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NOTES.

MONOPOLIES AND COMBINATIONS AGAINST PUBLIC POLICY.

A case recently decided in the United States Circuit Court for the Northern District of Ohio[1] presents for consideration several principles, which are of growing interest, in view of the present day anti-trust agitation.

The offending party being in this instance a telephone company, the question arose as to whether it was justified in making an exclusive lease for the period of 99 years, whereby certain local companies agreed to give all their long distance work to this particular company. In this respect it had been held that exclusive contracts in favor of express companies by a railroad were not against public policy;[2] also, that a contract whereby the Pullman Car Co. were to furnish exclusively all Pullman cars to a railroad was not in violation of

[1] *U. S. Telephone Co.* v. *Cent. Union Tel. Co. et al.*, 171 Fed. 130.
[2] *Express Cases*, 117 U. S. 1 (1885).

public policy.[3] Was an exclusive contract by a long distance telephone company to be put in any different class?

In the case of express companies the decision went upon the ground that the express business had to be carried out on passenger trains where, owing to the unavoidably limited space, and the necessity of having the agent of each express company present and in charge of the goods, it would cause endless delay and confusion, if it were necessary for a railroad to divide up such space among any and all express companies who chose to demand such accommodation. It is clear that such reasoning could not apply to a telephone company, in its endeavor to prevent local companies from using the long distance lines of competing companies.

As for the exclusive contract with the Pullman Company, it was said that who furnished the Pullman cars was of no concern to the general public, so long as they were furnished, and were allowed to be transferred over any lines in the country. It is submitted that the real distinction between both the above cases, (*i. e.,* express companies and Pullman companies) and the case of the present telephone company, is that a contract which affects only the *quality of the service*—and that not unreasonably—will not be deemed to be against public policy, whereas a contract which limits the *scope of the service,* is in violation of the duties of such companies to the public. Therefore, had the contract been to supply the telephone company exclusively with a certain kind of transmitter or receiver, it could hardly have been held an illegal or monopolistic contract, whereas had the contract of the Pullman Company been that no Pullman cars should be furnished or sent beyond certain points, it might well have violated the duties owed the public.

Another point of interest is whether or not under any view the local companies could be compelled to give their patrons long distance service if available; for if no such duty was owed the patrons, it was to be contended that no duty could be violated by entering into a voluntary contract by which the patrons were benefited. As the determination of such a question is necessarily limited to recent times, the decisions are not yet numerous, but it would seem to be solved as follows: The long distance company owed the duty of rendering long distance service to its patrons. By entering into an agreement of consolidation with the local companies, as in the present case, it assumed the duties of the local companies and *vice versa;*[4] or, as a modern text-writer has put it: "The liability

[3] *Railroad Co.* v. *Pullman Co.,* 139 U. S. 79 (1890).

[4] *Tomlinson* v. *Branch,* 15 Wall. 465 (1872); *Mobile* v. *State,* 41 So. Rep. 259 (1906).

of a consolidated company upon the contracts of its constituents is precisely the same as that of the original company."[5] Therefore, after having united with a long distance company, the local companies owed to their patrons the duty of providing them with long distance service.

Assuming, then, that it became the duty of the company to furnish to its patrons long distance service, the question remains: was the contract here entered into monopolistic and against public policy?

The contract was in the form of a 99 year lease, containing the exclusive restrictions before adverted to. It has been held that a lease may come within the provisions of a statute against "consolidation," though such a conclusion would seem to be stretching the interpretation of the word "consolidate." Accordingly, some courts have not accepted this view.[7] Under the Ohio statutes, however, the word "lease" has been specifically used, and there could be no doubt that a lease could be in violation of the public policy of Ohio. The question remained whether this particular lease was of that nature. The Court for this purpose treated the telephone company as a common carrier[8] and is supported in this view by authority[9] and many dicta, but it would seem impossible on theory to establish the essential relationship of bailor and bailee in the case of a telephone company. While it has been advanced that a telegraph company is a bailee of the message or of "intelligence,"[10] yet such reasoning can hardly apply to a telephone company, for the sender personally transfers his own message and delivers it himself, the company merely furnishing a method or means for such transportation. It could not be contended that the owner of a megaphone who offered it for public use in summoning conveyances, for example, could be liable as common carrier, and yet the case appears analogous. The better view, moreover, is that telephone and even telegraph companies are not to be correctly termed "common carriers."[11] Yet it is universally admitted that they occupy a position closely analo-

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[5] Noyes on Intercorporate Relations, p. 158.

[6] *State* v. *Atchison R. Co.*, 24 Neb. 164 (1888).

[7] *Gere* v. *N. Y. C. R. Co.*, 19 Abb. N. C. 210 (1885).

[8] P. 146.

[9] *State* v. *Cadwallader*, 87 N. E. 644 (1909); *Telegraph Co.* v. *Texas*, 105 U. S. 460 (1881).

[10] *Chesapeake* v. *Co.*, 66 Md. 399 (1886).

[11] *Leonard* v. *Tel. Co.*, 41 N. Y. 544 (1870); *Hibbard* v. *Tel. Co.*, 33 Wis. 558 (1873).

gous to that of common carriers with respect to their duties to the public.[12]

Then, reverting to the text submitted above, the lease for 99 years would here appear to be clearly against public policy, for the *scope of the service* was thereby materially limited, since the contracting company could not furnish the local companies with the connections which they could secure by supplementary contracts with other long distance companies. Such conclusion is supported by numerous authorities.[13]

The whole question arose in an unusual way, which is worthy of notice. The complainant company asked for an injunction to restrain the respondent company from interfering with this 99 year lease of complainant's, and from effecting breaches of this contract by the local companies. The relief was sought on the basis of the old doctrine of *Lumley* v. *Gye*.[14] The Court, however, held that in issuing an injunction to prevent a breach of contract, it necessarily devolved upon the Court to inquire into the legality of the contract which was to be thus negatively enforced. Then, turning the tables on the complainant, they held that it had made a contract in violation of public policy and statute law, and was therefore entitled to no relief on such contract.

The whole matter being an equitable proceeding the Court was entitled to look both at the respondent's wrong, and at the standing of the complainant, and it was justified in refusing aid not only for the reason just given above, but on account of the old equitable maxim that "he who comes into equity must come with clean hands." This was a case, therefore, when the "tu quoque" argument proved wholly effective.

W. L. MacC.

Action for Libel Where Defendant Has Used a Fictitious Name.

A curious and unusual set of facts has recently presented to the King's Bench Division a perplexing question in the law of Libel.[1]

The *Sunday Chronicle* published a letter from its Paris correspondent describing a motor festival at Dieppe. In this

[12] Hutchinson on Carriers, § 81a.

[13] *State* v. *Tel. Co.*, 47 Fed. 633 (1891); *Munn* v. *Illinois*, 94 U. S. 113 (1876); *Ohio* v. *Tel. Co.*, 36 Ohio, 296 (1880).

[14] 75 Eng. C. L. R. 216 (1853).

[1] *Jones* v. *Hulton*, L. R. (1909), ii K. B. D. 444.

letter the author in describing the crowd upon the terrace, wrote: "There is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing. Who would suppose by his goings-on that he was a church-warden at Peckham?" The correspondent invented the name "Artemus Jones" and had no idea of applying his remarks to any particular person. Unfortunately, however, a man bearing the name of Artemus Jones, who neither lived at Peckham nor was a church-warden, brought an action against the proprietors of the *Sunday Chronicle,* proved that several persons had thought him to be the Artemus Jones referred to in the letter, and recovered 1750 pounds damages. The three judges who decided the case on appeal dealt chiefly with this question,—To what extent does the defendant's intention affect the question of liability? Lord Alverstone, C. J., held that the defendant's intention was entirely immaterial; Fletcher-Moulton, L. J., held that it was crucial; and Farwell, L. J., divided his attention between the questions of intent and negligence.

The question of intent in libel has been discussed in three classes of case: (1) Where the defendant intends to publish a statement concerning the plaintiff, but does not intend it to be libellous. Here it is usually held that the defendant's intention is immaterial.[2] He has made a statement intending it to apply to the plaintiff and must take the risk of the consequences of such a publication; he is in the position of a man who, intending to strike his neighbor's dog in play, inadvertently strikes it dead.

(2) Where the defendant, intending to make an innocent statement concerning the plaintiff, makes a libellous statement by mistake. Here the same considerations apply. Thus where defendant, intending to insert plaintiff's name under "Notices of Dissolution of Partnership," put it by mistake under the heading "First Meetings Under the Bankruptcy Act," the plaintiff recovered.[3] So, too, where a newspaper in reporting an arrest inadvertently interchanged the names of prisoner and prosecuting witness, the latter recovered.[4] In both classes of case it is evident that the defendant is entirely innocent of any intent to harm the plaintiff; but it must be observed that the defendant intends to involve the plaintiff in the act which he is doing, *i. e.,* he intends to make a statement concerning the plaintiff.

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[2] *Haire* v. *Wilson,* 9 B. & C. 645 (1829).

[3] *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502 (1875).

[4] *Griebel* v. *Rochester Printing Co.,* 60 Hun, 319 (1891).

(3) Where the defendant has no idea of making any publication concerning the plaintiff. In this class, in which the principal case falls, the defendant not only has no intent to harm the plaintiff, but, having never heard of the plaintiff's existence, has no intent to do any act in which the plaintiff shall be involved. Can such a state of mind involve the defendant in liability to any action? Very few cases answer this question directly and in those cases which discuss the matter, the confused use of the words "intention" and "meaning" and the possibility of taking them either subjectively or objectively, make it difficult to ascertain the true opinion of the court. A few cases discuss the question of a publisher's liability to a plaintiff whose name has been innocently used by the publisher in a libellous article, but in most of these it appears that the defendant intended to level his remarks at some living person, if not at the plaintiff.[5]

Smith v. *Ashley,* 52 Mass. 368, seems to be a direct authority in conflict with the decision of Lord Alverstone and Lord Farwell. The Court in *Smith* v. *Ashley* held that a publisher was not liable for the publication of an article, though aimed at the plaintiff by the writer, provided the defendant thought the article a mere skit and the plaintiff's name a fictitious one. It is evident that the court was controlled by a theory of tort liability somewhat different from that which influenced Lords Alverstone and Farwell. The Court said, "If the defendant had no knowledge that the article published was libellous, he has been guilty of no wrong, and he is not responsible by law, although the plaintiff has thereby been injured." The Court in the principal case, on the other hand, takes the position that it is injury to the plaintiff, and not a wrongful act on the part of the defendant, which constitutes the real basis of liability. The modern conception of tort involves two ideas, (1) injury to the plaintiff and (2) the injury is directly due to an omission by the defendant of the performance of a duty due by him to the plaintiff. In the principal case, injury to the plaintiff is evident; it therefore becomes material to consider only the second of the above elements. Farwell, L. J., proceeds on the theory that the defendant was negligent in giving out to the world a scandalous story which might, by any possibility, injure a living person. This sets a high standard of the duty of carefulness owed by one man to his neighbors. On the other hand, in the few cases contra, it is said that a man discharges his duty to his neighbor in this matter, if he abstain from wilfully

[5] *Harrison* v. *Smith,* 20 L. T. (N. S.) 713 (*Nisi Prius,* 1869); *Hanson* v. *Globe Newspaper Co.,* 159 Mass. 293 (1893).

publishing statements meant by him to apply to one of his neighbors.[6]

Where two theories so widely divergent appear each to have a sound basis in legal philosophy, the criterion of liability must of necessity be found by an application of the dictates of common sense and convenience. Fletcher-Moulton, L. J., points out to what absurdities a logical extension of his colleagues' judgment must lead.[7] Since an action of libel will lie although no name has been used, a public speaker may bring upon himself very serious consequences by innocently introducing a hypothetical case to illustrate a point in his discourse. So a statement true of the John Smith "of and concerning" whom the defendant wrote, may give to a hundred other John Smiths a cause of action against the publisher. If it be said that by ascertaining the truth of his statement with regard to one John Smith the publisher has thereby discharged his duty of carefulness towards his neighbors, it may well be answered that this is an arbitrary rule and that, if the severe doctrine be carried out to its logical limits, a publisher should be obliged to make it plain and unquestionable which of the hundred and one John Smiths he intended. In the words of Fletcher-Moulton, L. J., "It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities." The milder rule seems more in accord with common sense and convenience than the stringent rule set forth by the majority of the English Court.

S. L.

False Representations of Principal and Agent.

It seems reasonably clear that an innocent principal is liable in tort for deceit, if his agent deliberately makes false representations, or makes them in conscious ignorance of their truth or falsity, while acting within the scope of his authority. The idea underlying this doctrine appears to be that the principal cannot employ an agent and retain the benefit of his services without assuming full responsibility for the frauds of the agent as well as for his other torts.

A few cases hold that this liability of the principal need not be based upon the tort of the agent, but may be referred to the contract, as on a breach of warranty. Thus, where an agent was authorized to make material and false representa-

[6] *Every Evening Printing Co.* v. *Butler*, 144 Fed. 916 (1906).

[7] L. R. (1909), ii K. B. D. 475.

tions as to existing facts, which were capable of exact knowledge, even though both principal and agent believed the representations to be true, and those representations induced the contract, the principal was held liable on the contract for the damages actually suffered in the case of *Wimple et al* v. *Patterson.*[1] The court advanced the proposition that in such cases "the liability of the principal need not be rested upon the tort, but may be referred to the contract, for whether made innocently or deceitfully, such representations against the seller operate as a warranty." The Texas case cited in support of this conclusion apparently sustains it,[2] but the only outside authority referred to does not.[3] All the latter case decides is that a principal is liable in an action of tort for the fraudulent misrepresentation of his agent made within the scope of his authority, which is self-evident. It is submitted that there is a distinction between permitting an action against the principal in tort for the fraudulent misrepresentations of his agent, and allowing an action against the principal on the contract as for a breach of warranty. A representation is not necessarily a warranty; the latter is a part of the contract, the former precedes and induces the contract. In case of breach of warranty the contract remains binding and damages only are recoverable for the breach; whereas upon a false representation, the defrauded party may rescind the contract and recover as damages the entire price paid. The same transaction cannot be a warranty and a fraud at the same time, for the one is a part of the contract, the other is a tort collateral to the contract. If this is correct, it will be seen that the case cited (*Rhoda* v. *Annis*) is no authority for the conclusion reached in *Wimple* v. *Patterson.*

If the false representations, innocently made, were not authorized by the principal, and were made without his knowledge, but within the apparent scope of the agent's authority, some cases hold that the principal is not liable, even though he receives the benefit of the contract.[4] See the celebrated case of *Cornfoot* v. *Fowke*[5] the agent represented that there was no objection to a house he was authorized to let, whereas, un-

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[1] 117 S. W. 1034.

[2] *Loper* v. *Robinson,* 54 Tex. 510.

[3] *Rhoda* v. *Annis,* 75 Me. 17.

[4] In *Deaker* v. *Fredericks,* 47 N. J. Law (18 Vroom), 469, the Court held that the principal is not liable for the false representation of his special agent where the latter was authorized only to sell the horse as he stood, without representations or warranties.

[5] 6 M. & W., 358.

known to him, but known to the principal, there was a brothel next door. The lessee pleaded the fraud in defense to an action for rent. The plea was held bad, although it would have been good if the principal were shown to have intentionally concealed the circumstances from the agent. However, what this case really decided was that it was error to tell the jury without qualification, "that the representations of the agent must have the same effect as if made by the principal himself," the plea averring fraud without qualification.[6] This case must be considered at flatly contra to *Wimple* v. *Patterson,* and is in accordance with the doctrine in England that to hold the principal liable it is necessary to lay the action with a scienter, and prove that he was guilty of some intentional concealment of the facts innocently misrepresented by the agent.[7] Therefore, what would have amounted to fraud had the agent possessed the knowledge of the principal when he made the misrepresentations is not fraud when the principal knows, but does not disclose, the real circumstances, which are innocently misrepresented by the agent, without the knowledge of the principal.

This case effectually disposes of the fiction of identity of principal and agent, advocated by a few writers; and also seems to repudiate the doctrine that seems to us the more reasonable, that a principal ought not to retain the benefit of a contract without assuming full responsibility for the means by which the contract was induced; which is, after all, nothing more nor less than a purely quasi-contractual obligation. And there is plenty of authority for the latter view. See *Reitman* v. *Fiorillo,*[8] where it was held that an innocent principal cannot assert any rights or retain any benefits upon a contract when it is procured by the fraud of his agent; and where an agent effected a sale of land for his principal by false representations, without the authority or knowledge of the principal, the latter was held liable for the fraud in the same manner as if he had known or authorized it in *Law* v. *Grant.*[9] The recent Pennsylvania case of *Shultheis* v. *Sellers*[10] is in line with these decisions. Here the defendant was the maker of a promissory note which he had been induced to sign by the false representations of the agent of a publishing house as part consideration for a set of books. The note was payable to the agent, and had been endorsed to the plaintiff, who failed to establish the

[6] Pollock's Torts, 5th Ed., p. 291.
[7] *Peak* v. *Derry,* L. R. 14 Ap. Cas. 541.
[8] 72 Atl. R. 74.
[9] 37 Wis. 548.
[10] 223 Pa. 513.

fact that he held the note without knowledge of the fraud. It was not alleged that the agent was an expert and knew that his representations as to the character and quality of the books were false, nor that the publishers authorized the agent to make the representations. It was held, *inter alia*, that the publishers could not affirm the action of the agent in making the sale and not assume responsibility for his representations.

As for the liability of the agent under such circumstances, both reason and authority are in accord with the proposition that an agent is personally liable for false representations resulting in damage to others while acting within the apparent scope of his authority, whether those representations were authorized by the principal or not. But in *Wimple* v. *Patterson* the agent was held not liable, the Court holding that where an agent, acting within the scope of his authority so as to bind the principal honestly believes the representations made by him to induce the purchaser to contract with his principal to be true, to the damage of the purchaser, he is not liable either on the contract or as for the tort. That he is not liable on the contract is clear, for he was not a party to it; but whether he is liable in tort for the deceit depends upon whether in a given jurisdiction the scienter must be proved. The peculiarity of *Wimple* v. *Patterson* lies in the fact it was not necessary to prove the scienter to hold the principal either on the contract as on a breach of warranty, or in tort for the deceit; whereas, in the case of the agent, the scienter must be proved to hold him liable in deceit.

G. H. B.