Case Notes

CASE NOTES

CORPORATIONS — Removal of Officer — Right to Compensation for Period Between Illegal Removal and Subsequent Ratification. — The plaintiff was employed as officer of the defendant corporation, the employment contract allowing plaintiff to be removed by the board of directors without cause at the board's pleasure. It had been adjudicated previously that the board invalidly removed plaintiff without a quorum present on June 2, 1959, but a quorum of the board of directors had legally ratified his removal on July 21, 1959. The plaintiff brought suit to recover his salary for the period between the invalid removal and the ratification. HELD: Even though in certain situations a ratification may bestow legality on an earlier invalid act, the ratification did not validate the prior action to the extent of defeating the officer's claim for compensation. *Essential Enterprises Corp. v. Automatic Steel Products, Inc.*, 164 A. 2d 437 (Del. 1960).

Where the board of directors is empowered to remove an officer at will without cause, action of some kind by the board signifying its intention that the officer shall no longer hold office is necessary to constitute a valid removal of the corporate officer. *Ginter v. Heco Envelope Co.*, 316 Ill. 183, 147 N.E. 42, 63 A. L. R. 780 (1925); *Keil v. Medart Mfg. Co.*, 46 S.W. 2d 934, (Mo. 1932). Charter, statutory, or by-law provisions relative to removal must be observed for the removal to be effective; thus, where the by-laws provide for removal of an officer by a certain vote of the board of directors, *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841); *Stephany v. Liberty Cut Glass Co.*, 76 N. J. L. 449, 69 Atl. 967 (1908), action of anyone not authorized to remove an officer, e.g., the individual and separate action of a portion of the directors not constituting a quorum, is illegal. *Hamlin v. Union Brass*, 68 N. H. 292, 44 Atl. 385 (1895); *Keil v. Medart Mfg. Co., supra.* The later ratification of a removal at a legal meeting constitutes a removal as of the subsequent date, for a corporation cannot ratify absolutely void or ultra vires acts. *D'arcy v. T. and C. R. Co.*, L. R. 2 Exch. 158 (1867); *State v. Fla. Central R. R. Co.*, 15 Fla. 690 (1876); *Gentry-Futch Co. v. Gentry*, 90 Fla. 473 (1925).

The corporation will be liable for a breach of contract in the case of improper discharge, as the mere device of discharging an officer from his office cannot deprive him of his right to a salary. *Ala. Lime and Stone Co. v. Adams*, 218 Ala. 647, 119 So. 853 (1928); *Barber v. Southern Service*, 182 Ga. 124, 185 S. E. 93 (1936). The officer may recover his salary from the time of improper discharge as compensation for being deprived of the chance of continuing to earn salary in accordance with his contract. *Ransome Concrete Mach. Co. v. Moody*, 282 Fed. 29 (2d Cir. 1922); *Realty Acc. Corp. v. Montgomery*, 51 F. 2d 636 (3d Cir. 1930). The mere lessening of the duties of an officer does not abrogate an agreement to pay him a salary. *Metropolitan Rubber Co. v. Place*, 147 Fed. 90 (2d Cir. 1906). Where an officer is paid a salary as officer and not for the performance of extra services, the suspension of work dispensing with the necessity of the extra services will not operate to affect the right to recover salary. *Bligh v. Peoples Packing Co.*, 192 Ill. App. 83 (1915). His suspension is a mere enforced vacation for which the board must pay him as if he had never been suspended. *State ex. rel. Charles v. Board of Commissioners of Port of New Orleans*, 159 La. 69, 77, 105 So. 228 (1925). An officer who has never been lawfully dismissed is entitled to receive his salary during his tenure of employment or until such time as he has been lawfully removed. *State of La. ex. rel. Boucher v. Heard*, 228 La. 1078, 84 So. 2d 827 (1955); *Hearty v. Dept. of Police, City of New Orleans*, 238 La. 956, 117 So. 2d 71 (1960).

With exceptions not here pertinent, the governing body of a corporation, as such, is the agent of the corporation only when it acts as an entity and not when its members act as individuals. Hence, it follows that ordinarily its members have no power to act except when assembled at a legally held board meeting with a quorum present. Individual action of the persons comprising such governing body is not the action of the constituted body of men clothed with the corporate powers. If the rule were otherwise, unethical directors could connive to have any meeting illegally assembled and thereby make many actions of the board voidable, subject at a subsequent legal meeting to ratification from the time of the illegal action if this would serve the ends of the corporation. A premium would be placed on invalid action and wronged officials discouraged from justifying their rightful position and obtaining due compensation. The *Essential Enterprises* case is in logical concert with other authority and the contra result would not only have stopped the officer in this case from receiving proper compensation but would also have established a precedent closing the courts to other corporate officers suffering under similar board actions.

BERNARD LEE FRIEDMAN.

ADMINISTRATIVE LAW — Federal Power Commission — Policy of Rate Determination of Independent Producers of Natural Gas. — As a result of problems and inequities encountered in assessing rates using the accepted rate base cost of service method discussed in Phillips Petroleum Company Opinion No. 338, Docket No. 1148, the Federal Power Commission issued a Statement of General Policy No. 61-1 September 28, 1960. The statement promulgated an area rate method of price regulation for wholesales of natural gas in interstate commerce by independent producers. The rate base cost of service, which includes original cost, prudent investment return, allowing for operating expenses, depletion, depreciation, and taxes, is traditionally used in regulating utilities with fixed capital outlays and anticipated operating expenses. The FPC distinguished this situation from independent producers of natural gas whose capitalized investment and operating expenses vary with the success of exploration and drilling costs. Also, it is the policy of the FPC to furnish incentives for exploration, in order to meet the demands of expanding markets. Finally, there is considerable administrative difficulty in attempting the regulation of thousands of independent producers on an individual basis. As an alternative to the rate base cost, regulation on a geographical area basis using applicable economic principles, existing prices and costs determined by a representative sampling in an area may be utilized. HELD: Price standards based upon area rate schedules are to be applied in determining the acceptability of initial price proposals and increased rate filings by independent producers of natural gas. *Phillips Pet. Co.*, Dkt. No. G-1148 (F.P.C. Sept. 28, 1960); *Statement of General Policy No. 61-1* (F.P.C. Sept. 28, 1960).

The Natural Gas Act, 15 U.S.C. ss 717-717w (1952) as amended, 15 U.S.C. 717, 717b (c) Supp. II (1954), was passed by Congress in 1938 in order to bring under federal regulation the sales and transportation of natural gas in interstate commerce. It was motivated by the monopolistic practices of pipeline companies which were beyond state regulation and had exploited consumers and companies engaged in production and gathering. *F.P.C. v. Hope Natural Gas Company*, 320 U.S. 591, 88 L. Ed. 333 (1944). The Act granted to the Federal Power Commission, which it created, the authority to fix rates, but Congress intended that the FPC allow sufficient revenue for operating expenses, for capital costs (service on debts and dividends), for the maintenance of financial integrity, for the attraction of capital, and returns commensurate with other enterprises having corresponding risks. *F.P.C. v. Hope Natural Gas Company, supra.* At the same time, rates were to be "just and reasonable" in order to guard the consumer from excessive prices. *F.P.C. v. Interstate Natural Gas Company*, 336 U.S. 577, 93 L. Ed. 895 (1949). A specific formula for determining rates was not specified. *City of Detroit v. F.P.C.*, 230 F.2d 810 (D. C. Cir. 1956). The rate base method of price regulation was approved by the United States Supreme Court in a case dealing with a pipeline company. *F.P.C. v. Hope, supra.* A strong dissent in that case by Justice Jackson recognized the difficulties in relating a company's investment to the amount of gas in the ground which it controls. Justice Jackson also pointed out in his concurring opinion in *Colorado Interstate Gas Company v. F.P.C.*, 324 U.S. 581, 89 L. Ed. 1206 (1945), in which the rate base was used, that the cost of service method created a different price for gas from many owner wells, depending upon the efficiency of the particular owner who was the seller. In *City of Detroit v. F.P.C., supra,* the commissioner abandoned the rate base method in allowing the Panhandle Eastern Pipeline Company to include a field price for gas produced on its own properties. The field price was based on a weighted average, arms-length prices, and excluded the cost and operating expenses from the rate base. The Court of Appeals disallowed the field price on the grounds that it increased consumer rates beyond that which was just and reasonable. *City of Detroit v. F.P.C., supra.* In *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 98 L. Ed. 1036 (1954), the Supreme Court held that an independent producer of natural gas was a "Natural Gas Company" within the meaning of the Natural Gas Act, thereby extending the jurisdiction of the FPC to thousands of independent producers. This was based on the reasoning that wholesales by such firms to pipeline companies constituted a sale in interstate commerce. It is upon this decision that the commission declares its Statement of Policy concerning rate regulation of independent producers of natural gas. F.P.C. Opinion 338, (1960). The courts have indicated that the FPC need not require a specific formula, but is free to use whatever method is necessary in determining a just and reasonable rate. *Forrest Oil Company v. F.P.C.*, 263 F.2d 622 (1959).

The area basis of determining rates of independent producers will undoubtedly be contested because of the holding in *City of Detroit v. F.P.C.*, *supra*, which requires use of the rate base method comparatively or as a departure point. However, the proposed regulation under the area basis would provide a criterion of industry requirements and this is distinguishable from the ruling in *Detroit v. F.P.C.*, *supra*, in which the cost was determined on the basis of fair field prices. Under the Natural Gas Act, the rate must be just and reasonable to fulfill the legislative intent, and it must be high enough to provide sufficient revenue for exploration and development in addition to capital income requirements. The area basis is definitely an improvement over the rate base and should give the Commission more flexibility in meeting requirements of the industry and in curing the ills which exist as a result of contractual escalator clauses between the producers and pipeline companies which tend to increase costs. The escalator clauses exist to perpetuate a seller's market created by long term contracts that are desired by pipeline companies in order to provide large amounts of gas reserves which are necessary to justify large capital outlays for facilities. Competition at the residential consumer level has virtually been eliminated by consumer investment in high cost durable goods which require natural gas for operation. The consumer is less able to convert to a cheaper commodity because of the prohibitive costs. The industrial consumer is more able to adjust to cheaper commodities and thus receives a cheaper competitive rate. Therefore, the residential consumer receives the brunt of a rate increase. In view of current market conditions which reflect a guaranteed market and the captive position of the distributor and consumer, a more strict construction of "just and reasonable" will be required to prevent exploitation and uphold the intent of Congress. The area base method may satisfactorily fill this need and protect the distributor and consumer from inequitable prices.

ALBERT QUITMAN TAYLOR, JR.

SALES — Manufacturer's Liability — Implied Warranty. — This action was brought by the purchaser of an automobile and his wife against the manufacturer and dealer to recover damages for injuries sustained by the wife while she was driving a recently purchased automobile with a defective steering system. The cause was submitted to the jury for determination solely on the issue of implied warranty of merchantability. The jury found for plaintiffs and defendants appealed. HELD: Affirmed: Under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of its ultimate purchaser. *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69, (N.J. 1960).

The restrictive rule that a manufacturer is not responsible to a remote purchaser with whom he has no privity of contract was founded upon the early English case of *Winterbottom v. Wright*, 10 M. & W. 109, 10 Eng. Rep. 402 (Ex. 1842). Subsequently, *Thomas v. Winchester*, 6 N.Y. 397 (1852), held that the remote vendee of a deadly poison could recover on the ground that "the defendant's negligence as to an inherently dangerous product, put human life in imminent danger." Thereafter Justice Cardozo's decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), rejected the idea that only fixed classes of articles are sufficiently dangerous for liability without privity of contract. The *MacPherson* rule, which has been generally adopted, is formulated in the *Restatement of Torts*, where the manufacturer's liability is extended to the manufacturer of any chattel "which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm." RESTATEMENT, TORTS § 395, comment b (1934). The negligence action has always included within its scope injury from negligent misrepresentation about the product, *George v. Skivington*, L. R. 5 Ex. 1 (1869), and in the case of the manufacturer this often took the form of advertisements. *Crist v. Art Metal Works*, 230 App. Div. 114, 243 N. Y. Supp. 496 (1930). These actions of deceit or misrepresentation traditionally require the elements of fraud or negligence; but there are cases in which a manufacturer has been obligated to make good a representation on a label or in an advertisement where these elements were not so clearly present, *Free v. Sluss*, 87 Cal.App.2d 933, 936-37, 197 P.2d 854, 856 (1948), and thus typify a shift from liability for misrepresentation to liability for breach of warranty. Lack of privity of contract does not bar an action for breach of an express warranty made to induce purchase, *Studebaker Corp. v. Nail*, 82 Ga. App. 779, 62 S.E. 2d 198 (1950); Cf. *Odom v. Ford Motor Co.*, 230 S.C. 328, 195 S.E. 2d 605 (1956), noted 10 S.C.L.Q. 12 (1957). Advertisements have been taken into consideration in deciding the existence of a warranty. *King v. Ohio Valley Terminix Co.*, 309 Ky. 35, 214 S.W. 2d 993 (1948). *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), held a manufacturer strictly liable for inaccurate advertising, reliance upon which led to the ultimate purchaser's injury. The usefulness of this doctrine is limited to situations of actual reliance upon publicized misrepresentations. Cf. *Odom v. Ford Motor Co., supra.* Extension of the relaxation of privity to implied warranties springs from the contention that "manufacturers often make representations to the public which if made directly to an immediate buyer would amount to warranties," and the reminder that, historically, contractual privity was unnecessary, the enforcement action being based on detrimental reliance rather than upon promise. 1 WILLISTON SALES 649 (rev. ed. 1948). In a growing minority of states the requirement of privity in the food and beverage cases has been disregarded, or avoided by means of somewhat technical legal doctrines: e.g. (a) implied warranty running with the goods, *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); (b) third-party beneficiary contracts, *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928); (c) agency relationships, *Timberland Lumber Co. v. Climax Mfg. Co.*, 61 F.2d 391 (2d Cir. 1932); (d) fictional contracts, *Davis v. Van Camp Pkg. Co.*, 189 Iowa 775, 176 N.W. 382 (1920); (e) and a finding of strict liability on public policy grounds to protect human health and life, *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 144 S.W.

2d 404 (Tex. Cir. App. 1940); *Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 282 - 83, 93 P.2d 799, 804 (1939). An entering wedge to establish strict liability in cases involving other than food and beverage situations was found in an extension from food to food containers. *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953). In this exploding bottle case the court regarded the defective bottle in the same light as defective contents. Shortly thereafter, a cause of action was allowed on grounds of implied warranty for injury from a piece of wire imbedded in a bar of soap, *Krupar v. Procter & Gamble Co.*, 113 N.E.2d 605 (Ohio App. 1953), and privity requirements were relaxed in a case involving hair dye. *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413 (1954). The case of *DiVello v. Garden Machine Co.*, 46 Ohio Op. 161, 102 N.E. 2d 289 (Ohio C.P. 1951), noted 5 VAND. L. REV. 149 (1952), B. J. 223 (1952), has been cited by leading authorities as extending the strict liability rule of the food cases to a mechanical product. This case concludes that a manufacturer should be strictly liable to remote consumers on the theory that the warranty runs for the benefit of "sub-purchasers as well as those using an article; . . . the sale of the grinding wheel carried with it an implied warranty of merchantability and fitness for the usages designed and that such warranty extended to the workman of the vendee who was injured in its ordinary use". Cf. *Odom v. Ford Motor Co., supra.*

Liability for breach of implied warranty would tend to promote safety by correction of defects at their source by increasing the degree of care which the manufacturer will use. "Best" methods of production can be made better, and the safest way to assure care is to throw the risk upon the person who decides what precautions shall be taken. Under mass production methods, the manufacturer has become unduly insulated from liability. The consumer lacks the means and skill to investigate the soundness of a product, or to prove existing defects in its manufacture. A strict liability of the manufacturer would serve to provide a desirable spreading of the risks or of the loss caused by defective products. What is in substance a strict liability already often is imposed indirectly by means of a series of warranty actions, beginning with one by the consumer against the retailer, or by means of free use of the doctrine of *res ipsa loquitur*. A more direct imposition of strict liability would avoid waste and circuity, and the results would be less haphazard. The public's vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade marks. The manufacturer's obligations to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. The modern law should shift the immediate incidence of the hazards of life in an industrial society away from the innocent individual and over to a group which can best distribute the loss, and place the loss where the most pressure will be exerted to keep down future losses. Public policy demands the holding in the instant case.

M. OBERMAN.

COPYRIGHT — General Publication — Loss of Rights in Literary Property. — Defendant, a Vice Admiral of the United States Navy, delivered a number of speeches on various topics, some of which concerned ideas developed in connection with his official duties. Texts of these speeches were distributed to the press and mimeographed copies were made available to his audiences and to all other interested persons. No notice of copyright or other restriction was affixed thereto. Subsequently, plaintiff publishing house sought to quote from this material in a forthcoming book and indicated a desire to publish the speeches. Defendant supplied several copies of the speeches, but denied permission to quote as he intended to include them in his own book. Plaintiff brought action for a declaratory judgment of the defendant's rights in the material, contending that the speeches were governmental publications and not subject to copyright protection. Plaintiff further contended that the widespread distribution of the mimeographed copies to the audiences and the press constituted an abandonment of the literary property and a dedication to the public domain. The District Court held that although the speeches had some bearing on and arose out of the defendant's official actions, they were not in the public domain and remained the property of the author. The Court also held that the distribution of copies to the press and the audiences was a limited publication which did not constitute an abandonment of the literary property or a dedication to the public. *Public Affairs Associates, Inc. v. Rickover,* 177

F.Supp. 601 (D.D.C. 1959). On appeal, HELD, affirmed in part and reversed in part. Defendant's literary productions were not uncopyrightable governmental publications, but his wide dissemination of mimeographed copies of the speeches without any copyright notice thereon to the press, his audiences, and other interested persons constituted a dedication of the literary property to the public, precluding copyright protection thereof. *Public Affairs Associates, Inc. v. Rickover*, __ F.2d __ (C.A.D.C. 1960).

An author has at common law the exclusive right to publish his works unless this right is lost by his general publication of them. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15 (2d Cir. 1906), *aff'd* 210 U.S. 339, 52 L.Ed. 1086 (1908); *Werckmiester v. American Lithographic Co.*, 134 Fed. 321 (2d Cir. 1904); *Loew's Inc. v. Superior Ct.*, 18 Cal. 2d 419, 115 P.2d 983 (1941). The only rights remaining to the author after the general publication of his works are those secured by compliance with the Federal Copyright Act. 17 U.S.C. (1958), *Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 8 L.Ed. 1055 (1834); *Holmes v. Hurst*, 80 Fed. 514, *aff'd*, 174 U.S. 82, 43 L.Ed. 904 (1875). A general publication by such a disclosure, communication, circulation, exhibition, or distribution of a literary product, tendered or given to one or more members of the public, implies an abandonment of the right of copyright or a dedication to the public. *Werckmiester v. American Lithographic Co.*, 134 Fed. 321 (2d Cir. 1904); *National Comics Publications v. Fawcett Publications*, 191 F.2d 594 (2d Cir. 1951); *American Tobacco Co. v. Werckmiester*, 146 Fed. 375 (2d Cir. 1905), *aff'd*, 207 U.S. 284, 52 L.Ed. 208 (1907). A limited publication communicates the contents of a work to a definite group and for a limited purpose not including the right of diffusion, reproduction, or sale, and does not result in the loss of the author's common law rights in his work. *White v. Kimel*, 193 F.2d 744 (9th Cir. 1952), *cert. denied*, 343 U.S. 957, 96 L.Ed. 1357 (1952); *American Visuals Corp. v. Holland*, 239 F.2d 740 (2d Cir. 1956). Thus, it has been held that the oral delivery of a speech was not a publication thereof. *Nutt v. National Institute, Inc.* 31 F.2d 236 (2d Cir. 1929). An author does not lose his rights in lectures which are delivered to paying classes, *Sherrill v. Grieves*, 57 Wash. L. Rep. 286 (Sup. Ct. D.C. 1929), or even by radio broadcast. *Waring v. WDAS Broadcasting System*, 327 Pa. 433, 194

Atl. 631 (1937). In *Hirshom v. United Artists Corp.,* 243 F.2d 640 (D.C. Cir. 1957), distribution of twenty-five hundred copies of a song to broadcasting stations and professional musicians for "plugging" purposes was held to be a limited publication. In so holding the court stated, "Not a single copy was sold. Nothing was said or done beyond the described distribution to give any recipient of a copy the impression that he could make any use of it without first obtaining the writer's permission." However, unrestricted release to the public constitutes such abandonment as to place the work in the public domain. *R.C.A. Mfg. Co. v. Whiteman,* 114 F.2d 86 (2d Cir. 1940), *cert. denied,* 311 U.S. 712, 85 L. Ed. 463 (1940). Distribution of copies of a literary product to a limited but non-interested audience with no indication of intent to retain the ownership thereof terminated the author's rights in his work. *Continental Cas. Co. v. Beardsley,* 253 F. 2d 702 (2d Cir. 1956). Furthermore, where copies of a manuscript were distributed over a long period of time to those desiring them, without any manifestation of intent to limit their use, sale, or reproduction, it constituted a publication sufficient to divest the author of his rights therein. *White v. Kimmell,* 193 F. 2d 744 (9th Cir. 1952), *cert. denied,* 343 U.S. 957, 96 L.Ed. 1357 (1952).

The decision of the court in the instant case falls within the accepted views on publication and is justifiable, particularly when reviewed in the light of the surrounding facts and circumstances of the case. Nevertheless, no general principle may be deduced from this decision which may with any certainty be said to be decisive of future cases. This is because the question is largely evidentiary and consequently each case must depend on the facts and circumstances peculiar to it. As a result, a decided lack of uniformity in the determination of what constitutes general publication is to be noted in the decisions from the various jurisdictions. As a means of securing greater uniformity in this field, it is suggested that the courts apply the rules determining publication strictly, especially in view of the relative simplicity with which statutory protection may be obtained. The limited audience and use tests would provide a restriction upon the dissemination which could be made without loss of common law protection. This approach would not be unfair or unduly harsh to authors and would protect the public's right to the widest possible dissemination of information. An author's interests would be better secured by strict rules or standards that are fairly clear and certain than by principles with potentially liberal implications but vague boundaries.

JOSEPH E. HINES, JR.