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ADMIRALTY—LIABILITY OF CITY FOR NEGLIGENCE OF ITS SERVANTS IN CHARGE OF A FIRE-BOAT.—WORKMAN V. MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, 21 SUPREME COURT REPORTER 212. —The plaintiff's vessel, while lying at a dock in the port of New York, was struck and injured by a fire-boat, owned by the city and in the custody and management of its fire department, while hastening to assist in extinguishing a fire at the head of the dock. *Held*, that city was liable for damages.

Decisions holding that a city is not liable for injuries caused by negligence of members of its fire department are very numerous. *Frederick* v. *Columbus* (1898) 58 Ohio St. 538; *Saunders* v. *Ft. Madison*, (1900) Iowa 82 N. W. 428, and others. All these cases expound the theory of sovereign attribute. This does not control maritime law, and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so. The City of New York, unlike the sovereign, is subject to the jurisdiction of the Court. The Court follows the doctrine found in *Mersey Dock & Harbor Board* v. *Gibbs*, (1866) L. R. 1 H. L. 122, and *Currie* v. *McKnight*, (1897) A. C. 97; that local law must not be permitted to control maritime law to the destruction of a uniform maritime law. The relation of master and servant exists between the city and those in charge of its fire-boats. This is at variance with the law as recognized by the principal text writers. 2 *Dill. Mun. Corp.* fourth ed., Sec. 975; 13 *Am. & Eng. Ency. Law*, second ed., p. 78. Exemption of fire-boat belonging to city from seizure *in rem* is no foundation for the proposition that city could not be called upon in an action *in personam*.

ADMIRALTY—PILOTS—FOREIGN PORTS.—BEGLEY V. N. Y. & P. R. S. S. CO., HUSS V. SAME, TORYESON V. HOY, 105 Fed. 74.—Three American vessels sailing between Porto Rico and the United States under coasting licenses refused pilotage services on entering New York, on the ground that they were not from a *foreign* port. *Held*, not liable to pilotage charges.

The Court seems to approve the previous decision of *Goetze* v. *United States*, 103 Fed. 72, and considers that enough legislation has taken place so as to make Porto Rico a part of the United States for the purpose of commerce. It seems to illustrate the fact that the decision in *Goetze* v. *United States* is the most practicable solution of the "Constitution following the flag" question that can be reached.

ADULTERATION—STATUTES—CONSTITUTIONAL LAW—INTENT.—STATE V. SCHLENKER, 84 N. W. (Iowa).—Code section 4989 provides that if any person shall sell any adulterated milk he shall be fined. Code section 4990 defines adulteration as the addition of water or any other substance or thing to milk. *Held*, it is within the police power of the State to prohibit the sale of adulterated milk, though there be no fraud or deceit in the sale, and the adulteration in certain cases be harmless.

The defense claimed that the provisions in Sec. 4990 of the code were in violation of the Fourteenth Amendment. The State by showing that adulteration laws were within the police power of the State conclusively proved that they were without the scope of the Constitution. *Railroad Co.* v. *Husen*, 95 U. S. 465, and *Barbier* v. *Connoly*, 113 U. S. 27.

BANKS AND BANKING—COLLECTION OF DRAFT—PAYMENT BY CHECK—PROTEST—LIABILITY OF BANK.—KERKHAM V. BANK OF AMERICA, 58 N. E. 753 (N. Y.).—A bank receives from one of its depositors a draft for collection. The depositary sends the draft to the bank of the drawee, and receives a check in payment, which it credits to the account of the plaintiff. The check is afterward protested. *Held*, that the defendant bank has become a debtor and is liable as such to the plaintiff.

In this case it seems that there is but one legal conclusion possible, and that is that the defendant must be deemed to have intended to treat the draft as paid, and that intention was conclusively expressed when it entered the item as a credit to the plaintiff. The question of that intention was purely one of law (*Clark* v. *Bank*, 2 N. Y. 380) and within the rule as laid down in *Whiting* v. *Bank*, 77 N. Y. 363.

CARRIERS—NEGLIGENCE—RELEASE.—JEFFREYS V. SOUTHERN RY. CO., 37 S. E. Rep. (N. C.) 515.—An instrument which begins by setting forth a claim for personal injury and releases such claim, "set forth above," in consideration of $40, and concludes with the provision that this release shall apply to all other claims for injury as well, is inoperative as to another prior injury. The court here *held* the concluding provision failed for want of consideration.

The case is in line with the principle stated in the third section on Limitations, 2 *Roll. Abri.* 409, which was denied by Lord Holt in *Knight* v. *Cole*, 1 Show. 155, but was approved by Lord Ellenborough in *Paylor* v. *Homersham*, 4 M. & S. 426.

CONSTITUTIONAL LAW—INDICTMENT—GRAND JURY—EXCLUDING NEGROES.—COLLINS V. STATE, 60 S. W. 42 (Tex.).—Appellant, a negro, moved to quash an indictment against him on the ground that negroes were intentionally excluded from the grand jury which indicted him. *Held*, that the refusal to quash the indictment was in violation of the Fourteenth Amendment of the Federal Constitution.

The Court reached its decision on the ground that even though the jury commissioners were not prejudiced against negroes, the mere fact that they had not been selected because it was not the custom for negroes to serve on grand juries, even though a large number were qualified, was an intent to exclude and therefore a violation of rights granted them by the Fourteenth Amendment of the Federal Constitution. *Carter* v. *Texas*, 177 W. S. 442.

CONTRACTS IN RESTRAINT OF TRADE.—CUMMINS V. BLUESTONE ASSOCIATION, 58 N. E. Rep. 525 (N. Y.).—A contract between the producers of ninety per cent of the bluestone put upon the New York market, whereby the price is to be fixed by the Association, is void notwithstanding its object is to procure reasonable profits, and the prices charged are not excessive. Nor need the article be of prime necessity.

This illustrates the persistency with which the law visits the penalty of avoidance on contracts which deprive, even by possibility, the public of the ad-

vantages that flow rom free competition. *Vide, United States* v. *Freight Association*, 166 U. S. 290-346; *United States* v. *Addystone Pipe Co.*, 175 U. S. 1, and *People* v. *Sheldon*, 139 N. Y. 251. As a result such associations are rare, and trusts numerous. The soundness of the rule of law is now in process of an economical test.

CONTRIBUTORY NEGLIGENCE—RECKLESS AND WILLFUL MISCONDUCT.—ILLINOIS CENT. R. Co. v. BROWN, 28 Sou. Rep. (Miss.) 949.—Passenger riding on top of a car having no brakes applied, upon a down grade switch track, was injured by its colliding with a moving train upon the main track. *Held*, contributory negligence of plaintiff does not bar a recovery where defendant has been guilty of gross, willful, or reckless misconduct.

This decision is in strict conformity with the decisions in *Mettlestadt* v. *Ninth Ave. R. R. Co.*, 32 How. Pr. Super. Ct. 482, and *Clairborne* v. *K. & T. Ry. Co.*, 57 S. W. Rep. 336. For cases with opposite ruling, see *Chicago, etc. R. R. Co.* v. *Rielly*, 40 Ill. App. 416, and *Florida Southern R. R. Co.* v. *Hurst*, 30 Fla. 39.

ERROR TO STATE COURT—RIGHT TO RAISE CONSTITUTIONAL QUESTION.—TYLER V. JUDGES OF THE COURT OF REGISTRATION, 21 Supreme Ct. 206.—The Torrens Act of Massachusetts provided a land court of final jurisdiction. One Gould disputed the boundary of Tyler's land and brought the question before the land court for settlement. Tyler petitioned Massachusetts Supreme Court for writ of prohibition restraining land court from proceeding, and alleged unconstitutionality of Torrens Act. *Held*, Tyler had not sufficient interest in the litigation to draw in question the constitutionality of the act. Fuller, C. J., Harlan, Brewer and Shiras, JJ., dissenting.

The Massachusetts Court did not question Tyler's competency to be heard and determined the Federal question presented. This raises an interesting point whether the Supreme Court can decline to exercise its jurisdiction when all requisite elements are present, because of any supposed error on part of State court in entertaining the suit. The proper rule would seem to be that of *Wheeling and B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, and *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, that the decision of the highest court of a State as to the finality of proceedings before it, is to be accepted in exercising appellate jurisdiction. Against the opinion that the Massachusetts court erred in entertaining the suit, see *Weston* v. *Charleston*, 2 Pet. 449, where, on a similar state of facts, Chief Justice Marshall held a writ of error to be properly issued and reviewed the Federal question presented.

ERROR TO STATE COURT—IMPAIRING OBLIGATION OF CONTRACT—EXEMPTING FROM TAXATION.—STEARNS V. MINNESOTA EX REL. MARR, 21 Supreme Ct. 73.—Lands lying in Minnesota were granted to that State by Congress for public purposes. In 1865 the State Legislature granted said lands to companies to aid in construction of railroads, agreeing upon payment of three per cent on gross earnings of said companies, to exempt all their property from other taxation. In 1895 said lands were taxed and the three per cent tax also continued. *Held*, that the legislation of 1895 impaired the obligation of a contract.

This case differs from other cases that railroad aid legislation has produced in holding that a Legislature when acting for the State as trustee of public lands, has the freedom of judgment of a trustee; is not limited by the constitutional provisions regarding taxation, and may make an irrevocable contract

exempting such lands. Four justices dissent from this view and say that the Legislature must perform the trust "in accordance with the powers and under the restrictions imposed by the Constitution of the State."

EVIDENCE—RAILROADS—MASTER AND SERVANT—NEGLIGENCE.— HASIK V. ALABAMA & VICKSBURG RY. CO., 28 Sou. Rep. 941 (Miss.).—In an action by an injured person against a railroad company for injuries sustained, the defendant company offered evidence of the general careful habits of the engineer, prior to the accident. *Held*, admissible.

This decision is at variance with the weight of American authority and goes further than any previous decision in admitting evidence of this kind. The distinction is to be carefully drawn as to the purpose for which such evidence is offered. In case of injury to a co-employee it is admissible for the purpose of showing that the defendant exercised the required degree of care in the selection of its employees, or for the purpose of showing that the defendant was culpably negligent. In this case, however, no such state of facts was involved. *Robinson* v. *R. R. Co.*, 7 Gray 92; *City of Delphi* v. *Lowery*, 74 Ind. 525. *Contra, Elevator Co.* v. *Neal*, 65 Ind. 438; *Gahagan* v. *R. R. Co.*, 1 Allen 187; *Peterson* v. *Adamson*, 67 Iowa 739, 16 E. D. Smith's Rep. 271; *Dunham* v. *Rackliffe*, 71 Me. 345.

INSPECTION OF PARTY'S PERSON—POWER OF COURT.—STACK V. N. Y., N. H. & H. R. R. Co., 58 N. E. 686 (Mass.).—*Held*, the power of a Court to order a party in a personal injury case to submit to inspection of his person in order to enable examiner to qualify as a witness, did not exist.

This decision follows the doctrine established in *Railroad Co.* v. *Botsford*, 141 U. S. 250, which is also followed in New York and Maryland; *McQuigan* v. *Railroad Co.*, 129 N. Y. 50; *Penn. Co.* v. *Newmeyer*, 129 Md. 401. The contrary rule is established in many States. See "*The Power to Compel Physical Examination in Case of Injury to Person*," 1 Yale Law Journal 57, where cases to the contrary are collected.

INSURANCE—ARBITRATION—CONDITION PRECEDENT—RIGHT TO SUE.—WESTENHAVER, ET AL. V. GERMAN-AMERICAN INS. CO., 84 N. W. Rep. 717.—Plaintiffs held policy which made arbitration a condition precedent to right of action for loss. Arbitrators failed to agree upon an umpire and plaintiffs sued. *Held*, in the absence of bad faith on part of insurer plaintiffs must propose other arbitrators with view to agreement, and that they could not arbitrarily set aside the arbitration clause and sue.

It is a mooted question as to how far either must go in his efforts to secure appraisal where both are free from fraud. It has been said that no cause of action lies until some award is made by arbitration. *Canal Co.* v. *Penn. Coal Co.*, 50 N. Y. 267; *Herrick* v. *Belknap*, 27 Vt. 673. The true rule is that under such a contract the party wishing to sue must show that he has done all that he could have done to carry out the contract.

INTERNAL REVENUE ACT—UNSTAMPED INSTRUMENTS—EVIDENCE IN STATE COURTS.—SMALL ET AL. V. SLOCUMB ET AL., 37 S. E. 481 (Ga.).—*Held*, that the Internal Revenue Act of 1898, declaring unstamped instruments inadmissible in evidence, is limited to Federal Courts only, and not to preclude admission of such instruments in an action in a State Court.

The Courts recognize the power of Congress to levy and collect taxes by requiring revenue stamps to be placed upon certain written instruments, and

the power to punish the failure or refusal to comply with that requirement, but the majority of the cases decided under the earlier acts, and all those decided under the act of 1898, in which the question has been expressly determined, hold, that the provision excluding unstamped instruments from evidence is inapplicable to the State Courts. *Carpenter* v. *Snelling*, 97 Mass. 452; *Griffin* v. *Rauney*, 35 Conn. 239; *Rockwell* v. *Hunt*, 40 Conn. 328; *Lynch* v. *Morse*, 97 Mass. 458; *Weltner* v. *Riggs*, 3 W. Va. 445; *Knox* v. *Rossi*, 57 Pac. 179. *Contra*, *Turnpike Co.* v. *McNamara*, 72 Pa. St. 278.

JUROR—CRIMINAL LAW—COMPETENCY.—STATE V. MAXFIELD, 28 So. Rep. 997 (La.).—Juror stated that he had talked with two witnesses whom he knew to be truthful men and that it would take strong evidence to alter the opinion he had formed, but stated further that he had no fixed opinion and his mind was in such condition that if accepted he would render verdict according to law and evidence. *Held*, competent juror.

This seems to be held in Louisiana decisions (45 La. 979; 35 La. 357), but almost without exception the contrary is held in the remaining States.

LOBBYING CONTRACTS—PRESUMPTION AS TO LEGALITY.—DUNHAM V. HASTINGS PAVEMENT CO., 67 N. Y. Sup. 632.—Plaintiff had contracted with the paving company to use all reasonable, honest and lawful efforts to secure for them the right to bid on paving contracts in New York city. *Held*, question of the legality of the contract was a question for the jury.

*Mills* v. *Mills*, 40 N. Y. 543, held that such a contract was void on its face as against public policy, but *Cheseborough* v. *Conner*, 140 N. Y. 382, held that such a contract was entitled to the presumption of legality, and that it was a question for the jury.

MUNICIPAL CORPORATIONS—BILL-BOARDS—AUTHORITY OF COUNCIL—CONSTITUTIONAL LAW—STATUTES—RESTRAINT OF TRADE.—CITY OF ROCHESTER V. WEST, 58 N. E. 673 (N. Y.).—City of Rochester was authorized by statute to license and regulate bill-posters and sign advertising. Acting under such authority, an ordinance was passed prohibiting the erection of bill-boards exceeding six feet in height without permission by the council. *Held*, the statute authorizing the ordinance is within the police power of the legislature and the ordinance is not unreasonable or an undue restraint of a lawful trade or business, or of the lawful use of private property, being intended to provide for the *safety* of the community.

Similar ordinances exist in Chicago and San Francisco, and since the rendering of this decision a bill has been entered in the New York legislature which prevents the erection of fences for advertising purposes more than four feet high on a building or ten feet high on the ground. This is to apply to Manhattan, Brooklyn and the Bronx. This, however, seems to be the first case to decide that such an ordinance is within the police power of the State.

NON-NAVIGABLE STREAMS—RIGHTS OF RIPARIAN OWNERS—FISHERIES—OBSTRUCTION OF STREAM.—GRIFFITH ET UX V. HOLMAN, 63 Pac. (Wash.) 239.—The owners of land on both sides of a shallow river, used only by persons fishing for pleasure from small rowboats, stretched a wire fence across the stream. Defendant, while in a rowboat, cut the wire and took trout from river. *Held*, that river was non-navigable, that plaintiffs had a right to maintain fence and that they had exclusive right of fisheries in waters flowing over their land.

This case is in accord with decisions of a majority of the States, that such rivers only are navigable as are susceptible of being used as highways for com-

merce. *Burroughs* v. *Whitman*, 59 Mich. 279; *The Daniel Ball*, 10 Wall. 557. Though in Massachusetts, rivers used for pleasure boating are held navigable. *Attorney-General* v. *Wood*, 108 Mass. 436. Many decisions uphold the right of riparian owners to maintain dams and such other obstructions as are necessary to a reasonable use of streams, but, that they may maintain fences for mere arbitrary purposes seems never before to have been decided, though there is much *dicta* to support such a decision. *Groat et al* v. *Moak*, 94 N. Y. 128.

PUBLIC WATER—PUBLIC USE—CUTTING ICE—INJUNCTION.—SANBORN V. PEOPLE'S ICE CO., 84 N. W. 641 (Minn.).—Defendant cut ice for sale from public waters, White Bear Lake. Plaintiff, a riparian proprietor, claimed special damages from consequent lowering of level and brought action to restrain defendant. *Held*, cutting ice for commercial purposes is not a common right. Lovely and Brown, JJ., dissenting.

The Court, in granting the injunction, undertakes to distinguish taking ice for domestic use from taking for sale, and holds that had the injury complained of resulted from taking ice for domestic purposes, no cause of action would have arisen. None of the authorities make any such distinction, and the injustice which would result is apparent. *Lamprey* v. *State*, 52 Minn. 181; *Ice Co.* v. *Davenport*, 149 Mass. 322; *Concord Co.* v. *Robertson*, 66 N. H. 1. The dissenting judges well say, "if the right to take ice is a public right, as conceded, this Court has no authority to say how much or how little any person can take for the public use."

RAILROADS—ACCIDENT AT CROSSING—GATES—FLAGMAN—CONTRIBUTORY NEGLIGENCE.—WOEHRLE V. MINN. TRANSFER CO., 84 N. W. 791 (Minn.).—The plaintiff, while crossing in a wagon defendant's railway track on a public highway, was injured by defendant's engine. The plaintiff, relying in great measure on the absence of defendant's flagman, who was accustomed to be in sight when trains approached, did not stop and listen. *Held*, reversing the decision of the trial court, that the *per se* rule in cases of failure to stop, look and listen did not apply. Lewis and Collins, JJ, dissenting.

According to some authorities, if the customary flagman is absent, a traveler is guilty of contributory negligence as a matter of law, unless he looks or uses ordinary precautions. *Lake Shore & M. S. R.R. Co.* v. *Franz*, 127 Penn. 297; *Tyler* v. *R.R. Co.*, 157 Mass. 336; *Dundon* v. *R.R. Co.*, 67 Conn. 266. But the rule that a traveler must stop, look and listen is relaxed in cases where gates or a flagman, or both, are provided by the railroad, partial assurance being given by the very fact of their being there. Hence, in these cases, not the same degree of care need be taken. *Gusling* v. *Sharp*, 96 N. Y. 676; *Palmer* v. *Railway Co.*, 112 N. Y. 234; *Burns* v. *Rolling Mill Co.*, 65 Wis. 312. Under such circumstances, how much care is needed is a question for the jury.

SURFACE WATER—RIGHT OF LANDOWNER—TRESPASS.—FORBELL V. CITY OF NEW YORK, 58 N. E. Rep. 644 (N. Y.).—A city, digging wells for mercantile purposes, so as to capture the percolations from a large surrounding area of land, and thereby lowering the underground water of adjacent land, is liable for damage done to crops on such land.

The right to percolations has been recognized by innumerable decisions on the ground that their source is unknown. In *Smith* v. *City of Brooklyn*, 18 App. Div. 340, the draining of a distant pond and brook by suction pumps was actionable, the source of the percolation being evident. The Court in the present case extends the application of this principle to the draining of subsurface waters, inasmuch as defendant knew beforehand the effect of the wells on adjoining lands.

TORTS—INJURY TO ANOTHER'S BUSINESS—EFFECT OF WRONGFUL INTENT. PASSAIC PRINT WORKS v. ELY & WALKER DRY GOODS CO. ET AL, 105 Fed. 163.—Plaintiff, a manufacturer, alleged that defendants, who were jobbers having on hand a limited quantity of plaintiff's goods, had for the purpose of injuring said plaintiff's business offered them for sale at such a low price that plaintiff's business was injured. *Held*, that such allegation did not state a cause of action for the recovery of damages. Sanborn, circuit judge, dissenting.

This decision is in accord with *Allen* v. *Flood* (1898), 1 App. Cas. 1, which was an action for maliciously inducing an employer to discharge and not to employ servant. The law on this question, in this country, has not been definitely decided and differs in the several States, but to a large extent the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away. *Walker* v. *Cronin*, 107 Mass. 555.

TRADE-NAMES—ENJOINING USE—ADVERTISING.—SAMUELS ET AL v. SPITZER, 58 N. E. 693 (Mass.).—Plaintiffs in suit had established a large trade advertised as the "Manufacturers' Outlet Company." This name was registered as their trade-mark and duly copyrighted. Defendants subsequently established a similar business in a neighboring town under the name, "Taunton Outlet Company." *Held*, that the plaintiffs are entitled to restrain the use of the name "Taunton Outlet Company."

The law regarding trade-names is that if the imitation is likely to deceive persons of ordinary intelligence, using ordinary care, into purchasing one man's goods for another's, it may be restrained. *Lee* v. *Haley*, 5 Ch. App. Cas. 155; *Sanders* v. *Jacobs*, 20 Mo. Ap. 96. In this case the Court holds that the words "Outlet Company" are the ones that attract attention, while the words "Manufacturers'" and "Taunton" are general and applicable as well to one name as the other.