Washington Law Review

Volume 4 | Number 3

8-1-1929

Recent Cases

A. O.

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Litigation Commons

Recommended Citation
A. O., Recent Cases, *Recent Cases*, 4 Wash. L. Rev. 139 (1929).
Available at: https://digitalcommons.law.uw.edu/wlr/vol4/iss3/3

This Recent Cases is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

WASHINGTON LAW REVIEW

Published Quarterly by the Law School of the University of Washington
Founded by John T Condon, First Dean of the Law School

SUBSCRIPTION PRICE $2.50 PER ANNUM, SINGLE COPIES $1.00

R. H. NOTTELMANN.....*Editor-in-Chief*
FRANK L. MECHEM.....*Associate Editor*
LESLIE J. AYER.....*Associate Editor, Bench and Bar*
J. GRATTAN O'BRYAN.....*Business Manager*

Student Editorial Board

MARION A. MARQUIS, *President*
JOSEPH E. GANDY, *Article Editor*
KENNETH G. SMILES, *Note Editor*
PHYLLIS CAVENDER
SHERMAN R. HUFFINE
LOWELL P. MICKELWAIT
ELMER GOERING, *Case Editor*
RAY L. JOHNSON, *Book Editor*
ALBERT OLSEN
HERALD A. O'NEILL
H. S. SANFORD
CORWIN P. SHANK, *Assistant Business Manager*

RECENT CASES

CONSTITUTIONAL LAW—POLICE POWER—REGULATIONS OF TRADES OR BUSINESSES—BARBERS. The plaintiff owned and operated a barber college in Seattle. A "Barber's Law," enacted by the 1927 legislature, among other things, provided that no more than one student or apprentice shall be employed in any one barber shop. It further provided that no license to conduct a barber school or college would be issued unless the college prescribed as a prerequisite to graduation a six months' course of instruction to include the following subjects: scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, etc., elementary chemistry, etc. The plaintiff brought an action to enjoin the enforcement of the above law. *Held*, injunction should be granted as to those portions above stated on ground that it unreasonably and arbitrarlly interfered with the liberty of a citizen to engage in a lawful occupation. *Marx. v. Marbury*, 30 Fed. (2nd) 839 (1929).

The right of the state under the exercise of the police power to prescribe qualifications for entering into certain trades or businesses and to pass laws regulating the conduct of such trades or businesses has become well settled. There are some businesses which it is conceded the state has the right to absolutely prohibit, such as the pool hall business. *State ex rel. Sayles v. Superior Court*, 120 Wash. 183, 206 Pac. 966 (1922) the liquor business, *In re Hoover*, 30 Fed. 51 (1887). On the other hand there are certain trades and businesses whose conduct does not affect the general welfare of the people; in such cases even the power to regulate is denied. A plumber's license law has been held invalid, *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851 (1906) likewise a law requiring horseshoers

to pass an examination and secure a license, *In re Aubrey*, 36 Wash. 308, 78 Pac. 900 (1904) Between these two extremes there are a large number of businesses which have come under the purview of the regulatory powers of the state. Legislation prescribing regulations for the following trades or businesses has been sustained: Real estate brokers, *Ex parte Pope*, 242 Pac. 290 (Okla. 1925) commission merchants, *Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924) life insurance agents, *Stern v. Metropolitan Life Insurance Co.*, 169 App. Div. 217, 154 N. Y. S. 472 (1916) architects, *People v. Lower* 251 Ill. 527, 96 N. E. 346, 36 L. R. A. (N. S.) 1203 (1911) dentists, *State v. Doerring*, 194 Mo. 398, 92 S. W 489 (1906) barbers, *State v. Walker* 48 Wash. 8, 92 Pac. 775 (1907). Generally, so long as the legislation can reasonably be deemed to serve the purpose of promoting the public health, safety or general welfare of the people by insuring the competency of the persons engaged therein or by regulating the manner in which the business is carried on, the legislation will be upheld. *Adams v. Tanner* 244 U. S. 590, 61 L. Ed. 1336, 37 Sup. Ct. 662, L. R. A. 1917F 1163, Ann. Cas. 1917D 973 (1917).

However, where the effect of the regulation is to arbitrarily limit the right to engage in a trade or business it will be held invalid. Examples of such legislation are instances where the law has definitely limited the number of those who may engage in such trade or business. Thus where a statute provided that a fire insurance company should have no more than one agent in cities of less than fifty thousand or more than two agents in cities of more than fifty thousand, it was held invalid, the court saying, "This legislation is an attempt to monopolize the business of writing insurance." *Northwestern National Ins. Co. v. Fishback*, 130 Wash. 490, 228 Pac. 516, 36 A. L. R. 1507 (1924) Other examples of such legislation are cases where the qualifications imposed cannot reasonably be deemed necessary for the fitness or competency of the person engaging in such business. In *Baker v. Daly*, 15 Fed. (2nd) 881 (1926), an Oregon law requiring a person to be skilled in all the arts of cosmetic therapy before he could engage in the occupation of manicuring or hairdressing was held invalid. Likewise a Kentucky law requiring applicants for real estate brokers' licenses to give evidence of good moral character was held unconstitutional on the ground that the requirement was not reasonably necessary for the fitness or competency of the person to carry on the business. *Rawles v. Jenkins*, 212 Ky. 287, 279 S. W 350 (1925). A law placing unreasonable requirements on persons wishing to become fire insurance agents was held invalid. *Hauser v. North British Insurance and Mercantile Co.*, 206 N. Y. 455, 100 N. E. 52, 42 L. R. A. (N. S.) 1139, Ann. Cas. 1914B 263 (1914). All these cases proceed on the theory that, although the power to regulate is conceded, if the regulation has the effect of arbitrarily limiting the right to engage in a certain trade or business, the supposed regulation will be held invalid on the ground that it interferes with a person's right to engage therein.

The law in question is of this type, and the court sensing its monopolistic purpose, held it invalid on the ground that it placed unreasonable restrictions on the right to conduct the business of a barber college when such was not reasonably necessary for regulating the barber trade.

A. O.

CONSTITUTIONAL LAW—POLICE POWER—VALIDITY OF ORDINANCE. The plaintiff brought an action to restrain the enforcement of two sections of a city ordinance against him upon the ground that these sections are unconstitutional. The ordinance is one relating to the inspection and sale of meat for human consumption. Sec. 17 provides that no person shall sell meat unless he has obtained a permit from the commissioner of health to do so; and that the commissioner shall issue such permit if the applicant be a responsible and trustworthy person, and if upon inspection of the shop it appears that said shop complies with the ordinance relating to sanitation. Sec. 21 provides that it shall be unlawful for any person to sell meat from a shop, or receive it therein, or keep such shop open,

except between the hours of seven o'clock a. m. and six o'clock p. m. *Held*, Sec. 17 is valid, and Sec. 21 is invalid. *Brown v. City of Seattle*, 50 Wash. Dec. 116, 272 Pac. 517 (1928).

Holding Sec. 17 of this ordinance valid is in accord with both principle and authority. The object in requiring the inspection of meat sold for human consumption, and of the shops in which it is sold, is to promote public health. Laws enacted for the promotion of public health are a proper exercise of the police power. *State v. Carey*, 4 Wash. 424, 30 Pac. 729 (1892) *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376 (1902) *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893 (1904) *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220 (1909) *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253 (1888) *Chicago v. Chicago & Northwestern R. Co.*, 275 Ill. 30, 113 N. E. 849 (1916).

The fact that the commissioner of health shall issue the permit if he be satisfied that the applicant is a responsible and trustworthy person, and has complied with the ordinances relating to sanitation, does not make this section invalid upon the ground that it leaves the matter to the arbitrary judgment of the commissioner. The commissioner is bound to issue a permit if the applicant is responsible and trustworthy and has complied with the laws relating to sanitation. The discretion vested in him is of a judicial nature, and subject to review in the courts for any arbitrary exercise thereof. Therefore the courts agree that such a provision is valid. *Town of Sumner v. Ward*, 126 Wash. 75, 217 Pac. 502 (1923) *Riley v. Chambers*, 181 Cal. 589, 185 Pac. 855 (1919) *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 Sup. Ct. 217 (1916). It may be that on occasions the administration of such a provision results in a deprivation of property without due process of law. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. 1064 (1886). That fact, however, does not render the section or provision as such unconstitutional.

Section 21 of this ordinance seems clearly invalid. The closing of meat shops at six o'clock p. m. has no relation to the promotion of public health. It is true that the courts will go a long way in upholding a statute or an ordinance under the police power. *Seattle v. Ford*, 144 Wash. 107, 257 Pac. 243 (1927) but there must be at least some logical connection between the object sought to be accomplished by such statute or ordinance, and the means prescribed to accomplish that end. *Chicago v. Chicago & Northwestern R. Co., supra, Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. 499 (1884). Applying this test to Sec. 21 it can be readily seen that the court was correct in its holding. The business of conducting a meat market is not an objectionable or unlawful business. If it were, then there would be a sound reason for upholding this section. *State v. Nichols*, 28 Wash. 628, 69 Pac. 771 (1902) *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085 (1908) *In re Ferguson*, 80 Wash. 102, 141 Pac. 322 (1914) *State ex rel. Sayles v. Superior Court*, 120 Wash. 183, 206 Pac. 966 (1922). It seems, therefore, that Sec. 21 of this ordinance amounts to nothing more than an unreasonable interference with the rights of the plaintiff under the circumstances. E. G.

RAILROADS—FIRES—PRESUMPTION OF NEGLIGENCE. In an action to recover damages for loss by fire occasioned by defendant's locomotive. *Held*, proof that sparks or cinders from the locomotive set the fire does not raise a presumption of negligent construction or operation of the locomotive. *General Insurance Co. of America v. Northern Pacific Ry. Co.*, 28 Fed. (2nd) 574 (1928).

Upon the question whether the setting of a fire by a railway locomotive creates a presumption of negligence on the part of the railroad company, the authorities are in conflict. The affirmative is held by the English courts and a large number of state courts in this country, including the state of Washington. *Thorgrimson v. Northern Pacific Ry. Co.*, 64 Wash. 500, 117 Pac. 406 (1911) *Northwestern Mutual Fire Assn. v. Northern Pacific Ry. Co.*, 68 Wash. 292, 123 Pac. 468, Ann. Cas. 1913E 968 (1912).

These courts have generally held that where the circumstances lead to the conclusion that the origin of the fire was from a locomotive there is a prima facie case, and the burden of showing that there was no negligence in the construction or operation of the locomotive is upon the railroad company. The reason generally given for this rule is that the railroad company and its employees have possession and control of the engine, and the means of knowing its condition, while the plaintiff has not. *Louisville & N. R. R. Co. v. Reese*, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66 (1888) *Union Pacific Ry. Co. v. De Busk*, 12 Col. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350 (1889) *Dyer v. Main Central R. R. Co.*, 99 Me. 195, 58 Atl. 994, 2 Ann. Cas. 457, 67 L. R. A. 416 (1904)

Among the courts holding the negative view are the Federal Courts, where it is held that the question is one of general law, and that one who charges negligence must prove it by showing that the defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of. *Garrett v. Southern Ry. Co.*, 101 Fed. 102, 49 L. R. A. 645 (1900) *McCullen v. Chicago and Northwestern Ry. Co.*, 101 Fed. 365, 49 L. R. A. 642, 41 C. C. A. 365 (1900). The most convincing reasons given in support of this rule are, that a railroad company which is authorized by law to use steam, is not an insurer against fire, if the right to use steam is exercised in a lawful manner and with reasonable care and skill; that the owner of property adjacent to a railroad assumes the risk; and that in an action founded on negligence the plaintiff must prove it, the mere fact of injury not being proof of negligence. *Garrett v. Southern Ry. Co., supra.*

The principal case is now before the Supreme Court of the United States, a petition for a writ of certiorari having been granted.

C. P. S.

JOINT ADVENTURERS—LIABILITY TO EACH OTHER—IMPUTED NEGLIGENCE. Action by one member of a joint enterprise against another to recover damages for injuries received while riding with defendant who negligently lost control of her car. The principal question involved was whether the negligence of the defendant could be imputed to the plaintiff, thus barring a recovery on the part of the plaintiff. *Held*: The negligence of the defendant could not be imputed to the plaintiff. *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 305 (1928).

The doctrine of imputed negligence is limited to actions involving third persons. Where parties are engaged in a joint enterprise, each is acting as agent for the other, and the negligence of one in performing acts within the scope of that enterprise is imputed to the other so as to defeat a recovery by the other against a third party. *Koplitz v. City of St. Paul*, 86 Minn. 378, 90 N. W 794 (1902) *Ryan v. Snyder* 292 Wyo. 146, 211 Pac. 482 (1923) *Masterson v. Leonard*, 116 Wash. 551, 200 Pac. 320 (1921) *Hurley v. Spokane*, 126 Wash. 213, 217 Pac. 1004 (1923) 29 Cyc. 542; 1 WASH. LAW REV. 113.

The relations of joint adventurers as between themselves should be governed by the same rules that govern partners, master and servant, principal and agent. *Harm v. Boatman*, 128 Wash. 202, 222 Pac. 478 (1924) 15 R. C. L. 500. The joint adventurer owes to his associates in the enterprise the duty to use reasonable skill and care in the conduct of its business and will be held liable to them for losses occasioned by his negligence. *Knudson v. George*, 157 Wis. 520, 147 N. W 1003 (1914) 33 C. J. 852. The law presumes a member of a joint enterprise to have been given power to bind his associates by such acts as are reasonably necessary to carry on the joint adventure and for any injury resulting therefrom to third parties, they all assume a joint and several liability. *Leake v. Venice*, 50 Cal. App. 462, 195 Pac. 440 (1920) *Bonfile v. Hayes*, 70 Colo. 336, 201 Pac. 677 (1921) 33 C. J. 871. But it is apparent that the reason for imputing negligence does not exist as between the members of the joint enterprise themselves, the doctrine existing solely for the protection of third parties. There could be no justification for such a policy that would permit a wrong-doer to hide behind his own wrong.

P. C.