



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 43
Issue 1 *Dickinson Law Review - Volume 43,*
1938-1939

10-1-1938

Optometry is a Profession

J. Stewart Glen Jr.

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

J. S. Glen Jr., *Optometry is a Profession*, 43 DICK. L. REV. 77 (1938).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol43/iss1/5>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

There is another class of cases where evidence of prior specific instances may be introduced, and that is where it is necessary to impute to the defendant *knowledge* of the existence of a defect.³⁴

Evidence in both of the above instances can be weakened by the introduction in rebuttal of evidence to the effect that conditions in preceding instances were substantially different from those in the one under consideration.³⁵

It remains only to caution the reader that the discussion as to character of inanimate objects has reference, except as above noted, to the *character of a condition* and *not to the condition itself* because we here have the rule that the *existence of a condition* cannot be proved by prior specific instances. Perhaps an illustration will help. It could not be proved that an engine had jumped the track at a given point by showing that other engines had previously jumped the track there. But, if the fact that the particular engine had jumped the track was established by independent evidence, then evidence as to others having done so would be admissible to show either that

1. The character of the condition at the given point was dangerous, or
2. The defendant knew, or ought to have known, of the existence of the defect.

J. MURRAY BUTERBAUGH

OPTOMETRY IS A PROFESSION

During the last few years, we have become accustomed to read among the advertisements of many large department stores that one of the services that is offered to their patrons is a well equipped optical department. These stores have assured the public that their staff is composed of the most capable optometrists and that they are able to provide glasses for a quite reasonable price. In a very late, and rather unique case¹ the Supreme Court of Pennsylvania decided that this practice can no longer be carried on. This case is interesting from two different standpoints. It was necessary for the court to decide that optometry is a profession in order for them to reach the result desired. The case also illustrates the granting of relief by a court of equity to members of a profession in the form of an injunction against others not authorized to engage in that profession.

³⁴Butcher v. Philadelphia, 202 Pa. 1 (1902).

³⁵O'Rourke v. Blocksom, 69 Pa. Super. Ct. 93 (1917).

¹Neil v. Gimbel Bros. Inc., 330 Pa. 213. Cases pending which are ruled by Neil v. Gimbel Bros. Inc. are Neil v. Block, 330 Pa. 222; Neil v. Harry C. Kahn and Son, 330 Pa. 223; Neil v. Stern & Co., 330 Pa. 224.

In *Neil v. Gimbel Bros. Inc.*,² the defendant leased a portion of its store to a partnership engaged in the optical business for a definite period of time and at a definite rental. However, the sign outside the leased department read "Gimbel Brothers' Optical Department" and all advertisements appeared under Gimbel's name, with no mention of the registered optometrist actually in charge of the department. All the employees of the department were hired and paid by the lessee but they were under the control of the department store which had the right to dismiss them at any time. All charges for the examination and fitting of glasses were made in Gimbel's name and all payments were made directly to them.

A group of licensed optometrists brought a bill in equity to enjoin Gimbel Brothers Inc. from practicing optometry directly or indirectly. The Chancellor in the lower court entered a decree enjoining the defendants from holding themselves out as optometrists by advertisement, sign, or otherwise, but refused to enjoin the department store from employing duly licensed optometrists on the ground that the statute³ does not make it unlawful for a corporation to contract with a duly licensed optometrist to examine the eyes of such patrons as may request it.

The Supreme Court on appeal sustained the demands of the optometrists bringing the action and enjoined the department store from employing licensed optometrists to examine the eyes of its customers. The court felt that Gimbel Brothers had retained so much control over the lessees that they were in fact agents of the defendants. The court goes on to say that optometry is a profession and it is generally recognized that a licensed practitioner of a profession may not lawfully practice his profession among the public as the servant of an unlicensed person. The court in sustaining its view that optometry is a profession said:

"Optometry has become a real science devoted to the measurement, accommodation, and refractory powers of the eyes without the use of drugs, thus superseding obsolete and archaic methods of fitting eye glasses. It has become one of the important professions and for the preparation of its proper practice, courses are given in many large universities as well as colleges specializing in optometry.

²Supra.

³Act of March 30, 1917, P. L. 21, 63 P. S. Sect. 231-244 as amended: "On and after January first, one thousand nine hundred and eighteen, it shall be unlawful for any person in this Commonwealth to engage in the practice of optometry or to hold themselves out as a practitioner of optometry, or to attempt to determine by any examination of the eye the kind of glasses needed by any person, or to hold himself out as a licensed optometrist when not so licensed, or to hold himself out as able to examine the eyes of any person for the purpose of fitting the same with glasses, excepting those hereinafter exempted, unless he has first fulfilled the requirement of this act and has received a certificate of licensure from the Board of Optometrical Education, Examination and Licensure created by this act (The act provided punishment for violating its provision of fine or imprisonment or both).

The learning and the ethical standards required in practicing optometry transcends the requirements of an ordinary trade and place it on a professional basis. Traditionally, the learned professions were theology, law and medicine; but some other occupations have climbed and still others may climb to the professional plane. Dentistry has done so within modern times."

The court goes on to point out that a corporation cannot possess the personal qualities required for a practitioner of a profession, and its servants, although professionally trained and licensed, do not have that personal interest in the patients that a professional man should have.

The court distinguishes this situation from *Liggett Co. v. Baldridge*,⁴ which held a Pennsylvania statute⁵ unconstitutional which provided that every pharmacy or drug store should be owned by a licensed pharmacist and in the case of corporations required that all members thereof shall be licensed pharmacists except such corporations as were already organized and duly authorized to own drug stores could continue to own and conduct the same, on the ground that it violated the fourteenth amendment of the Federal Constitution. The court said that case does not deal with a profession. The legislature does have the right to forbid a corporation from employing a professional man such as a lawyer or a doctor to render services to the customers of the corporation, for such a practice is contrary to public policy, which is properly concerned with the maintenance of high professional standards.

The outcome in both of these cases seems to depend on the court's opinion as to whether a certain occupation is a profession or not. Justice Holmes writing the dissenting opinion in *Liggett Co. v. Baldridge* points out that he considers pharmacy a profession when he says:

"It has been recognized by the profession, by statute, and by decision that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession."

Throughout the United States there is a definite split of authority as to whether optometry is a profession, many courts holding the fitting and selling of eyeglasses is merely a trade, and a corporation or unlicensed person may engage in it as long as the work is done by licensed servants.⁶ The Pennsylvania Supreme court as far back as 1915 intimated that it considered optometry a profession.⁷

⁴278 U. S. 105.

⁵Act of May 13, 1927, P. L. 1059.

⁶*Dvorine v. Casteberg Jewelry Corp.*, 170 Md. 661; *Jaecle v. L. Bamberger & Co.*, 119 N. J. Eq. 126; *State ex inf. McKittrik v. Gate City Optical Co.*, 334 Mo. 427; *Georgia State Board of Examiners in Optometry v. Friedman's Jewelers, Inc.*, 183 Ga. 669; *State v. Gus Blass Co.*, 193 Ark. 1159; *Sage-Allen Co. v. Wheeler*, 119 Conn. 667; *State v. Knapp*, 327 Mo. 24; *Golding v. Schibach Optical Co.*, 70 P. 2nd., 871 (Utah); *Williams v. Mack*, 278 N. W. 585 (Minn.).

⁷*Martin v. Baldy*, 249 Pa. 259.

It is now certain that Pennsylvania has fallen in line with the large number of other states that have placed optometry on a professional plane with theology, law, medicine, and dentistry.⁸

*Neil v. Gimbel Bros. Inc.*⁹ is interesting also because it settles that a member of a profession can get an injunction against others practicing that profession without a license.¹⁰ The practice of optometry without a license is made a crime by the statute.¹¹ However, equity does not enjoin an act simply because it is a crime, nor on the other hand does equity refuse to enjoin because the act is a crime.¹² Equity takes jurisdiction over acts that constitute crimes on the theory that they are a "nuisance," if it can be shown that a property right is being violated.¹³ In many cases the court feels the remedy of the criminal law is inadequate; that it is better to prevent the act than to punish after the act has been done. The property right that the courts have found in cases where members of a profession seek to enjoin others from unlawful practice of that profession is the right of enfranchisement.¹⁴ The right to practice optometry is a valuable privilege, carrying with it the opportunity to secure material benefits and to earn a livelihood not given to those outside the profession.

In every case where a court of equity has granted an injunction to protect members of a profession, the suit has always been in the form of a representative suit in the name of all other individuals similarly situated.¹⁵ This was true in *Neil v. Gimbel Bros. Inc.*, where the action was brought by a group of licensed optometrists, individually and as trustee of the Philadelphia Optometry Association. It is much easier for a court to find a property right when the action is brought to protect all members of the profession than when an individual member of the profession wishes only to protect his own interest. Whether Pennsylvania will lead the way by permitting a member of a profession to use injunctive relief in protecting his individual interest is rather difficult to say. There has been a very

⁸State ex rel. Beck v. Goldman Jewelry Co., 142 Kan. 881; Stern v. Flynn, 278 N. Y. S. 598; State v. Kindy Optical Co., 216 Iowa 1157; Eisensmith v. Buhl Optical Co., 115 W. Va. 776; Seifert v. Buhl Optical Co., 276 Mich. 692; McMurdo v. Getter, (Mass.) 10 N. E. 2nd. 139; Funk Jewelry Co. v. State, ex rel. La Prade, 46 Ariz. 348; Bennett v. Indiana State Board of Registration and Examination in Optometry, 7 N. E. 2nd. 977; State ex rel. Harris v. Myers, 128 Ohio St. 366; State ex rel. Bricker v. Buhl Optical Co., 131 Ohio St. 217; State v. Etzehooser, 223 Mo. App. 577; Rowe v. Standard Drug Co., 132 Ohio St. 629.

⁹Supra.

¹⁰Childs v. Smeltzer, 315 Pa. 9, 171 At. 883, the court affirmed the decree of the lower court enjoining the unlawful practice of law.

¹¹Act of March 30, 1917, P. L.: 21, 63 P. S. Sect. 231-244 as amended.

¹²Funk Jewelry Co. v. State ex rel. La Prade, 50 P. 2nd 945 (Ariz.); State Board of Oklahoma v. Retail Credit Assn., 170 Okla. 246, 37 P. 2nd 954; Paul v. Stanley, 108 Wash. 371, 12 P. 2nd 401; Sloan v. Mitchel, 113 W. Va. 506, 168 S. E. 800; Kentucky State Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S. W. 188.

¹³Unger v. Land Lords Management Corp., 114 N. J. Eq. 68, 168 At. 229; Sloan v. Mitchel, 113 W. Va. 506, 168 S. E. 800.

¹⁴Dwarken v. Apartment House Owners Assn. of Cleveland, 38 Ohio App. 265, 176 N. E. 577; Land Title Abstract and Trust Co. v. Dwarke, 129 Ohio St. 23, 193 N. E. 650; Depew v. Wichita Retail Credit Assn., 141 Kan. 481, 42 P. 2nd. 214.

¹⁵Paul v. Stanley, 108 Wash. 371, 12 P. 2nd. 401; Seifert v. Buhl Optical Co., 276 Mich. 692.

definite trend recently by the Supreme Court of Pennsylvania to extend the traditional concept of property rights and to grant injunctive relief where obviously it is needed in the interest of justice. This was shown clearly when the court found a property right in a performer's interpretation of a musical composition.¹⁶ That the property concept may be extended in granting relief against unlawful practice of a profession is quite conceivable when we realize that what the courts are really doing is protecting the public against incompetent practitioners.¹⁷

J. STEWART GLEN, JR.

¹⁶Waring v. W. D. A. S. Station, Inc., 327 Pa. 433.

¹⁷Depew v. Wichita Retail Credit Assn., 141 Kan. 481, 42 P. 2nd. 214; Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910.