CASE NOTES

TORTS—NEGLIGENCE—COMMON CARRIER

Plaintiff, a young lady attorney, sued the State of New York, which operated through its Conservation Department a chair lift at its ski resort for the purpose of transporting skiers up a mountain. In attempting to alight from the chair lift the plaintiff lost her balance, fell to the ground and fractured her leg. *Held*: In operating a chair lift at the resort the state was a common carrier. *Vogel v. State*, 204 Misc. 614, 124 N.Y.S.2d 563 (1953).

At common law a carrier of passengers was not considered a common carrier. *Middleton v. Fowler*, 1 Salk. 282 (1699). Today such view is generally not accepted. *Anderson v. Fidelity & Casualty Co. of New York*, 228 N.Y. 475, 127 N.E. 584 (1920). A common carrier is "one whose occupation is the transportation of persons . . . from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged." *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918). A common carrier of passengers was formerly liable as an insurer of the safety of those passengers it undertook to transport, *Ingalls v. Bills*, 43 Am. Dec. 346, 355 (1845); but today such is not the rule. *Kebbe v. Connecticut Co.*, 85 Conn. 641, 84 Atl. 329 (1912). The highest degree of care, skill and diligence is required on the part of the carrier consistent with the efficient use and operation of the mode of transportation adopted. *O'Callaghan v. Dellwood Park Co.*, 242 Ill. 336, 89 N.E. 1005 (1909). Common carriers of passengers have included stagecoaches, *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 147 N.E. 387 (1925); steamboats, *Reason v. Paducah & Illinois Ferry Co.*, 152 Ky. 220, 153 S.W. 222 (1913); railroads, *Chicago, R. I. & P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N.E. 705 (1905); motor buses, *Simmons v. Pacific Electric Ry. Co.*, 60 Cal. App. 129, 212 Pac. 637 (1923); taxicabs, *Stewart Taxi-Service Co. v. Spencer*, 149 Md. 635, 132 Atl. 153 (1926); jitneys, *State v. Quigg*, 94 Fla. 1056, 114 So. 859 (1927); ambulances, *Leete v. Griswold Post No. 79, American Legion*, 114 Conn. 400, 158 Atl. 919 (1932); airplanes, *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932); escalators, *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 139 Atl. 878 (1927); scenic railways, *O'Callaghan v. Dellwood Park Co., supra;* roller coasters, *Barr v. Venice Giant Dipper Co.*, 138 Cal. App. 563, 32 P.2d 980 (1934); cable cars, *Burke v. State*, 64 Misc. 558, 119 N.Y.S. 1089 (1909).

The instant case is one of first impression in New York In a well reasoned opinion, Judge Young describes the expansion of the skiing industry, and the advent of the chair lift. Such device, he says, physically conveys the skier and isolates him from his own resources and revenue derived from the fares charged helps operate the ski area. A modern trend is pronounced in the case at bar, that is, applying the term common carrier to each new development catering to the public generally.

BERTRAM H. RAPOPORT

EVIDENCE—EXPERT TESTIMONY—RESULTS OF RADAR TIMING DEVICES ARE INADMISSIBLE WITHOUT EXPERT TESTIMONY AS TO THE ACCURACY OF THE PRINCIPLE

Defendant was convicted of driving an automobile in excess of speed limits established by city ordinances. The trial court admitted in evidence records of the defendant's speed obtained by the use of radar timing devices. The foundation for this evidence was the testimony of the police officers who had timed the defendant and the technician who had installed the radar device in the police car. While these witnesses knew how to operate the device, none of them were familiar with the principles upon which it was based, and none were trained in electronics or radar. The defendant appealed, contesting the admissibility of the results of the radar device. *Held*: Reversed. Testimony of speed based on the results of radar speed-testing devices is inadmissible in the absence of a proper foundation laid by the testimony of competent experts as to the accuracy of the principles of physics upon which the device is based. *People v. Offerman*, 204 Misc. 769, 125 N.Y.S.2d 179 (1953).

Once the instrument or process used is established as accurate, knowledge gained by the aid of a scientific device or process is as admissible as evidence obtained by the unaided senses. 3 WIGMORE, EVIDENCE § 795 at p. 189 (3d ed. 1940). This requisite accuracy may be established by a foundation of expert testimony. *Ibid.* An expert may be defined as a person who, because of special knowledge or experience is able to give testimony on matters which are unknown to the average man. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204 (1910). But an expert must have more qualification than mere observation without study or experience. *Wheeler & Wilson Mfg. Co. v. Buckhout*, 60 N.J. 102, 36 Atl. 772 (1897). There are degrees of expert testimony, *Kelly v. Richardson*, 69 Mich. 436, 37 N.W. 514 (1888), ranging from that requiring only ordinary intelligence and certain practical experience, *Crosby v. Wells*, 73 N.J.L. 790, 67 Atl. 295 (1907), to that requiring highly technical training in specialized fields of arts and science. *May v. Bradlee*, 127 Mass. 421 (1879). Cases falling close to the latter category are: an out of state attorney's testimony as to the law of the state in which he practices, *Chattanooga, Rome and Columbus R.R. Co. v. Jackson*, 86 Ga. 686, 13 S.E. 109 (1890); a chemist's analysis of the contents of a fluid, *Delaney v. Morris*, 193 Okl. 589, 145 P.2d 936 (1944); or of the intoxicating effect of a percentage of alcohol in the blood, *Macon Busses, Inc. v. Dashiell*, 73 Ga. App. 108, 35 S.E.2d 666 (1945); a physician's testimony regarding a disease, *Hook v. Stovall*, 26 Ga. 704 (1859), or cause of death, *Edge v. State*, 144 Tex. Cir. R. 408, 164 S.W.2d 677 (1942), or whether certain stains are human blood, *State v. Knight*, 43 Me. 11 (1857). In order to introduce X-ray plates into testimony, one must be prepared to show (1) the accuracy of the plates, *Rienhold v. Spencer*, 53 Idaho 688, 26 P.2d 796 (1933); (2) the experience and intelligence of the party taking the picture and testifying in regard to it, *Bruce v. Beall*, 99 Tenn. 303, 41 S.W. 445 (1897), and (3) the accuracy of the particular machine used, *Luchenmyer v. Glotfeltey*, 248 Ill. App. 397, 2 N.E.2d 180 (1936). The results of "lie detector" tests are entirely excluded because these tests

have not obtained scientific and psychological recognition sufficient to justify an acceptance of their accuracy by the courts. *People v. Forte*, 167 Misc. 868, 4 N.Y.S.2d 913 (1938).

It will be noted from the above cases that while the principles involved in the making of X-ray plates are no longer a question for the courts, it is this very point—the validity of the foundation principles—that is fatal to the admission of "lie detector" results. A party introducing evidence obtained by the aid of a scientific device must be prepared to prove the accuracy of the principles of science involved. Since the prosecution in the instant case made no satisfactory effort to do this, the court had no choice but to reject the scientific evidence offered. In reversing the lower court, the justice warned against blind acceptance of the accuracy of evidence just because it is labeled "scientific." The point is well made. The modern mind has a tendency to pay homage to the advancements of science by accepting without question hypothesis coming even from the very frontiers of research. While in general this attitude does no harm, it would be a dangerous addition to the rules of evidence. The principal case is sound. Its theory is a good one to remember when dealing with any scientifically obtained evidence.

B. CARL BUICE

MUNICIPAL CORPORATIONS—FRANCHISE OF PUBLIC UTILITY—REQUIREMENT OF RELOCATING CONDUITS NOT "TAKING" OF PROPERTY

The City of Macon, acting under power granted by State Legislature, closed part of a city street for the purpose of providing a site for construction of a needed addition to the city-operated public hospital. The telephone company, a private corporation, provided service to the community under a special franchise granted by the city. In 1946 the telephone company requested and received permission to excavate in that portion of the street now closed by the city, and thereafter the cables and conduits in question were placed underground. Because of excavation the city requested that the company remove its cables, and provided a new location for relaying of the facilities one block away from the present site. The company asked compensation for the expenses involved in removing and relocating the cables and conduits, contending that such order is a taking of the franchise right of the company in violation of constitutional provisions. Upon the city's refusal to make payment, the company brought action in the form of declaratory judgment proceedings to determine its rights, if any, to compensation. From judgment for the company, the city excepted. *Held*: Reversed. The company, by reason of its franchise and the specific permit to excavate, acquired no indefeasible right to that portion of the street which would entitle it to compensation as against a valid, reasonable exercise of the city's police powers. *City of Macon v. Southern Bell Tel. and Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

A municipal permit is merely a grant of a privilege and does not constitute a contract, and no vested rights are obtained by acquiring a permit.

Wilder v. Little Rock, 150 Ark. 439, 234 S.W. 479 (1921). A permit is not property and it may be revoked. *City of Rochester v. Alcott*, 173 Misc. 87, 16 N.Y.S.2d 256 (1939). Nor does it exempt the holder from the operation of subsequent ordinances and regulations legally enacted by the city in the exercise of its police powers. *C. C. Julian Oil and Royalties Co. v. City of Oklahoma City*, 29 P.2d 952, 167 Okl. 384 (1934). A license has been defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter. 17 R.C.L., Licenses § 78 (1917). But when the right to use the streets is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract. *City of Texarkana v. Arkansas, Louisiana Gas Co.*, 306 U.S. 188, 59 S.Ct. 448, 83 L. Ed. 598 (1939). In American law, a franchise is defined broadly as a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right. *Tulsa v. Southwestern Bell Tel. Co.*, 75 F.2d 343 (C.C.A. 10th 1935). While the use of a franchise may require the occupancy, or even the ownership, of land, that circumstance does not make the franchise itself an interest in land. *Texas & P. R. Co. v. El Paso*, 126 Tex. 86, 85 S.W.2d 245 (1935). A franchise, as such, is essentially "property" and will be safeguarded by law in all respects as other property. *City of Wichita Falls v. Kemp Hotel Operating Co.*, 162 S.W.2d 150, 141 Tex. 90 (1942). But though a franchise is "property" it is not more sacred than other property. *City of Oakland v. Hogan*, 41 Cal. App.2d 333, 106 P.2d 987 (1940). The power to grant franchises to use the streets resides primarily in the legislature. *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602 (1872). But not infrequently the courts have confused mere rights and powers which belong to persons and corporations alike, with franchises which inhere in and must emanate from, the state alone. *Woods v. Lawrence County*, 1 Black (U.S.) 386, 17 L. Ed. 122 (1862). A municipality cannot make a general grant to a street railway company of a right to construct its road in any of the streets of the municipality at any time the company desires, since a delegation of the power to determine what streets could be used and occupied for street railway purposes consistent with the public safety and welfare is void. *Logansport R. Co. v. Logansport*, 114 Fed. 688 (C.C.D. Ind. 1902). However, a municipality cannot, under the pretense of regulation as an exercise of its police power, deprive the grantee of a franchise of its property or of any of its essential rights and privileges required under the franchise. *Chicago v. Chicago O. P. El. R. Co.*, 250 Ill. 486, 95 N.E. 456 (1911). It is elementary that an exercise of the police power in order to be valid must be reasonable. *Western Union Tel. Co. v. Richmond*, 178 Fed. 310 (C.C.E.D. Va. 1909). "Franchises . . . are coming to be regarded, however, not so much as privileges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control." 12 McQUILLIN, MUNICIPAL CORPORATIONS, § 34.01 (3rd Ed. 1950). And the grantee of a franchise to use the streets takes it subject to the right of municipality to make public improvements whenever and wherever the public interest demands, and if the improvement causes injury to the company, as by re-

quiring it to relay or change the location of its pipes, tracks or poles, or otherwise, the grantee of the franchise cannot recover damages from a municipality because thereof. *New Orleans Gas Light Co. v. Drainage Comm. of New Orleans*, 111 La. 838, 35 So. 929 (1903).

The problem raised by the principal case, that of the interests of private corporations rendering public service versus exercise of governmental police power, has proved vexing. Where the exercise of the police power is demanded by public emergency, or where the action of the state or municipality is clearly arbitrary or proprietory in nature and there is an actual taking or destruction or complete abrogation of a franchise, or contract right, the problem has caused little controversy. It is in the twilight zone between public emergency and arbitrary taking of property that most of the litigation has occurred. What rights, specifically, does the franchise holder gain? What is reasonable exercise of police power? Perhaps the most bothersome tenet of all is the strong desire to be morally fair. But there would seem to be no basic legal error in holding that a franchise right may be reasonably modified where the needs of the community demand. With the steady growth of metropolitan areas and the expectation that cities will continue to expand their suburban boundaries, it is quite possible that the new construction and the enlargement of existing municipal facilities, such as hospitals, schools and streets, will give rise to more frequent conflict between public service corporations and the communities which they serve. Perhaps placing the burden of disruption expenses upon the utility may be offset by the fact that increased metropolitan area gives the light, gas, telephone or railroad company an increased market for its services. The modern trend is toward emphasizing the public service mission of public utilities rather than pecuniary gain to the franchise grantor or grantee. And where, as here, there is no arbitrary discontinuance of the general franchise right, but in fact the city offers and places at the disposal of the telephone company a new location near to the site of the old, it is in principle sound that the company should make the relocation without compensation.

EUGENE L. HEINRICH

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—MOTION PICTURE CENSORSHIP

The New York Court of Appeals upheld the censorship of "La Ronde," a motion picture found to be immoral by depicting promiscuity and adultery, under a statute providing for the censorship of moving pictures found to be "obscene, indecent, immoral, or sacrilegious." The case was taken on appeal to the Supreme Court of the United States. *Held*: Reversed. The per curiam decision rendered no written opinion, but the concurring opinion stated that censorship of motion pictures under any circumstances is unconstitutional. *Commercial Pictures Corporation v. Regents of University of the State of New York.* ..... U.S. ..... 74 S.Ct. 286, 98 L. Ed. 235 (1954).

In the same decision, the Supreme Court held unconstitutional an Ohio statute providing as a standard for censorship motion pictures "of a moral,

eductional, or amusing and harmless character." *Superior Flms, Inc. v. Department of Education of the State of Ohio*, ... U.S. .... 74 S.Ct. 286, 98 L. Ed. 235 (1954). Cited as authority was *Burstyn v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L. Ed. 1098 (1952), which held that a New York statute allowing censorship of motion pictures found by the censor to be sacrilegious was unconstitutional under the Fourteenth and First Amendments as placing a prior restraint on freedom of speech without setting an adequate and certain standard to limit the discretion of the censor. Freedom of speech is protected from federal enroachment by the First Amendment, and from state action by the broad interpretation of the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138 (1925). Motion pictures are not to be denied the protection afforded other modes of expression. *Gelling v. Texas*, 343 U.S. 960, 72 S.Ct. 1002, 96 L. Ed 1359 (1952). Earlier cases treated motion pictures as spectacles for profit, not entitled to freedom of speech protection. *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230, 35 S.Ct. 387, 59 L. Ed. 552 (1915). Newsreels were not entitled to protection. *Pathe Exchange v. Cobb*, 236 N.Y. 539, 142 N.E. 274 (1923). Freedom of speech is not absolute, but subject to the state's police power to protect its citizens when a clear and present danger is created. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1045 (1927). If the gravity of the evil weighed against its improbability justifies the invasion of the right of speech, the court will find a clear and present danger. *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L. Ed. 1137 (1951). Speech which is lewd and obscene, profane, or libellous is not protected by the constitution. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L. Ed. 1031 (1942). Even libellous speech directed at a large but well defined group, such as the Negro race, is not protected by freedom of speech. *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L. Ed. 919 (1952). A person cannot speak with utter disregard for the rights of involuntary listeners in a manner which constitutes a nuisance. *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L. Ed. 513 (1949). Blackstone expressed the view that censorship is destructive of a free state. IV *Blackstone, Commentaries* 151-152. Prior restraints are particularly condemned. *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). But when an immediate breach of the peace is threatened, the state may prevent or punish. *Feiner v. New York*, 340 U.S. 315, 71 S.Ct. 312, 95 L. Ed. 280 (1951). A restraint on speech at the discretion of an administrator, however, is unconstitutional. *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L. Ed. 280 (1951). A statute requiring a license for solicitation and leaving to the determination of an administrator what constitutes a religious group is an unconstitutional prior restraint as censorship at the discretion of an administrator. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L. Ed. 1213 (1940). A municipal ordinance creating a board for censorship of motion pictures "prejudicial to the best interests of the people" is unconstitutional; the standard for censorship is too indefinite. *Gelling v. Texas*, *supra*.

In the *Burstyn* case, *supra*, the court expressly refused to decide "whether a state might censor motion pictures under a clearly drawn statute

designed to prevent the showing of obscene films," leaving the future of censorship precariously uncertain. Since most of the censorship statutes set no definite standard to guide the censor, their fate will probably be that of the statute in the principal case. The courts have been reluctant to allow censorship of the press, since free people fear government control of thought. Motion pictures, having matured from a mere spectacle to a vital means of expressing views and ideas, are now to be given as much protection from censorship as the press. Subsequent punishment, which is not under the arbitrary control of a censor, is less objectionable than censorship, and will surely be used to protect the public morals.

JOHN BEDFORD

TORTS—SLANDER—ORAL CHARGE OF COMMUNISM ACTIONABLE WITHOUT PROOF OF SPECIAL DAMAGES

Without alleging special damages, plaintiff charged defendant with slandering him by an oral statement that he was a communist. In the presence of a public assembly of 1500 people, defendant made the following charge about the plaintiff, "Don't let that man speak, I know him and he is a communist." The trial court dismissed the complaint on the grounds there was no proof of special damages and the statement did not impute a criminal offense, an existing loathsome disease, or conduct incompatible with proper exercise of business. On appeal, *Held*: Reversed. An oral charge of communism is actionable without proof of special damages. *Joopavenko v. Gavagan*, 67 So.2d 434 (Fla. 1953).

The older definition of defamation concerned statements that would expose plaintiff to hatred, ridicule, or contempt. *Rice v. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766 (1838). The newer conception of defamation includes, in general, statements about a man to his discredit. *Scott v. Sampson*, L.R. 8 Q.B. Div. 491 (1882). Libel is defamation arising from writing, print, pictures, or signs, and may be maintained without proof of special damages, because of the deliberation and permanency of the publication. *Ajouelo v. Auto-Soler Co.*, 61 Ga. App. 216, 6 S.E.2d 415 (1939). Slander is oral defamation, and to be actionable without proof of special damages must impute a punishable crime or a loathsome disease, or be injurious to trade, occupation or business. *Moore v. Francis*, 121 N.Y. 119, 23 N.E. 1127 (1890). Without proof of special damages, an early exception allowed recovery for oral imputations of unchastity in women. *Richter v. Stolze*, 158 Mich. 594, 123 N.W. 13 (1909). Early in the development of the concept of defamation, courts challenged the distinction between libel and slander as to the necessity of proof of special damages in slander. *Thorley v. Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812). But the principle was considered too well rooted in the law to be ignored. *Baker v. Clark*, 186 Ky. 816, 218 S.W. 280 (1920). Radio defamation has been held slander, under the ordinary definition of slander being oral. *Lynch v. Lyons*, 303 Mass. 116, 20 N.E.2d 953 (1939). Other decisions have sustained libel actions in such circumstances, on the theory of the widespread dissemination of radio broadcases even though oral. *Weglein v. Golder*, 317 Pa.

437, 177 Atl. 47 (1953). Some jurisdictions allow recovery for all spoken words that tend to injure the reputation of another. *O'Connor v. Dallas Cotton Exchange*, 153 S.W.2d 266 (Tex. Civ. App. 1941). An early case allowed calling one an enemy of the state to be slanderous and actionable without proof of special damages. *Charter v. Peter*, Cro. Eliz. pt. 2 p. 602, 78 Eng. Rep. 844 (1598). Courts have allowed recovery without proof of special damages on an oral imputation that one is an anarchist. *Von Gerichten v. Seitz*, 94 App. Div. 130, 87 N.Y.S. 968 (1904). Oral statements that one is a communist have been held actionable without proof of special damages. *Lightfoot v. Jennings*, 363 Mo. 878, 254 S.W.2d 596 (1953). *Contra*: *Pecyck v. Semoncheck*, 157 Ohio St. 354, 105 N.E.2d 61 (1952).

The case at hand stands squarely for the proposition that an oral imputation of communism, if false and not privileged, is actionable as slander without proof of special damages. As early as 1812, opposition arose to the more rigorous rules of slander. The distinction seems to be mainly historical rather than logical; we evidently have a principle that started off wrong, but nevertheless became firmly entrenched in the law. There seems to be no reason to hold that greater damage will occur from a single third party reading a libelous letter, than from a slanderous statement made before 1500 people. The same reasoning applies in the case of holding an oral imputation of a veneral disease damaging in itself, while holding the reverse as to a charge of communism. It seems that the better method of correcting these imperfections is openly to allow recovery for statements that would cause injury as a natural and probable consequence, rather than obviously to strain the exceptions to the rule. The instant case appears to be a step in the right direction.

JACK E. COWART, JR.