Master and Servant; Liability of Principal Contractors as "third parties" under Workman's Compensation Act

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old fence and built a fence along the center line of the alleged alley, which borders the original eight feet conveyed by the east owners and being the east half of the alley. The alley has not been used by the public at large and the use was with the consent of the west owners originally.

The court spends a goodly portion of the opinion in differentiating between statutory dedication and common law dedication, and rights by prescription and common law dedication.

The real distinction between statutory law dedication and common law dedication is that the former requires that there be a grantee in esse at the time of the dedication to make an acceptance.

The former operates by grant and the latter by estoppel in pais, and whereas the former conveys the fee the latter merely conveys an easement. No writing or conveyance is required in either case and the statute of frauds does not apply, but there must be an unequivocal intention to dedicate; yet, long acquiescence in public use, coupled with acts and declarations by the grantor are sufficient.

The essential difference between common law dedication and a right acquired by prescription is that the latter is acquired by open and claimed adverse use for the statutory period whereas the former requires no such statutory period and operates by the very consent of the owner.

In this case there was no unequivocal intention to dedicate and the original use being by consent, the presumption is that the continued used was by consent of the owner. There being no adverse use or dedication, there is no easement acquired by prescription or common law dedication.

Bert Berkwich

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Master and Servant; Liability of Principal Contractors as "third parties" under Workman's Compensation Act.

Cermak v. Milwaukee Air Power Pump Co.¹ In this case the plaintiff was employed by the Universal Construction Company who was a sub-contractor to the defendant Pump Company. During the course of the plaintiff's employment he was injured. Both companies were under the Workman's Compensation Act of Wisconsin. The plaintiff collected compensation from the Universal Construction Company and now brings an action in tort against the defendant for injury sustained as a result of the said defendant's negligence. The defendant pleaded the act as the exclusive remedy to which a demurrer was interposed. The lower court sustained the demurrer and the Supreme Court affirmed the ruling.

The theory of the Workman's Compensation Act is based on the idea of quick and sure remuneration to an injured employee. The act provides for a uniform system of compensation, a speedy payment and a guaranty of funds. In giving this advantage to the employee he loses, however, some of his common law rights as against the employer for the remedy against the employer announced in the act is exclusive.

¹ 211 N.W. 354, -Wis.-
The act, however, is not designed to deprive an employee of a right of action which accrues from the negligence of some third party. Section 102.29, sub-section 1 clearly shows the legislative intent to retain to an employee his common law action against negligent third parties. Quoting from Smale v. Wrought Washer Mfg. Co. at page 334:

The purpose and effect of the Workmen's Compensation Act is to control and regulate the relations between an employer and his employee. As between them the remedies there provided are exclusive when both are under the act at the time of the accident. The law does not attempt in any way to abridge the remedies which an employee of one person may have at law against a third person for a tort which such third person commits against him.

The question then arises is a principal contractor in such a position in relation to an employee of a sub-contractor as to render the principal contractor liable to an action at common law for negligence. In other words—is a principal contractor a third party in relation to an employee of a sub-contractor within the means of section 102.29?

In defining an employer Section 102.04 (2) we have "Every person, firm, and private corporation (including any public service corporation) who has any person in service under contract of hire express or implied, oral or written, and who at or prior to the time of the accident for which compensation, under sections 102.03 to 102.34 inclusive may be claimed, shall . . . have elected to become subject to the provisions of Section 102.03 to 102.34 inclusive . . . ."

Section 102.06 provides that an employer subject to the provisions of Sections 102.03 to 102.34 inclusive, shall be liable for compensation to an employee of a contractor or sub-contractor under him who is not subject to Sections 102.03 to 102.34 inclusive or who has not complied with the conditions of sub Section 2 of Section 102.28 (relating to insurance to be carried by the sub contractor) in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

In passing upon the question above expounded, the court in the majority opinion clearly takes the position that the act will not and does not create a relationship of employer and employee which in fact does not exist. The provisions of Section 102.06 which makes the principal contractor liable for insurance in case the sub-contractor fails to comply with the act "does not make it an employer under the statute any more than any insurance carrier is put in the relationship of an employer of an injured employee by the fact that he has insured the payment of compensation."

The decision in this case is of far reaching importance and makes the position of a principal contractor rather precarious. This case decides that the principal contractor is liable as a third party in case his negligence causes injury to an employee of a sub-contractor who does comply with the act. This makes the principal contractor liable as any third party. By the terms of the act the principal contractor is liable for injuries regardless of negligence to an employee of a sub-contractor who does not comply with the act. In this situation the principal contractor is made an insurer by operation of law.

160 Wis. 331.
NOTES AND COMMENT

It might be well to state in this connection the objection of the dissenting justices to the constitutionality of the interpretation of the court. "If the principal contractor, who has complied with the law and requires his sub-contractor to protect his employees by insurance, is not an employer, within the meaning of the statute, I see no constitutional basis upon which liability may be imposed upon him. It is said that by accepting the terms of the act he becomes an insurer; the act makes no provision for third or other party bringing themselves within its terms. One not an employer "cannot accept the provisions of the act." The relationship is certainly not that of insured and insurer, for that relationship implies the voluntary agreement to assume by contract a definite obligation."

CHARLES L. GOLDBERG

Monopoly: Fixing of Reasonable Prices; Reasonable Restraint of Trade.

In United States v. Trenton Potteries Co. et al., a prosecution under the Sherman Anti-Trust law, the Supreme Court reaffirmed its earlier position that a combination between producers of articles sold in interstate commerce to fix prices is in violation of the Sherman Anti-trust Act, regardless of whether or not the prices fixed are unreasonable.

In their exposition of the present state of the law an interesting analysis of the law on this point was drawn by Justice Stone. The pertinent, refused instruction primarily considered in this regard was as follows:

The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

The charge was found to be true as an abstract proposition although inapplicable to the present case to the point of effect of reasonableness of prices fixed. The charges given, viewed as a whole, were held to have fairly submitted to the jury the question whether a price fixing agreement was entered into by respondents. The gist of the Court's discussion on this point is embodied in the following at page 406-7:

It does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable.

Our view of what is reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably