Yale Law Journal

Volume 7
Issue 5 *Yale Law Journal*

Article 6

1898

RECENT CASES

RECENT CASES.

COMMON CARRIERS.

Damaged Goods—Liability of Carriers.—Morganton Mfg. Co. v. *Ohio R. and C. Ry. Co.*, 28 S. E. Rep. (N. C.) 474. Where defendant's agent received a box of goods which had been shipped over several connecting lines, and marked the bill of lading "O. K.," and the goods are found to be damaged at the end of the line, a rebuttable presumption arises that they were injured after they were thus received. If the contents of the box were unknown to the defendant, liability could have been guarded against by examination or stipulation, and failure to do so was negligence (*Dixon* v. *Railroad*, 74 N.C. 538).

Telegraph Companies—Rules—Effect on Receiver of Telegram—Presentation of Claim.—Webb v. *Western Union Tel. Co.*, 48 N. E. Rep. (Ill.) 670. A rule of a telegraph company printed upon the back of the telegram, requiring all claims for damages to be presented within sixty days is not binding upon the receiver of telegram in the absence of proof that he assented thereto. And where the action is one sounding in tort for a mistake in transmitting the telegram the mere knowledge of such a rule by the receiver will not affect his right to recover. While there may be a contract relation between the sender of the message and the company which under proper condition will bind the sender, there is no contract relation between the receiver and the company, and his proper remedy for damages for its alteration is an action in tort (*Telegraph Co.* v. *Fairbanks*, 15 Ill. App. 600). As the receiver's remedy is in tort, the company cannot compel a claim for loss to be made in any particular time. As a general rule an action for tort can be brought within any time allotted by the statute of limitations (Gray on Communication by Telegraph, § 75; *Telegraph Co.* v. *Underwood*, 37 Neb. 315).

Carriers—Cars for Colored Passengers.—Louisville and N. R. Co. v. *Catrow*, 43 S. W. Rep. (Ky.) 443. Section 801 of the separate coach laws (Act May 24, 1892) reading, "The provisions of this act shall not apply to * * * officers in charge of prisoners," construed as an exception in favor of the officer and not of the prisoner; and therefore no action will lie against the railroad in favor of an officer, because a colored prisoner whom he was transporting was obliged by the conductor to occupy the coach reserved for colored people, thereby necessitating the officer's presence in that coach in order to guard his prisoner.

Railroads—Transportation Facilities—Discriminations.—Little Rock and Ft. S. Ry. Co. et al. v. *Oppenheimer et al.*, 43 S. W. Rep. (Ark.) 150. In a year when the crop and shipments of cotton were unusually large appellant railway company furnished sufficient cars at certain points on its route where there were competing lines and superior advantages for shipment to carry all cotton offered, but at certain intermediate points failed to furnish cars sufficient to ship cotton as fast as it was offered. Act of March 24, 1887, sec 1, provides that "All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this State, and no unjust or undue discrimination shall be made in charges for, or in facili-

ties for, transportation of freight or passengers within the State," etc., and section 4 provides that no discrimination in charges or facilities for transportation shall be made between individuals and transportation companies, by any means, nor shall any preferences be made in furnishing cars and motive power, etc. For violations of these sections a penalty is prescribed (sec. 12), which may be recovered by civil action by the party aggrieved. *Held*, the facts did not show such an unjust discrimination as to subject the company to the penalty at the suit of a shipper. So long as all the individuals at any given station are treated alike there can be no discrimination within the meaning of the act. The dissenting opinion maintains, however, that there is nothing in the act limiting the discrimination to individuals. See *Chicago and A. R. Co.* v. *People*, 67 Ill. 11.

EVIDENCE.

Evidence—Coroner's Verdict—Life Insurance—Suicide.—Germania Life Ins. Co. v. *Ross-Lewin et al.*, 51 Pac. Rep. (Col.) 488. In an action to recover upon an insurance policy, *held*, that the duly-certified verdict of the coroner's jury as to the alleged suicide of deceased was not admissible. The statutes prescribing the coroner's duties are construed as making him a conservator of the peace and the purpose of his inquisitions to furnish the foundation for a criminal trial where the death is shown to be felonious. As no judicial powers are conferred on the coroner by statute, the inquest proceedings are extra-judicial and not admissible as evidence to prove suicide. The English rule admitting such evidence is based on purely historical grounds and should not prevail over the injury to public policy which would result from the attempt to corruptly influence the inquests if such testimony were admitted. The Illinois cases, under statutes similar to those of Colorado, declare such evidence admissible. See, also, *Walther* v. *Ins. Co.*, 65 Col. 417, 4 Pac. 413; *Ins. Co.* v. *Newton*, 22 Wall. 32. Campbell, J., concurring specially, asserts the admissibility of such testimony, citing especially the common law and Illinois rule.

Bills and Notes—Liability of Parties—Oral Testimony.—Shuey v. *Adair*, 51 Pac. Rep. (Wash.) 388. An agreement between the maker, payee and indorser of a negotiable note, that the payee shall look to the indorser and not to the maker for payment, cannot be proved by oral evidence in order to relieve the maker of his responsibility. The cases on this point are in apparent and bewildering conflict, and many of them seem at first sight to sustain the admissibility of such testimony. But the cases where such evidence is rightly admitted fall within one of three principles, viz.: (1) Where the check or order drawn by the agent discloses the principal, see *Brockway* v. *Allen*, 17 Wend. 40; *Whitney* v. *Wyman*, 101 U. S. 392; *Hill* v. *Ely*, 9 Am. Dec. 376; *Cragin* v. *Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, and cases there reviewed; (2) where there is enough on the face of the written instrument to render it doubtful whether it was the intention to bind the agent or the principal, see *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Michels* v. *Olmstead*, 14 Fed. 219; *Metcalf* v. *Williams*, 104 U. S. 93; *Kean* v. *Davis*, 21 N. J. Law 683; Mechem, Ag. § 449; and, (3) where the instrument was to be delivered upon the taking effect of some future stipulated condition, and it has been delivered before such condition is performed, see *Small* v. *Smith*, 1 Denio. 583; *Bank* v. *Lucknow*, (Minn.), 35 N. W. 434; *Westeman* v. *Krumweide*, (Minn.), 15 N. W. 255. As a matter of course the defense of fraud or mistake is always available, see *Hill* v. *Ely*, *supra*,

and *Small* v. *Smith*, *supra*. As casting some light upon the decisions of the Supreme Court of the United States on the point, and its construction of the Pennsylvania cases, which are concededly the cases which support the admissibility of this sort of testimony, see *Bust* v. *Bank*, 101 U. S. 93.

Action for Services—Incompetency as a Defense—Rebuttal Evidence.—State (Continental Match Co., prosecutor) v. *Smith*, 38 Atl. Rep. (N. J.) 969. Plaintiff, an artisan, brought a suit for breach of a contract of employment, the defense being incompetency, justifying his discharge. The lower court admitted evidence showing plaintiff's unsatisfactory work in another factory. To the claim that such admission was erroneous on the ground that the acts done in another place were *res inter alios actæ*, the court *held* such evidence to be admissible. See *Brierly* v. *Mills*, 128 Mass. 291.

Carriers—Injury to Passengers—Evidence—Statements of Plaintiff.—West Chicago St. Ry. Co. v. *Kennelly*, 48 N. E. (Ill.) 996. The testimony of a witness in an action for personal injury that the plaintiff "complained" of her injury the morning after the accident is not inadmissible as being a declaration in interest, but is admissible as a mere exclamation. But a statement by the same witness that plaintiff "complained of her side, and under the spine, in the back and this ankle," the morning after the accident, is not competent, because the statements of the plaintiff may have been made with a view to future litigation, and therefore declarations in interest. Statements of pain and suffering, past and present, are inadmissible in an action for personal injuries unless made to a physician or medical expert for the purpose of treatment or other legitimate purposes, or are made at the time of the injury so as to form part of the *res gestæ* (*Railroad Co.* v. *Sutton*, 42 Ill. 40; *Quaife* v. *Railway Co.*, 28 Wis. 524).

TAXATION.

City Lots—Assessments for Street Improvements—Election of Remedies.—City of Cincinnati v. *Emerson*, 48 N. E. Rep. (Ohio) 667. An owner of a city lot, who has two grounds for contesting the validity of an assessment imposed thereon for street improvements, one of which is common to him and the abutting owners of other lots, and the other pertains to his lot only, and who elects to bring an action enjoining the collection of the assessment in his and the abutting owners' behalf, is deemed to have waived the right to bring an action on the ground which pertained to his lot alone. A judgment rendered under the first action refusing the relief sought is a bar to the second action, even though the first action, if maintained, would have defeated the assessment altogether, while the second action, if successful, would have merely reduced the assessment against the one particular lot.

Privilege Tax—Exemption—Class and Special Legislation—Motion of Legislature.—Knoxville & O. R. Co. v. *Harris, Comptroller*, 43 S. W. Rep. (Tenn.) 115. A statute—Acts 1895 (Ex. Sess.), p. 592, c. 4, § 7—providing that specified corporations should pay specified taxes on specified privileges, and among them railroad companies, not paying an *ad valorem* tax to the State, discloses an obvious intention of the assembly to treat as a tax privilege the business of the railroad and not the abstract condition of "not paying an *ad valorem* tax to the State." Such a tax is not objectionable class legislation, in that there are only two such companies, because it applies equally to all corporations in a similar condition, and makes a natural and

reasonable classification. Neither can the validity of the tax be attacked on the ground that the motive in passing the act was to deprive the railroads of their advantage of exemption from *ad valorem* taxation. Also, that a company's charter provides "that its capital stock, the dividends thereon, and the road and fixtures, depots, etc., shall be forever exempt from taxation, provided the stock or dividends, when the dividends exceed legal interest, may be subject to taxation in common with money at interest, but no tax shall be imposed so as to reduce dividends below legal interest," does not exempt such company from privilege taxation.

Taxation—Railroad Machine Shop.—Western N. Y. & Pa. R. Co. v. *Venango County*, 38 Atl. Rep. (Pa. 1088). *Held*, in an action to enjoin the collection of taxes, that a machine shop belonging to a railroad company, and used exclusively for repairs in its own business, is not subject to local taxation. Case of *East Pa. R. Co.*, 1 Wash. (Pa.) 428, distinguished. The test is whether the property under discussion is used exclusively in the distinct and direct furtherance of the object for which the charter of the company was granted.

Inheritance Tax—Validity—Estates Previously Probated.—Gelsthorpe, County Treasurer, v. *Furnell, et al.*, 51 Pac. Rep. (Mont.) 267. An inheritance tax is not void in so far as it applies to estates probated, but not distributed until after it comes into effect. Although the privileges and rights of heirs and legatees to take and receive shares of the property of a decedent are vested immediately upon the death of the testator or intestate (see Sec. 1794, Civ. Code); yet the term "vested rights" should not be set up as "a shield of protection" against all considerations designed by the legislature to promote the general welfare, or establish an advanced public policy for the State. Cooley, Const. Lim., p. 437. The right, moreover, is subject to the control of the courts for distribution and is dependent upon the laws for its protection. See *Carpenter* v. *Com.*, 17 How. 456; *Succession of Oyer*, 6 Rob. (La.) 504; *Succession of Deyraud*, 9 Rob. (La.) 357.

TRADE-MARKS.

Trade-Mark—Geographical Name—Unfair Competition.—Gage-Downs Co. v. *Featherbone Corset Co.*, 83 Fed. Rep. 813. A Chicago manufacturer, who for years has made corset waists and sold them as "Chicago Waists," until the goods under such name have become known to the trade as the goods made by him, may enjoin another in a different city and State from selling his goods as "Chicago Waists." The appropriation of the name of the place where goods are manufactured is not often protected, but where by the use of the name it has acquired a secondary signification, as a mark denoting the manufacturer rather than the place where the goods are made, and it is the manifest intent of the adverse user to derive advantage from the reputation the goods thus branded have attained in the market, it will be enjoined.

Trade Marks and Trade Names—Labels of Laborers' Union.—Hetterman et al., v. *Powers et al.*, 43 S. W. Rep. (Ky.) 180. That the members of certain voluntary trade unions of cigar makers are not strictly "in business" for themselves, but are employed for wages in producing cigars to which they have attached labels indicating such cigars to be the exclusive product of their labor, is no defense to an action brought to restrain others from using these labels. There is nothing objectionable in such labels, as denouncing other

makes of cigars than union-made ones, in that the organization which makes the cigars upon which the labels are placed is described as "opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship." The decisions on the question of the validity of such labels are not uniform. Opposed to enjoining the infringement are *Werner* v. *Brayton* (Mass. 1890) 25 N. E. 46; *Union* v. *Conhaim*, 40 Minn. 243, 41 N. W. 943; *McVey* v. *Bundel*, 144 Pa. St. 235, 22 Atl. 912; *Schneider* v. *Williams*, 44 N. J. Eq. 391, 14 Atl. 812. Sustaining the validity of the labels as "trade-marks," see *Strasser* v. *Moonelis*, 55 N. Y. Super. Ct. (affirmed, 15 N. E. 730); *Cohn* v. *People*, 149 Ill. 486, 37 N. E. 60. See also *State* v. *Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Carson* v. *Ury*, 39 Fed. 777. In a number of States—and in Kentucky since this case arose—statutes have recently been passed recognizing the right of of wage earners to organize and select appropriate symbols to designate the results of their handiwork.

MISCELLANEOUS.

Bank—Acting as Agent—Liability.—Pefforday v. *Citizens' National Bank of Latrobe*, 38 Atl. Rep. (Pa.) 1030. Plaintiff entrusted defendant national bank with several shares of railroad stock, to be forwarded by them and sold according to his direction by the bank's brokers. The stock was sold and the broker's check forwarded to the bank which instantly placed the amount to the credit of the plaintiff. Meanwhile the brokers had failed, and the bank having forwarded the check it was returned protested. Defendant thereupon charged back to the plaintiff the amount of the check, and the plaintiff, having overdrawn his account according to the latter accounting, sues the bank for the balance due him according to the first accounting, *Held*, that plaintiff could recover. A national bank in buying or selling stock exercises no function pertaining to it as a bank. In this case it was a voluntary action on the part of the bank and having assumed the liability of an agent it was subject to the rules governing that relation. In applying the amount of the check to the plaintiff's credit they acted voluntarily and were liable for any loss arising therefrom. *Paul* v. *Ginn*, 165 Pa. St. 139, 30 Atl. Rep. 721. Judge Mitchell, dissenting, based his opinion on the ground that the relation existing between the defendant and plaintiff was that of bank and depositor rather than that of principal and agent.

Divorce—Adultery—Condonation.—Gorser v. *Gorser*, 38 Atl. Rep. (Pa.) 1015. In an action for divorce by a husband it was shown that the wife had committed various improprieties which she had admitted to him, but denied actual guilt. Thereupon he had accepted her explanation but had never cohabited with her afterwards. Proof of her guilt after that time having been established, it was *held* by the court that such previous condonation would not prevent the decree from being granted.

Appeal—New Trial—Surprise.—Allen v. *Chambers et al.*, 51 Pac. Rep. (Wash.) 478. The surprise contemplated by the statute as a ground for a new trial must relate to a matter of fact, and not of law; but where it is shown that appellants neglected to introduce material evidence shown by their affidavits to be in their possession, relying on a ruling of the supreme court declaring such testimony not necessary for their view of the case, which ruling was apparently directly overthrown by a subsequent decision of the court, rendered after appellants' case had been submitted to the trial judge, a new trial will be granted. See *Starkweather* v. *Loomis*, 2 Vt. 573.

Criminal Law—Murder—Insane Delusions—Instructions.—People v. *Hubert*, 51 Pac. Rep. (Cal.) 329. An instruction was given in a murder trial enumerating and setting out the special beliefs which the defense claimed constituted the insane delusion or monomania which impelled the defendant to commit the homicide, and the jury were told that if the defendant entertained such beliefs, and they were unsound, existing only in his imagination, then they were insane delusions, as a matter of law. *Held*, error. There is no such rule of law: matters of science must always be proven, and are treated as matters of fact, and the court should not instruct in regard to them. That these matters are discussed in legal treatises or judicial opinions does not convert them into propositions of law.

Constitutional Law—Police Regulations—Restrictions on Interstate Commerce—Inspection of Sheep—Validity of Statute.—State v. *Duckworth*, 51 Pac. Rep. (Idaho) 456. Section 14 (Sess. Laws, 1895, p. 125), and Sections 4 and 6 (Sess. Laws, 1897, p. 115), amendatory thereof, known as the "Scab Laws," concerning the appointment of a sheep inspector, his fees for inspection, etc., and declaring it unlawful to bring sheep into the State unless they have first been inspected and dipped as provided by these acts, are repugnant to Section 8, Article I., of the Federal Constitution, relating to the regulation of commerce. They place an unnecessary burden and restriction upon interstate commerce and are not a valid exercise of the police power, as interpreted in *Gibbons* v. *Ogden*, 9 Wheat. 1. Said sections also discriminate against non-resident sheep owners in favor of resident owners to an extent repugnant to the Federal Constitution, Section 2, Article IV. The case is distinguished from those involving the constitutionality of what are known as "Texas Fever" statutes. Texas cattle are the natural *habitat* of the latter disease, while it is conceded that Idaho sheep are no more free from the "scab" than the sheep of other States. But see, for a "Texas Fever" decision, *R. R. Co.* v. *Husen*, 95 U. S. 465. Compare *Minnesota* v. *Barber*, 136 U. S. 313, 10 Sup. Ct. 862.

Defective Highways—Proximate Cause.—Davis v. *Inhabitants of Longmeadow*, 48 N. E. Rep. (Mass.) 774. Plaintiff's team became mired in the highway and while in the efforts and under the strain of getting it out, one of the horses burst a blood vessel and soon after died. *Held*, that if the driver reasonably thought he could get through the mud hole, and, exercising due care, made reasonable efforts to extricate the team therefrom, the bursting of the blood vessel and the horse's death were the direct and immediate consequence of the defect in the road.