question.

A recent case in Illinois, *American Press Association v. Daily Story Pub. Co.*, 35 *Chi. Legal News* 99 (Nov. 8), is interesting upon this point. Although the facts are similar to those in the previous cases on this subject, the opinion of the court is not entirely in accord with that of the Federal Court in a case arising in Massachusetts, *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. 54. In the case in Illinois the court held, that where plaintiff, a publishing company, had sold to its patrons a copyrighted story which it had appropriated from a paper in St. Louis, and which the latter paper had obtained from defendants, another publishing company, for limited use on condition that it print a notice of copyright with it, but which it had failed to do, the plaintiff could not restrain the defendant from collecting damages from plaintiff's patrons. The grounds upon which this decision was based were that the St. Louis paper was not an agent of defendant and that the latter could not be legally deprived of his property in the copyright without his consent (R. S., Sec. 4976).

But the court seems to imply that if the St. Louis paper had been an agent of defendant, the latter could not have recovered, as there was no notice of copyright on the reproduction of the story. This opinion follows *Werckmeister v. Pierce & Bushnell Mfg. Co.*, 63 Fed. 445, in holding that Sec. 94 Revised Code of July 8, 1870, c. 230 (16 Stat. 198), which reads that no person shall maintain an action for infringement of his copyright unless he shall give notice thereof by printing on the several copies a notice of copyright, refers to reproductions of an original as well as to the original. However, this is in conflict with the opinion in *Pierce & Bushnell Mfg. Co. v. Werckmeister*, *supra*, which reverses *Werckmeister v. Pierce & Bushnell Mfg. Co.*, *supra*, and holds that the above section refers not to reproductions but to the individual copyrighted things, whether one or many.

In the decision of the present case the fact that the copyright law has two purposes—to protect the author, and also to encourage the full circulation of literature upon which no copyright mark is attached—does not seem to have had much weight.

It seems as though the full spirit of the copyright law would be better carried out if the property, which an innocent third person has acquired in a bona-fide manner on the faith, induced by the negligence of some other party, that authority was given when in fact it was not, could be secured to him and the free circulation of uncopyrighted literature be accompanied by less risk.

In connection with the question of copyrighted newspaper articles *Walter v. Steinkopff*, L. R. 3 Ch. D. 489 [1892], where the cases are collected, is interesting.