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NOTES.

EQUITY JURISDICTION—PROPERTY IN NEWS—UNFAIR COMPETITION—It may be regarded as definitely settled that where one at the expense of time, money, and labor has gathered news, equity will protect such person in the enjoyment of the fruits of his enterprise for a reasonable time against piracy resulting from breach of contract or trust. The reasons for affording this relief are not uniform, in some cases the remedy has been regarded as the protection of a property right; in others it has been treated as analogous to the prevention of unfair competition in trade. In the leading case in the Supreme Court of the United States, where the complaint was that the defendant was surreptitiously obtaining and making use of quotations of prices collected by the Chicago Board of Trade, the court said, in holding the plaintiff entitled to an injunction, that its right was "like a trade secret." The plaintiff had the right to keep the work it had done and the fact that others might do similar work did not authorize them to steal the plaintiffs'. The latter did not lose its right by communicating the result to persons, even if many, in confidential relation to itself, and strangers to the trust would be restrained from getting and using the knowledge obtained by inducing a breach of trust.[1]

In the recent case of the *International News Service* v. *Associ-*

[1] Board of Trade of Chicago v. Christie G. & S. Co., U. S. 236 (1905). See also, Exchange Tel. Co. v. Gregory (1896), 1 Q. B. 147; Exchange Tel. Co. v. Central News Ltd. (1897) 2 Ch. 48; Exchange Tel. Co. v. Howard, 22 Times L. R. 375 (1906); Kiernan v. Manhattan Quotation Co., 50 How.

ated Press,[2] the Supreme Court has been confronted with the problem in a new form and has rendered a judgment of the greatest importance to newspaper publishers throughout the country. Briefly, the bill was by the Associated Press to restrain the defendant from pirating its news in various ways, but the only question argued in the Supreme Court was whether the defendant could lawfully be restrained from appropriating news taken from bulletin boards of complainant's members, or from early editions of their newspapers for the purpose of selling it to defendant's clients. Complainant's news was not copyrighted and, according to complainant's contention, was not within the copyright laws. Defendant contended that upon publication on bulletin board or in a newspaper whatever right the complainant had was lost. The majority of the court in a judgment rendered by Mr. Justice Pitney took the ground that the case turned on unfair competition in business; that, although neither party had any remaining property interest as against the public in uncopyrighted news after publication, it did not follow that there was no interest as between themselves. The peculiarity of the case, as distinguished from earlier decisions was the wide extent of complainant's service. Bulletins copied in Eastern cities could be telegraphed to and published in Western papers at least as early as those served by complainant. Stripped of all disguises, said the court, the process was an interference with complainant's business at the point where the profit was to be reaped and amounted to unfair competition. "Defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." It may be questioned whether the complainant's rights are not put clearly in the judgment of the circuit court of appeals. There it was shown that the plaintiff corporation was really co-operative, each member contributing to the expense and having his own locality and an equal right to the result of the common enterprise, whether in New York or San Francisco. Plaintiff's service was for the benefit of all, who could not simultaneously exercise their rights; the publication in New York was a use of the news that did not destroy the rights of the other members and the rights of the complainant, as against a rival, should continue until

Pr. N. Y. 194 (1876); National Tel. N. Co. v. Western Union Tel. Co. 119 Fed. 294 (1902); Dodge v. Construction I. Co., 183 Mass. 62 (1903); Sullivan v. Postal Tel. C. Co., 61 C. C. A. 2 (1903); Board of Trade v. Cella C. Co., 145 Fed. 28 (1906); McDearmot C. Co. v. Board of Trade, 146 Fed. 961 (1906) s. c. 7 L. R. A. N. S. 889, 8 Ann. Ca. 759; Board of Trade v. Price, 213 Fed. 336 (1914); Board of Trade v. Tucker, 221 Fed. 306 (1915); Western Union Tel. Co. v. Foster, 224 Mass. 365 (1916).

[2] 39 Supreme Court Reporter 68 (Dec., 1918). Affirming Associated Press v. International News Service, 245 Fed. 244 (1917), which modified 240 Fed. 983 (1917).

the reasonable reward of each member was received, that is, until complainant's most Western member had enjoyed his reward, which was, "not to have his local competitor supplied in time for competition with what he has paid for."[3]

Mr. Justice Holmes, with whom concurred Mr. Justice McKenna, held that the only ground of complaint was in the defendant's implied misrepresentation that the news had been acquired at its own expense and that a suitable acknowledgment of the source was all that plaintiff could require. His opinion was that defendant should be enjoined from publishing news obtained from the Associated Press for a given number of hours, unless express credit was given to the Associated Press. The objection to this view is that it is too narrow in its attitutde toward unfair competition. While it is true that in many cases the test of imitation has been its effect upon the public, there are other decisions granting relief without the usual imitation elements.[4] As a practical matter of journalism it would be far more injurious to the plaintiff if the defendant labelled the appropriated news as Associated Press dispatches. The rights of the member newspapers would be even more seriously affected, since their competitors would in this manner obtain the credit of furnishing the Associated Press service without incurring the obligations of membership.

Mr. Justice Brandeis in dissenting takes issue with the other members of the court on most of the questions involved, contending that there was nothing tortious in using for purposes of gain information purchased in the open market or obtained from bulletins publicly posted. There was no unfair competition, he asserts, because the manner of obtaining the news was unobjectionable and the purpose of the defendant was not to divert the trade of the complainant, but merely to supply its own subscribers.[5] This reasoning is surprising and reminds one of that of the good highwayman of ancient stories who robs not to incommode his victims, but to give to the poor. But this is not to be over-emphasized, for the learned justice admits the injustice of the condition created by defendant's acts and argues that for equity to give relief would amount to the creation or recognition of a new private right that might work injury to the public, unless its boundaries are definitely settled, which could be better accomplished by legislation. It is evident that he favors the regulation of news collecting as a business affected with a

[3] Per Hough, J., 245 Fed. 244 at p. 250.

[4] Barnes v. Pierce, 164 Fed. 213 (1908); Fonotipia Ltd. v. Bradley, 171 Fed. 951 (1909); Prest-O-Lite Co. v. Davis, 215 Fed. 349 (1914); Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692 (1914); Prest-O-Lite Co. v. Heiden, 219 Fed. 845 (1915) s. c. L. R. A. (1915) F. 945.

[5] Clark v. Freeman, 11 Beav. 112 (1848), which might support this view, "has seldom been cited but to be disapproved"; Walter v. Ashton (1902) 2 Ch. 282.

public interest, the collector to be protected only on assuming the obligation of supplying news at reasonable rates without discrimination to all papers which applied therefor. Such an attitude toward news has been established by judicial decision in Illinois,[6] but the opposite view has also been vigorously maintained. In Massachusetts, by statute, the public service commission may compel a telegraph company to furnish quotations within its control to a person properly applying for them.[7] Anyone who supplies a useful commodity to his neighbors, is, in a sense, engaged in public service and potentially subject to regulation; the question is one of degree. It is possible that the national character of the news agency may bring it within that category, although government control seems unlikely at present, in view of the vast and far more pressing problems of regulation to which the nation is committed. In the meantime is a wrong to go without a remedy because the precise name for it cannot be found in dictionary or digest?

Decided on the ground of unfair competition the case leaves us somewhat in the dark as to the exact status of collected news as property. The majority opinion evades the issue by refusing to spend time on the general question of property in news. "It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience." On the other hand, Mr. Justice Brandeis holds that news is "not property in the strict sense," but, if treated as possessing the characteristics of property, such rights would cease with the earliest publication. Mr. Justice Holmes holds that "there is no property in the combination or in the thoughts or facts that words express. . . . Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it." The court was not so cautious in *Hunt* v. *N. Y. Cotton Exchange*,[8] where it was said: "It is established that the quotations are property and are entitled to the protection of the law."

W. H. L.

[6] New York Grain Exch. v. Board of Trade, 127 Ill. 153 (1889), applying the principle of Munn. v. Illinois, 94 U. S. 113 (1876). Accord: Inter-Ocean Co. v. Associated Press, 184 Ill. 438 (1900); News Pub. Co. v. Associated Press, 190 Ill. App. 77 (1914); Western Union Tel. Co. v. State, 165 Ind. 492 (1905).

Contra: Matter of Renville, 46 N. Y. App. Div. 37 (1899); Commercial Tel. Co. v. Smith, 7 Hun. 494 (1888); Wilson v. Commercial Tel. Co., 18 N. Y. St. Rep. 78 (1888); s. c. 3 N. Y. Supp. 633; Griffin v. Western Union Tel. Co., 8 Ohio, Dec. (Reprint) 572 (1883); Sterrett v. Phila. Local Tel. Co., 18 Phila. Pa. 316 (1886); s. c. 18 W. N. C. Pa. 77; Bryant v. Western Union Tel. Co., 17 Fed. 825 (1883); Marine Grain Exch. v. Western Union Tel. Co., 22 Fed. 23 (1884).

[7] Western Union Tel. Co. v. Foster, 224 Mass. 365 (1916).

[8] 205 U. S. 322 (1907).

PROBATING A DUPLICATE WILL—Before *Furber's Estate*[1] the courts, both in this country and in England, had uniformly held that an admittedly duplicate will was not entitled to probate, generally on the ground that, being a duplicate, it could add nothing to the original will already probated.

But the court in *Furber's Estate* held that "the proponents have a right to offer the duplicate paper for probate," thus establishing a new precedent.

That case is the leading case at this date, as it was not appealed and has not been overruled.

As Furber's estate has been settled and distributed, a discussion of the case is now proper.

The case arose in an appeal from a decree of the Register of Wills of Philadelphia County, admitting a will to probate, because he had not, at the same time, admitted the duplicate will to probate as a part of the original will.

The point of the case for the appellant, a charity, residuary legatee, was that the decision enabled it to offer the duplicate will for probate, and, in that proceeding, to prove the signatures of the two subscribing witnesses, which had not been proved at the probate of the original will (in fact, one of them had been denied), and, by proving these, to validate the bequest to itself.

A statement of the causes which led up to the case; the new forms of procedure, invented to fit the case, in detail, and the result of the case, may be of interest to the profession, not only in Pennsylvania, but, by analogy, in other states, as matter of law and practice in a like case; and a like case may arise, because duplicate wills, while unusual, are not rare.

As to the Register of Wills, it was held in *Topham's Estate*,[2] that

> The Register, *qua* Register of Wills, is a separate, independent County official, whose duties are prescribed by statute. His court is not a court of record, and, in the discharge of the duties thereof, he is entirely independent of the direction of the Orphans' Court, whose jurisdiction is that of an appellate court. Should an appeal be taken from his decision, such appeal is a proceeding *de novo*.

That explains the language in the decree in *Furber's Estate* (*infra*), *viz.*:

> And the said decree of said Register of Wills is opened *to enable him to consider* a petition for probate of the other paper writing.

The Register is not commanded to probate the duplicate will; he is commanded to consider whether or not he will, in his judgment, admit it to probate.

[1] 22 Pa. Dist. Rep. 987 (1913).

[2] 12 Pa. Dist. Rep. 4 (1902). See also Act 15 March 1832, Secs. 5 and 31, P. L. 136 and 144; and also 4 Stew. Purd. Dig. 4077, note n, and 4082, note o.

The proponent is given the right to offer the duplicate will for probate. The Register must receive it for consideration and proof If it is properly proved, like any other will, he must admit it to probate.

THE FURBER CASE.

Caroline E. Furber, spinster, died in 1911, in Philadelphia, leaving two wills, exact duplicates, in which she left her residuary estate to a charity. Both wills were witnessed by the same two witnesses, Solomon and Warfield. Solomon died before testatrix.

On June 8, 1911, one of these two wills was offered by the Executor for probate in Philadelphia. Caveats were filed by the next of kin. At the hearing before the Register of Wills the other will was offered in evidence as Exhibit A. Mrs. Warfield testified that she had not signed either; that the signatures purporting to be hers were not hers. (*Her testimony, if true, of course, invalidated the bequest to the charity.*)[3] The will offered for probate was admitted to probate December 11, 1911.

In 1912 Mrs. Warfield died.

In January, 1913, the Executor filed its account, which was set for audit by the Orphans' Court of Philadelphia in February, and notified the charity (a Boston religious corporation), which then, learning for the first time of the existence of the will, as it had had no notice of its probate, retained me; and the audit was continued at my request.

As the next of kin proposed to contest the bequest the charity *on the ground that the will was not witnessed by two witnesses in accordance with the statute,*[4] I requested the Executor to appeal from the decree of the Register, which it declined to do, but stated that it would not oppose such an appeal.

I accordingly, on May 3, 1913, filed in the office of the Register of Wills the following

APPEAL:

To the Register of Wills of Philadelphia County:

Estate of Caroline E. Furber, deceased:

The undersigned hereby appeals to the Orphans' Court of said County from the decision of the Register of Wills in the above Estate admitting to probate a certain paper writing, dated the fifth day of August, 1886, *alone* as the last will and testament of said decedent and failing[5] to admit therewith a certain other paper writing, dated August 5, 1886, as part of the last will and testament of said decedent.

Board of Missions, Residuary Legatee under the Will of CAROLINE E. FURBER, deceased.

[3] Two witnesses necessary; Act 26 April 1855, Sec. 11, P. L. 332.

[4] Act 26 April, 1855, Sec. 11, P. L. 332.

[5] Such an appeal had never before been taken, so far as the Register of Wills and I knew.

Security was entered on the appeal, and the petition put on the Orphans' Court Motion List.

On May 17, 1913, I presented to the Orphans' Court, and filed, the following

PETITION:

To the Honorable, the Judges of Said Court:

The petition of the Board of Missions, residuary legatee under the will of Caroline E. Furber, deceased, respectfully represents:

That Caroline E. Furber, late of said County, died in the City of Philadelphia on the 25th day of March, 1911, leaving two holographic documents purporting to be her will, both dated August 5, 1886, and both bearing the signatures of William A. Solomon and Aimee S. Warfield as witnesses, and each the duplicate of the other, except that upon one the signature of Aimee S. Warfield is imperfect and on the other is perfect; copies of which documents are hereto attached, marked Exhibit A and Exhibit B.

That the Register of Wills of said County admitted to probate, December 11, 1911, upon the testimony of persons other than said two witnesses, said will containing said imperfect signature (Exhibit A), which was numbered 2693 of 1911, and recorded in Will Book, No. 332, page 318, etc., and admitted as merely an exhibit said will containing said perfect signature, but did not admit to probate said will containing said perfect signature, said document not having been offered for probate by proponent.

That both of said wills should have been offered for probate by said proponent, and both should have been admitted to probate by said Register of Wills.

That in both said wills your Petitioner is named as residuary legatee, and The Philadelphia Trust, Safe Deposit and Insurance Company is named as Executor, and that said Company duly qualified as Executor.

That said Caroline E. Furber left also another holographic document, explanatory of said two wills, of which the following is a copy:

"MEMORANDA

One of my three wills (each being the duplicate of the other two) has the signatures of the witnesses in the following order:

Aimee S. Warfield
Wm. A. Solomon

This one with the original certificate of Dr. Morris I shall probably retain.

The other two which are severally in the keeping of Mr. Hipple and Mr. Solomon have the signatures of the witnesses in the following order:

Wm. A. Solomon
Aimee S. Warfield
Handed to Mr. Hipple by Caroline E. Furber.
Date of writing above Dec. 7, 1886.

C. E. FURBER."

That, judging from the order of the signatures of the witnesses, the will probated is either the will left with Solomon or the will left with Hipple, and the will not probated is the one which she says "I shall probably retain."

That the third will has not yet been found.

That your Petitioner is informed and believes and therefore avers, that said imperfect signature of Aimee S. Warfield upon the will probated will be called in question by the next of kin of the decedent upon the audit of the Account of said Executor, thereby putting the bequest to your Petitioner in jeopardy.

That the other legatees named in both said wills are S—— and W——.

That your Petitioner is informed and believes and therefore avers, that said S—— and W—— are next of kin to said decedent.

That your Petitioner has appealed to your honorable court from the decision of said Register of Wills in said Estate, admitting to probate a certain paper writing, dated the fifth day of August 1886, *alone* as the last will and testament of said decedent, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent.

WHEREFORE your Petitioner prays that a citation may issue, directed to the said The Philadelphia Trust, Safe Deposit and Insurance Company, Executors, and said S—— and W——, who are, your Petitioner is informed and believes and therefore avers, the only parties interested except your Petitioner, commanding them to appear before your honorable court on a day certain to show cause why said appeal from the decision of said Register of Wills admitting to probate a certain paper writing, dated the fifth day of August, 1886, *alone* as the last will and testament of said decedent, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent, should not be sustained, and said decision of said Register of Wills be opened to enable him to consider a Petition for the probate of said other paper writing dated August 5, 1886, as part of the last will and testament of said decedent.

And your Petitioner will ever pray, etc.

BOARD OF MISSIONS,

DECREE AWARDING CITATION.

AND NOW, May 17th, 1913, on consideration of the foregoing Petition, and on motion of Charles P. Sherman, pro Petitioner, the court order that a citation issue directed to the Philadelphia Trust, Safe Deposit and Insurance Company, Executor of the will of Caroline E. Furber, deceased, and S—— and W——, commanding them to appear before the court to answer the Petition of the Board of Missions and show cause why an appeal from the decision of the Register of Wills of Philadelphia County, made December 11, 1911, admitting to probate a certain paper writing, dated the fifth day of August, 1886, alone as the last will and testament of Caroline E. Furber, deceased, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent, should not be sustained, and said decision of said Register of Wills be opened to enable him to consider a Petition for the probate of said other paper writing, dated August 5, 1886, as part of the last will and testament of said decedent.

Returnable seq. reg. GEST, J.

Citations were issued and served, and the answers of the Executor and of the next of kin filed, and the appeal put on the list for argument.

The audit was continued pending the appeal.

Testimony was taken befort the court on the appeal, and the case argued, before Gest, J., October 16, 1913.

Gest, J., after reciting the facts, said in part:

OPINION:

This appeal is taken in order that the decree of the Register of Wills may be opened so as to enable him to consider a petition for the probate of the other paper writing, dated August 5, 1886, as a part of the last will and testament of Caroline E. Furber, deceased.

It was contended that the signature of Aimee S. Warfield to the paper

admitted to probate was imperfect, but that the signature of Aimee S. Warfield to the second paper was without imperfection. This fact, however, or its relevancy, if it be a fact, is not necessary for the present presiding judge to decide.

The testimony of John R. Naulty and William D. Geiger was taken by the presiding judge as to the signatures of the testatrix, and these witnesses have also testified before the Register of Wills. It further appeared that the Board of Missions, residuary legatee in both testamentary papers, and the appellant now before the court, was not represented or present before the Register of Wills.

The signature of the testatrix to the second testamentary paper, which had been marked at a hearing before the Register as "A Oct. 17/11 Register," was not disputed. *The only question was whether the paper, being a duplicate of the will already admitted to probate and being marked "Duplicate" in the handwriting of the testatrix, was entitled to admission to probate as a part of her will.*

The motive of the testatrix in executing her will in duplicate, or indeed in triplicate, if reliance may be placed upon the holographic writing, marked "Memoranda," offered in evidence, is not important. *The only question is whether one of them should be admitted to probate alone as constituting the will of the testatrix, or whether the Register should admit both as together constituting her last will upon due proof being made in accordance with law.*

This appeal was indeed opposed on the ground that as the provisions of the two wills were the same no good purpose would be accomplished by proving both. *But the proponents have a right to offer the duplicate paper for probate,* and all other questions will be for subsequent consideration either by the Register or by this court. Further discussion seems unnecessary.

It is proper to add that at the hearing before the Register no petition for the probate of the duplicate paper was presented.

DECREE:

AND NOW, this 24th day of October, 1913, the appeal of the Board of Missions from the decree of the Register of Wills admitting to probate a certain paper writing, dated the 5th day of August, 1886, as the last will and testament of Caroline E. Furber, deceased, and the said decree of said Register of Wills is opened to enable him to consider a petition for probate of the other paper writing, dated August 5, 1886, as a part of the last will and testament of the said decedent.

No exceptions to the decree were filed.

By this appeal I established *a case de novo*[8] before the Register, and thus obtained the opportunity to prove, in the regular way, the signatures of the two witnesses to the duplicate will, and incidentally to the will already probated.

On December 16, 1913, I filed the following:

PETITION FOR PROBATE:

To the Register of Wills of Philadelphia County:

The Petition of the Board of Missions respectfully showeth: That it is the residuary legatee named in the last will and testament of Caroline E. Furber, dated the fifth day of August, A. D., 1886: . . . that said last will and testament was admitted to probate in Philadelphia County, Decem-

[8] See note 2, *supra*.

ber 11, 1911, and that said decree of Probate was opened by decree of the Orphans Court of Philadelphia County, dated October 24, 1913, to enable said Register of Wills to consider a Petition for Probate of a certain other paper writing, dated August 5, 1886, as a part of the last will and testament of the said decedent. Therefore said Board of Missions respectfully applies for probate of said other paper writing, dated August 5, 1886, as part of the said last will and testament.

BOARD OF MISSIONS.

Hearings before the Register were had from December, 1913, to April, 1915, during which *Mrs. Warfield's* and Solomon's *signatures to both wills were so conclusively proved* that the next of kin, who had contested the probate of the duplicate will, abandoned the contest.

The duplicate will was, on March 21, 1916, admitted by the Register to probate "as part of the last will and testament of Caroline E. Furber, deceased," and the Executor qualified thereunder.

The charity won.

Charles P. Sherman,

Of the Philadelphia Bar.