UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 57 OCTOBER NUMBER 1

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES

LIABILITY OF MANUFACTURER FOR INJURIES TO THIRD PERSON FROM DEFECTIVE MACHINERY.

The recent case of *Statler* v. *Ray*[1] (125, N. Y. App. Div. 69) is important as bringing defective machinery, in this case a boiler, within the exception to the rule exempting manufacturers from liability for injuries to third persons arising from defective articles.[2] The exception referred to has been said to exist in the case of articles "imminently dangerous to life or health."[3] There has, however, been an almost uniform

[1] The court also placed its decision on the ground that the boiler was dangerous to the public.

[2] *Huset* v. *J. I. Car Machin. Co.*, 120 Fed. 865.

[3] *Huset* v. *J. I. Car Machin. Co.* (*supra*), p. 870.

tendency to exclude machinery, and mechanical appliances and structures from the scope of this exception. Thus while courts have asserted the liability of manufacturers of drugs,[4] weapons[5] and food,[6] they have denied liability for injuries due to defects in the following cases—a hook holding a heavy weight in a drop press,[7] a porch,[8] a cylinder of a threshing machine which burst,[9] a hoisting rope of an elevator,[10] and a shelf designed as a platform for workingmen.[11] Indeed, in an earlier New York case,[12] which seems to have been ignored in both the majority and minority opinions in the recent case under discussion, injuries resulting from a defective boiler were held to impose no liability on the manufacturer.

The reason for this arbitrary exclusion of mechanical appliances and machinery from the category of articles "imminently dangerous to life or health" seems to rest upon a misconception of the case of *Wenterbottom* v. *Wright*,[13] which is assumed to have negatived the exitsence of any duty on the part of a manufacturer toward third persons, whereas in fact it merely held that no action in contract could be maintained by such third person against the manufacturer. Since that case involved a defect in a mechanical appliance, *i. e.*, a coach, subsequent courts, misunderstanding that decision, denied the manufacturer's liability in this class of cases, while recognizing a liability in instances, which though analogous in principle, were divergent in fact. Investigation seems to show that there existed at common law a principle which required every man to properly exercise his trade, and subjected him to liability to third persons who were injured by his failure to fulfill this duty. Consequently, the liability of a manufacturer of goods imminently dangerous to life or health, which is now consid-

---

[4] *Thomas* v. *Winchester*, 6 N. Y. 397.

[5] *Dixon* v. *Bell*, 5 Maule & Sel. 198.

[6] *Bishop* v. *Weber*, 139 Mass. 411. But *contra*: *Tomlinson* v. *Armor Co.*, 65 Atl. 885.

[7] *McCaffrey* v. *Mfg. Co.*, 50 Atl. Rep. 651.

[8] *Curtin* v. *Somerset*, 140 Pa. 70.

[9] *Heize* v. *Kingsland, etc., Mfg. Co.*, 110 Mo. 605.

[10] *Barrett* v. *Mfg. Co.*, 31 Super. Ct. N. Y. 545.

[11] *Levan* v. *Jackson*, 55 Hun, 194.

[12] *Losee* v. *Clonte*, 51 N. Y. 494.

[13] 10 M. & W. 109.

ered an exception to a rule, is really merely a most obvious application of a common law doctrine.

No doubt the difficulty of applying the standard of "imminent danger to life or health" has contributed to the exclusion of manufactured articles from the operation of the exception under consideration. Many instances would plainly fall within the *ratio* of this exception, as for example, a high scaffold;[15] others would as clearly fall without, as a table; while still others would be difficult of classification, as a chair or shelf. It is submitted, however, that the interests of justice may be served without too great a sacrifice of judicial convenience if the following elements be requisite to the fixing of the manufacturer's liability in any given case: (1) That the article be one which if defective is imminently dangerous to life or health; (2) that there be shown a failure to use reasonable care in the manufacture or production of this article; (3) that it be an article with which the class of persons of whom the plaintiff is one will naturally come in contact; (4) and that the injury actually occurs while the article is put to the use for which it was designed. To these requirements might well perhaps be added another, (5) that the article be sold by the manufacturers as a sound and adequate article, thus relieving the manufacturer from liability for injuries arising from "cheap goods," and holding that in such case the act of the vendee in knowingly using such inferior article is the proximate cause of the injury.

The Evasion of a Covenant Running With the Land by Incorporation.

In the case of *People's Pleasure Park Co., Inc.* v. *Rohleder*, 61 S. W. 794, a bill was filed to enforce a covenant in a deed which covenant must be taken to be one that ran with the land, one which was not against public policy and one which was not an unreasonable restraint on alienation, though this last proposition might be doubtful as applied to this particular covenant and would make a very interesting subject for discussion, were opportunity afforded.

The facts show that in 1900 the then owner of this piece of land containing some hundred acres divided it into several

---

[15] *Devlin* v. *Smith*, 89 N. Y. 470.

building lots, and sold these lots separately, each one being sold subject to a covenant that title thereto should never vest in "a person or persons of African descent" or in "any colored person." There were no covenants as to user, etc. After a mesne conveyance from the first grantee, in which this covenant was purposely omitted, several of these lots were conveyed to the defendant (who under the pleadings must be held to have known all along of the covenant) a corporation, composed exclusively of colored persons, the charter of which set forth that the corporation was to maintain a pleasure park solely for negroes. The Court very properly said that the admitted object of the corporation to so use the land could not be considered, as there was no covenant in the deed as to user. The Court, however, denied the injunction solely on the ground that "such a conveyance by no rule of construction vests the title in a person or persons of African descent." The Court states three propositions:

(1) Forfeitures are frowned upon in law.

(2) The words of a covenant like this must always be most strictly construed, and to obtain a forfeiture the defendant must be brought beyond all doubt into the class of those subject to its terms.

(3) A corporation is a separate and distinct legal entity entirely idefferent from any single shareholder, or the entire group of shareholders taken together.

The first of these three is undoubted law. As for the second, it would seem that the word "person" in the covenant could properly have been construed to include a corporation, (for many courts under varied circumstances have so construed it) and thereby the plain and obvious intent of a covenant admittedly binding could have been carried out. The Court's duty was to construe the covenant fairly, strictly and with due regard to the purpose and object of the parties. It is submitted that this could have been accomplished by letting "person" include a corporation, a construction which has been sanctioned frequently by the courts, and, therefore, could have been adopted. The Court might have given practical effect to this construction by holding that unless a by-law or the charter of the corporation prevented negroes from holding its stock then it could not take title to this land.

But though it might have been a possible way out of the difficulty tht Court pays but little attention to this point, and rests the case on the third proposition; *i .e.*, that a corporation is an entity, entirely separate from any and all of its members. The chief authorities cited by

the Court are, "Cook on Corporations," Rudolph Sohm's "Institutes of Roman Law," Marshall, C. J., and Judge Denio. Two of these are text-books and the other two, though men of the most eminent authority, nevertheless gave their decisions at a time when that proposition was more firmly established than it is to-day. The corporation's separate existence as an entity is admittedly a legal fiction, and is being less and less resorted to by courts to obtain desired results. In reality, the title to the land may, at the dissolution of this corporation, be divided up among its real owners; *i. e.*, the shareholders, and if so, then what becomes of this covenant? Are the real owners to be denied title to their property which they own when composing a corporation, and is a forfeiture either to the State or to the original grantors, to be made when the corporation attempts to divide up its assets among their real owners? If it is admitted that a conveyance to a corporation composed exclusively of colored persons is not a conveyance to colored persons, what rule of law can be invoked to prevent the shareholders from coming into their own on the dissolution of this legal entity? Either this covenant, which is here granted to be sound and binding, is rendered of no effect at all by the fact that a corporation steps in between, or a much more questionable application of the covenant is made at a time when it is far more unjust to enforce it; for entirely innocent shareholders who bought their stock later might suffer, or a white shareholder, supposing such a one to exist, could take title to his pro rata share of the land, while his colored brother, who paid just as much for his stock, could not. It would seem as possible and perhaps more desirable to enforce the covenant, if at all, at a time when it would work less injustice and this would be when the corporation containing colored shareholders first attempted to take title.

Waiver of Constitutional Guaranties.

The right to a jury trial guaranteed by Section 2 of Article 3 of the Federal Constitution, as well as by the 5th, 6th and 7th Amendments[1] thereto, has always been assumed by the

---

[1] As the first ten amendments are purely restraints upon the federal government (*Spies* v. *Illinois*, 123 U. S. 86; *Holden* v. *Hardy*, 169 U. S. 366, 382; *Brown* v. *New Jersey*, 175 U. S. 174) and Article 3 relates purely to suits in federal courts (*Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31, 1890) it has been held (*Maxwell* v. *Doe*, 176 U. S. 581) there is no objection to trying felonies against state laws in a state court by a

courts to be the common law jury of twelve;[2] at least such, it was said, must be the number of jurors at the beginning of the case. In *Thompson* v. *Utah*[3] the Supreme Court of the United States decided that one indicted for a felony could not consent to be tried by less than twelve jurors, and any such waiver of his right was invalid. In the case of civil suits this right to a jury of twelve may be waived.[4] The case of petty misdemeanors was raised in *Shick* v. *U. S.*[5] There the defendant was fined $50 by the lower court for selling oleomargarine not stamped as required by the Act of Congress,[6] after waiver by the defendant of his right to be tried by jury. The Court[7] held that such a "petty offense" was not a "crime" within the meaning of Sec. 2 of Article III of the Constitution, and affirmed the conviction. The Court distinctly differentiated such an offense from a misdemeanor of a more serious character, such as would be punished by imprisonment, resting their opinion largely on Blackstone's statement that the word "crimes" technically includes both felonies and misdemeanors, yet "in common usage the word "crimes is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors only,"[8] the Constitutional Convention having by unanimous vote amended the words "the trial of all criminal offenses" in Sec 2 of Article 3 to read "the trial of all crimes."

---

jury of less than twelve, if such is provided for by the state constitution (the statute in Utah provided for a trial of felonies by a jury of 8).

[2] *Thompson* v. *Utah*, 170 U. S. 343 (1898).

[3] *Supra.*

[4] *Parsons* v. *Armor*, 3 Pet. 413; *U. S.* v. *Rathbone*, 2 Paine, (U. S.) 578. (A similar view has been taken by the state courts concerning similar provisions in the state constitutions: *Huron* v. *Carter*, 5 S. Dak. 4; *Cravins* v. *Grant*, 4 T. B. Monroe, 126; *Roach* v. *Blakey*, 89 Va. 767; *Krenchi* v. *Dehler*, 50 Ill. 176.) The phraseology of the 7th Amendment is, "The right of trial by jury," &c., hence it is not mandatory so as to be incapable of waiver by the defendant. Similarly the word "right" is used in reference to the privileges guaranteed by the 6th Amendment in criminal cases. On the contrary, Sec. 2 of Article 3 and the 5th Amendment are unqualifiedly mandatory.

[5] 195 U. S. 65 (1904).

[6] Oleomargarine Act of 1886 (24 St. 209) as amended by Act of 1902 (32 St. 93).

[7] Harlan, J. dissenting.

[8] Commentaries, vol. 4, page 5.

In the recent case of *Dickinson* v. *U. S.*[9] the Circuit Court of Appeals for the First Circuit held that a cashier of a national bank indicted for "the unlawful conversion of certain moneys, funds and credits," a misdemeanor under Sec. 5209 Revised Statutes, could not consent to be tried by less than twelve jurors. The case started with a jury of the requisite number—twelve; two of the jurors were, however, excused by the Court for cause (illness and death in the family) during the trial. The defendant in writing agreed to the discharge of the jurors and the continuance of the case, and then on appeal alleged that the trial was on this account unconstitutional since there was no trial by a common law jury. The majority of the court[10] agreed with the contention of the defendant and set aside the judgment. The Court distinguished between the provisions of the Constitution as originally adopted and the first ten amendments, holding that the latter were merely a Bill of Rights, and as such intended purely for the protection of the person to be benefited thereby, and hence, as he alone was concerned in their enforcement, they could be waived, while the former generally was intended to establish a form of government, and as such the entire public had an indirect interest in its enforcement, and hence it could not be waived, since to do this would be to allow any defendant to change the form of government in the constitution of the courts at his will. Just as no defendant in a criminal suit could agree to have his case tried by Congress, so he could not agree to be tried by less than twelve jurors, since either is a change in the constitution of the tribunal which the people of the United States have provided for the trial of such offenses as the one best suited to subserve the public interests.[11] And this is true though, says the Court[12] at least in the case of misdemeanors, he can waive the right to compulsory process for witnesses, the right to the assistance of counsel in his defense, the right to be confronted by witnesses[13] and the like—privileges secured

---

[9] 159 Fed. 801 (decided Feb. 12, 1908).

[10] Aldrich, J., dissenting.

[11] The proceeding is "*in invitum* against the will of the defendant" and he is not in a position "to change the constitution of the court and jury by which he is to be tried" (*Hill* v. *People*, 16 Mich. 351). "He has no power to consent to the creation of a new tribunal unknown to the law to try his offense" (*St.* v. *Mansfield*, 41 Mo. 470).

[12] At page 806.

[13] See Cooley on Constitutional Limitations, (7th edition) page 441, note 1, and page 452. See also note 1 (*supra*).

to him purely through the Sixth Amendment, and hence intended merely as a personal protection and not going to the constitution of the Court.[14]

The question of waiver in the case of a serious misdemeanor has never come before the Supreme Court of the United States, and the English cases never seem to have decided the point, though they contain some conflicting dicta.[15] The cases in the States where the right of waiver of a jury of twelve was denied have been mostly cases of felonies,[16] though the *ratio decidendi* is usually broad enough to cover either the case of felonies or misdemeanors. The great majority of the State cases where the question of *Dickinson* v. *U. S.*[9] has actually arisen have decided that the waiver was valid[17].

The Constitutionality of the Commodities Clause of the Hepburn Act.

On September 10, 1908, the Circuit Court of the United States for the Eastern District of Pennsylvania, in *United States* v. *The Coal Roads,* decided, that the Commodities Clause of the Hepburn Act was invalid, because "in the opinion of this Court, the enactment in question is not a regulation of commerce within the proper meaning of those words as used in the Commerce Clause of the Constitution, and therefore not within the power granted by that clause;" and secondly, because it violated the Fifth Amendment. A comparison of this case

---

[14] In *Teenan* v. *Oklahoma,* 190 U. S. 343 (murder), the Supreme Court held that the right to object to the disqualification of a juror discovered after the taking of evidence had begun may be waived. But see *Hill* v. *People,* (*supra*), (murder), contra.

[15] Cf. Forsyth's History of Trial by Jury, 241; Lord Dacre's Case, Kelyng's Reports, 56.

[16] *Hill* v. *People,* (*supra*); *Wilson* v. *St.,* 16 Ark. 601; *St.* v. *Mansfield,* (*supra*). See also Cooley's Constitutional Limitations (7th ed.), page 458 and cases cited in note 1 on that page.

[17] *Comm.* v. *Dailey,* 12 Cush. 80 (per Shaw, C. J.); *C.* v. *Sweet,* 16 Pa. C. C. 198; 4 Dist. 136 (false pretences); *St.* v. *Borowski,* 11 Nev. 119 (misdemeanor in office); *St.* v. *Cox,* 8 Ark. 436 (assault and battery); *Murphy* v. *Comm.,* 1 Metc. (Ky.) 365 (betting at an election). The defendant was fined $100 and the court adverts to the petty character of the offense in arriving at their decision.

with the Northern Securities decision is very interesting. In each there was a corporation owning two properties—in one, a controlling interest in the shares of two competing railroads; in the other, a railroad and a coal property. The wrong to be prevented in one was restraint of trade; in the other, discrimination. In neither, did duality of ownership of *necessity,* nor *actually,* but only *possibly* cause the wrong to be prevented. In both duality of ownership was authorized by State law. In the Coal Roads case the Court said, that the Commodities Clause forced upon the Coal Roads the alternative of either selling, or of retaining and not using. In the Northern Securities case, not even the benefit of such an alternative was given. At common law there is no right to make a contract in restraint of trade, nor to enter into a combination for that purpose. Nor is there any right at common law for a common carrier to discriminate.—A private carrier, whether a "farmer" or a corporation, is under no duty at common law to treat all alike; and any law compelling either so to do would interfere with the right of contract.—To deny the right to do either, viz., to cause a restraint of trade or to discriminate, is merely re-enforcing the common law; and is not in violation of the Fifth Amendment. Every such enactment, of necessity, is bound to cause some indirect loss.

The power of Congress under the Commerce Clause to enact the Commodities Act was denied on the ground that it amounted to a prohibition; and that the power to regulate did not include the power to prohibit. To determine whether there was, in fact, a prohibition, it is necessary to consider the substance and not the form; to consider the actual state of affairs, in order to see if transportation was, in fact, prohibited. In contemplation of law a corporation is an entity, distinct and apart from its members. Actually, the stockholders are the corporation, and the co-owners of the two properties in both of the two cases in question. A group of men, owning two properties, associated in corporate form in order to embark and operate them in one business enterprise. In the Northern Securities case, it was held that to do this, made restraint of trade a possibility; in the Coal Roads case, it made discrimination a possibility. In neither case were the stockholders actually compelled to sell either one of their properties. By neither act were they prevented from operating both of their properties separately. All that was prohibited by either statute was the continuing to

[1] 193 U. S. 359 (1903).

operate the two properties together. Duality of operation, not of ownership, was forbidden. Viewed in the above light, it can hardly be said, that the Coal Roads were forced either to sell, or to retain and not use. "All that is necessary is to distribute to the stockholders *pro rata* the shares of a new corporation, formed to take over the mining and manufacturing business of the corporation." [2] The decrease in the value of the shares in the old corporation would be commensurate to the value of the shares in the new. The only loss incurred would be due to the inability to continue to operate the two properties together—certainly, an indirect taking of property. Corporate organization would require a formal alienation from the old corporation to the new. But to contend that there was an actual sale, or even an actual alienation from one group of men to another, would be impossible. If the actual state of affairs is taken, it is hard to see that there was any prohibition of the transportation of any commodity; and it is unnecessary to decide whether such is within the power of the Commerce Clause. The power to prevent discrimination and restraints upon trade has never been questioned. If the power to regulate commerce includes the power to prevent possible restraints upon trade, there is no reason why it should not include the power to prevent possible discriminations.

But it must not be overlooked, that the so-called duality of ownership was subsequent to the enactment of the Anti-Trust Act in the Northern Securities case, while it was prior to the enactment of the Hepburn Act in the Coal Roads case. This affects the question of "due process of law." It must also be remembered, that in the former case the rights of no third parties, who owned shares in corporations in which the offending company was "indirectly" interested by a like ownership of shares in the same corporation, were affected. It may prove to be a defect in the drafting of the Hepburn Act that such rights of third parties may be jeopardized.

---

[2] See article by Dr. William Draper Lewis—"Constitutional Questions Involved in the Commodity Clause of the Hepburn Act"—in the Harvard Law Review, Vol. XXI (1908), page 595, at page 613.