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Under the method in use up to the present time, the issue of the JOURNAL which has appeared at the close of the month has been dated as of the month just ending. The disadvantages of this system have become so obvious that a change has been effected. The present number is dated February instead of January, there being no issue of that date. There will be no change at present in the number of issues to a volume or the time of appearance. The ninth and last number this year will be dated July instead of June as heretofore, and the first number next fall will be dated November instead of October.

ANTI-TRUST LAW—POWER OF CONGRESS TO RESTRICT CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE—ADDYSTON PIPE AND STEEL CO. V. U. S., 20 SUP. CT. REP. 96.

This is one of the most interesting and valuable of the recent decisions of the Supreme Court. The opinion by Justice Peckham is very lucid in its exposition of the principles upon which a contract restraining competition in bidding for contracts to furnish goods, to be manufactured by the successful bidder, is a contract in restraint of trade and not such a monopoly of manufacture merely

as is held legal in the case of *U. S.* v. *E. C. Knight Co.,* 156 U. S. 1. Of more especial merit, however, is the discussion of the proposition that the power given by the Constitution to Congress to regulate interstate commerce, was not intended as "a general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to or regulation of that commerce." This contention is based on the grounds that the power was vested in Congress so as to insure uniformity of regulation against conflicting and discriminating state legislation, and that the constitutional guaranty of the liberty of private contract is a limitation on the power of Congress to regulate commerce. In answer the court holds that the power of Congress to legislate is given as a limitation on the right of contract; that the interference with interstate commerce by contract may be as far-reaching as any by state legislation, and if unrestrained would result in the regulation of a subject which has been given over to Congress; and that if such power over contracts does not vest in Congress it must reside either in the legislatures or courts of the states, which could thereby exercise indirectly a conflicting and discriminating control over interstate commerce.

The decision of this point is not based on authority, for the question is a somewhat novel one; but it stands on sound principles. The power to regulate a subject unquestionably must include the power to regulate the right of contracts relating to that subject. The power to regulate interstate commerce is vested in Congress and the anti-trust law of 1890 is a valid exercise of that power.

PRIVILEGED COMMUNICATIONS—RIGHT OF ATTORNEY TO COMMENT UPON FAILURE TO CALL FAMILY PHYSICIAN.

The common law limited very closely the doctrine of privilege to witnesses or communications. Indeed they were not really privileges, but extensions of the rule that a party to a suit was incompetent to testify for himself. The wife could not testify, being one with the husband; the attorney, being agent and representative of the party. With the relaxation of the rule on which they were based they were modified and became pure privileges. But the law refused to physicians this benefit. They could be compelled to go upon the stand, and, once there, to disclose confidential professional communications. *Duchess of Kingston's Case,* 20 How. St. Trials 572.

New York was the first State to prohibit by statute "any doctor of physic" from disclosing "any information acquired in attending a patient in a professional capacity," but allowing the patient to waive

the privilege. Such is practically the language of the twenty states that have passed similar laws;—including Indiana. *Gartside* v. *Connecticut Mutual Life Insurance Company,* 76 Mo. 446-Note. A conflict exists as to whether the failure to call as a witness a person to whom the privilege extends may be commented upon by the opposing attorney as raising a presumption that his evidence would be against the interest of the party failing to call. The Master of the Rolls in *Wentworth* v. *Lloyd,* 10 H. L. 589, endeavored to apply the rule of *Armory* v. *Delmaire,* Strange 505, but the Lords reversed him on the ground that the exclusion of such evidence was for the general interest of the community. And in *Freeman* v. *Fogg,* 82 Me. 408, it was held proper for the court to refuse to allow comment upon the fact that the attorney who had drawn the contract upon which the plaintiff based her claim and the terms of which were in dispute, had not been called as a witness. Or upon the failure of the accused in a criminal trial to testify for himself. *Wilson* v. *United States,* 149 U. S. 60. Or failure to call his wife. *Graves* v. *United States,* 150 U. S. 118. But Mr. Justice Brown based his decision on the fact that the wife was not a competent witness and that the accused could not call her.

Here lies a partial standard by which to measure this right of comment by counsel and one which will reconcile the opinions in *City of Warsaw* v. *Fisher,* 55 N. E. 42, the case under review, where it was held that, in an action for damages resulting from personal injuries, counsel for defendant may properly comment upon plaintiff's failure to call as a witness his attending physician. He was not incompetent as a witness and *the plaintiff was basing his action upon matters about which the testimony of this physician could fairly be presumed to be the best evidence obtainable.* It was within the plaintiff's power and his only to call him as a witness. The rule is that, if a party has it peculiarly within his power to produce a witness, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 *Starkie on Evidence* 54. Presumptions are auxiliary evidence and may therefore be commented upon by counsel.

But it is argued that this is to change a privilege to a snare and practically defeat a statute by a rule of practice. Not so. The purpose of the statute is to inspire confidence between the patient and physician. Will any patient be deterred from stating his symptoms by the knowledge of this rule? To extend an absolute privilege without right of comment to cases of this kind would be to encourage baseless litigation and promote damage suits now altogether too frequent and slightly grounded.

SUITS AGAINST PUBLIC OFFICERS FOR OFFICIAL MISCONDUCT—LAW GIVING RIGHT TO BE IDEMNIFIED BY MUNICIPALITY UNCONSTITUTIONAL.

In the recent case of *In re Jenson*, 60 N. Y. Supp. 933, the Supreme Court of New York declares the Ahern Act to be unconstitutional because it provides retrospectively for alleged claims against the municipality and authorizes taxation for purposes not public in their nature. This act in substance provided for the defrayal of expenses of legal proceedings paid or incurred by certain officers and officials of the state and of the cities and counties thereof, and enabling them to obtain a reimbursement, either from the city, county or state treasury, as the case may be, for reasonable counsel fees and expenses paid or incurred in any trial or proceeding to remove from office, or any prosecution for a crime alleged to have been committed in the performance of official duties, or in connection therewith, in which trial or proceeding the prosecuted officer had been successful. The act also provided for the levying of a tax to meet such reimbursements.

It has long since been well settled that the taxing power can be exercised only to raise money for a purpose that in some sense at least can be said to be public. *Loan Asso. v. Topeka*, 20 Wal. 655. In the present case, the court in deciding that the levy of a tax to meet such reimbursements was not one for a public purpose, takes into consideration the novelty of the idea and the fact that courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal, and concludes that never yet has a purpose of this character been included among the objects for which taxes have been customarily levied.

It has never been deemed essential that claims against the state or municipality bear a legal character, but the same, if supported by a moral obligation and founded in justice, where the power exists to create them but the proper statutory proceedings are not strictly pursued or for any reason are informal or defective, may be legalized by the legislature, and enforced, either against the state itself or any of its political divisions, through the judicial tribunals. The justness of this proposition is obvious. But in the case under review, it is difficult, if not impossible, to find any obligation whatever, legal, equitable, or moral, on the part of the state or any of its municipalities, to make such reimbursement, and such payment would therefore be open to the objection of being a mere gratuity.

The courts have at all times been open to private individuals to recover any damages incurred by reason of a prosecution against them, whenever they are able to establish all of the elements essential to an action for malicious prosecution. Even in case of established innocence, the views which have thus far prevailed have been that he who is criminally prosecuted with apparently good cause must bear the burden of his own defense, as a part of the price he pays for the protective influences of our institutions of government. This sense of hardship has never been regarded as raising an equitable claim against the state for a reimbursement on the part of any acquitted defendant, generally in criminal cases, and it is impossible to perceive any distinction in favor of officers prosecuted for official misconduct which should give rise to a moral obligation in their case not existing in favor of non-official defendants.

The court, in the opinion handed down, makes reference to, but does not decide, the fact that it may be that purely prospective legislation announcing the intention of the state to pay such expenses incurred in future cases would be deemed expressive of a public purpose, and that the assurance thus given might be regarded as creating such an obligation as to relieve the subsequent payment from the objection that it was a mere gratuity.

VICE-PRINCIPAL—CONDUCTOR OF A FREIGHT TRAIN—NEW ENGLAND R. R. CO. V. CONROY, 20 SUP. CT. REP. 85.

No little confusion in the law governing the liability of a master for injuries caused by the negligence of fellow servants is cleared up by this decision, handed down in December by the United States Supreme Court. In general the rule adhered to by this court, following the current of authority in this country and England, has been that the master is not liable to the servant unless the servant whose neglect caused the injury is "one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department." *Northern P. R. Co. v. Peterson*, 162 U. S. 346. At the same time, however, the decision in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, in which it was held that an engineer could recover from the company for the negligence of the conductor of the train, on the ground that the latter is a vice-principal, though in conflict with the doctrine upheld in other cases, has never been overruled in terms.

The court now decides that it was overruled in effect by the case of *B. & O. R. Co. v. Baugh*, 149 U. S. 368, where a fireman was not allowed to recover from the company for injuries caused by the

negligence of his engineer occupying the position of "*ad interim* conductor." The perplexity caused by these inharmonious decisions is well illustrated in the earlier stages of the present case. The trial court instructed the jury that under the rule of the Supreme Court the conductor of a freight train is a vice-principal. On appeal the judges of the Circuit Court of Appeals for the First Circuit were unable to decide the point and referred it to the Supreme Court. This court has done well in now definitively overruling the Ross case and affirming that it cannot under the ordinary conditions of railroading "hold a conductor of a freight train to be a vice-principal within any safe definition of that relation."

Justice Harlan, who concurred in the decision of the Ross case, dissents on the ground that the control of a conductor over a train is sufficient to render him a vice-principal. This view, if logically applied, would make almost any boss over a particular piece of work in a department stand in that position. The conductor of a train is under instructions from train operators and other officials and is in no wise superintendent of a department. That the master is liable for the gross negligence of a servant of superior rank is held in Ohio, Kentucky, and perhaps a few other states. But the weight of authority is strongly the other way. On principle, it would seem that the reason for the qualification to the rule of non-liability of the master for negligence of fellow servants, which is made in the case of a vice-principal, extends only to such superintendents as for all purpose relating to the control of the department and servants in it, stand in the shoes of the principal. A servant, of no matter how high grade, himself under the control of other servants, does not hold that position.

The case is a valuable one for its review of the authorities on the whole subject of the liability of master to servant.

CIVIL SERVICE OF CITIES—APPOINTMENTS FROM ELIGIBLE LISTS.

Since the inauguration of the civil service legislation, the question as to eligibility to appointment to public offices has often found its way into the courts. In this connection the recent case of *People et rel. Balcom v. Mosher et al.*, 61 N. Y. Supp. 452, is of some interest, in that the court interprets the provisions of the Constitution of the State of New York, relative to this question, and declares that the statute and civil service rules, passed in pursuance thereof, providing for the appointment of the person graded highest on the proper eligible list, is in conflict with the Constitution of the state.

The Constitution, Art. 5, Sec. 9, in substance provides That the appointments in the civil service of the state shall be according to

merit and fitness, ascertained so far as practicable by competitive examination. The statute and rules above cited can readily be harmonized with this section. But the Constitution, Art. 10, Sec. 2, makes a further provision that "all city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such city * * * *or appointed by such authorities thereof, as the legislature shall designate for that purpose.*" This provision clearly contemplates some degree of discretion as to the personnel of the appointee. The statute and rules are therefore in conflict with this provision.

It will be found upon an examination that, prior to the adoption of the Amendments to the Constitution, which are now under consideration, the practical construction of the then existing civil service laws, requiring appointments to be made as the result of competitive examinations, was not to compel the appointment of the person standing highest upon the list, as a result of such examination, but permitted the selection of one out of a limited number of those standing highest upon the list. The object of these civil service rules was to reduce the opportunities for favoritism to the lowest point deemed possible, yet to leave some degree of discretion and responsibility for the appointment in the officer making it.

In endeavoring to ascertain the intention of the law-makers upon any given subject, the history of the times, and of the subject, and of the laws and customs in relation to it, if any existed, the proceedings of the law-makers, and the evils intended to be corrected, and the good to be accomplished, must be considered. It is a familiar rule of construction, that the framers of constitutions and statutes are presumed to have a knowledge of existing laws, and that the instruments that they frame and adopt, are framed and adopted in reference to such existing laws.

After a lengthy review of the authorities and also a short historical discussion of civil service legislation, the court comes to the conclusion that there can be no doubt that in adopting the Amendments of the Constitution, the framers intended to continue the hitherto uniform rule as to "at least a limited and restricted discretionary power," and not to compel the appointment of the one highest upon the eligible list, and thereby also deprive the appointing authority of the very essence of the power elsewhere granted.

The decision in thus reconciling these provisions of the Constitution, clearly elucidates the rigidness with which that fundamental rule of construction, namely, that in interpreting the Constitution, it is to be considered as a whole, complete in itself, and force and effect must be given to every provision contained in it, is applied.