Yale Law Journal

Volume 11
Issue 2 *Yale Law Journal*

Article 4

1901

RECENT CASES

RECENT CASES.

APPEAL—RECORD—JUDICIAL COGNIZANCE.—WESTERN A. R. Co. & HYER, 39 S. E. 447 (Ga.).—*Held,* That a statement in a brief of evidence, as to a proceeding in a lower court, that the plaintiff "introduced in evidence the mortality and annuity tables in the 70th Georgia Reports," does not authorize an appellate court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix to that volume. Simmons, C. J., and Lewis, J., dissenting.

Under this ruling of the court the plaintiff in error loses his case because he failed to bring up in the record a copy of a set of tables whose contents the law presumes the court to know, and as to which, if it had forgotten them, it could have refreshed its memory by reference to them as published in its own reports. This was error, for by the weight of authority courts take judicial notice of the standard mortality and annuity tables without proof. See *1 Greenl. Ev. (16th Ed.) 6; 17 Am. Enc. Law (2nd Ed.)* 900. In declining to look beyond the record the court refuses to follow *Ragland v. Barringer,* 41 Ga. 114, in which it was held that the court could take judicial notice of the contents of a proclamation issued by the governor of the state, although not set forth either in the brief of evidence or the bill of exceptions.

BILLS AND NOTES—WAIVER OF PROTEST.—WERR V. KOHLES ET AL., 71 N. Y. Supp. 713.—Plaintiff failed to protest at maturity a promissory note on which defendant was endorser. A month after maturity defendant paid plaintiff's husband interest due on note, saying that it was money he owed plaintiff. *Held,* in absence of proof that defendant knew of plaintiff's laches, the payment and statement were insufficient to continue waiver of protest. Adams, P. J., and Spring, J., dissenting.

While the law is well settled that to constitute a waiver of protest after maturity, knowledge by the endorser of the holder's laches is necessary, some uncertainty exists as to whether such knowledge can be inferred from the endorser's promises and attending circumstances, or whether it must be clearly proved. *Kent* in his *Commentaries,* Vol. III, page 113, says that "weight of authority is that this knowledge may be inferred as a fact from the promise under the attending circumstances, without requiring clear and affirmative proof." Such is not the weight of authority to-day. The burden of proof is upon the plaintiff to show that defendant had knowledge of the laches and it must be made clear to appear. *Trimble v. Thorne,* 8 Am. Dec. 302 and note; *Tebbest v. Dowd,* 23 Wend, 379; *Crawford's "Negotiable Instruments Law,"* 180 and note.

CHATTEL MORTGAGES—PROPERTY IN ANOTHER STATE—ATTACHMENT—PRIORITIES—WHICH LAW GOVERNS—AULTMAN & TAYLOR MACHINERY CO. V. KENNEDY, 87 N. W. 435 (Iowa).—Appeal from district court. Affirmed. James Kennedy, a resident of North Dakota, on the 14th of March, 1898, exe-

cuted a chattel mortgage on certain personal property temporarily in Iowa, and certain other personal property in North Dakota, to the Red River National Bank, who is the intervener in this case. The mortgage was recorded in North Dakota, where the mortgagee resided. On August 4th, 1898, plaintiff attached the property located in Iowa. The evidence shows that plaintiff had actual notice of the chattel mortgage. The trial court awarded the property to the intervener. *Held,* notwithstanding that by the laws of North Dakota a mortgage is void as against creditors of the mortgagor, unless said mortgage is recorded in the place where the property is situated, the present case must be determined by the laws of the place where the property is situated, and by the laws of Iowa such mortgage is good when the creditor has actual notice of the same.

The court argues that the rule that the lox loci contractus governs when personality is concerned, is correct as far as the parties to the mortgage are concerned; but as between the parties the mortgage good in North Dakota, and the statutory invalidity as to third parties when the goods are in a state where no such rule exists, is of no effect, since the law of the latter governs. *Green v. Van Buskirk,* 7 Wal. 139. The laws of one state are recognized in another only by comity and are not compulsory.

This rule, however, would seem to be open to some doubt. *Watson v. Campbell,* 38 N. Y. 153.

CONSTITUTIONAL LAW—NEWSPAPERS—PUBLIC PRINTING—COMPENSATION —VAN HARLINGEN V. DOYLE, COUNTY AUDITOR, 66 Pac. 44 (Cal.).—The plaintiff, a publisher of a newspaper of less than one year's existence, under a contract with the county auditor, printed certain tax lists. *Held,* that plaintiff might recover compensation, in spite of a County Government Act, providing that no printing should be procured of any person whose paper had not been established in the country for one year or more, such act being in violation of the provision of the State Constitution, Art. 1, Sec. 2, that "all laws of a general nature shall have a uniform operation."

The above act plainly intended to exclude all newspapers not established in the county from any share in public or official advertising. Laws have generally been held to have a uniform operation when they apply to all of a class, but how arbitrary such classes may be made is always a question of doubt and uncertainty. *Smith v. Judge of Twelfth District,* 17 Cal. 556; *Abeel v. Clark,* 24 Pac. 383; *Pasadena v. Stinson,* 27 Pac. 604; Cooley's Const. Lim. pp. 389-397. In *State v. Mayor of Hoboken,* 38 N. J. L. 110, a contrary view seems to be taken, the mayor being compelled, under the city charter, to designate as official organs those newspapers which had been established a year or more.

CORPORATION—DISSOLUTION—EXTINGUISHMENT OF LIABILITIES—ACTION FOR LIBEL—ABATEMENT AND REVIVAL—SHAYNE V. EVENING POST PUB. CO., 61 N. E. 115 (N. Y.).—The defendant was dissolved by the expiration of the time limited in its certificate of incorporation. An action for libel against it was thereby abated and an order was sought reviving it against the former directors of the defunct corporation. *Held,* that the action may be continued and revived against the former directors as trustees of the corporation for the benefit of the stockholders. *See Comment.*

INFANTS—PUBLIC POLICY—DANGEROUS EMPLOYMENT—INJURIES—RIGHTS OF PARENT—TEXAS & P. RY. CO. v. PUTNAM, 63 S. W. Rep. 910 (Texas).—A father consented to the employment of a minor son by a railroad company, and agreed never to trouble the company if the son was injured. *Held,* that the father could recover for injuries received by the son, resulting from the negligence of the company, and not contemplated by, or naturally arising out of the employment.

The company cites *Railroad Co.* v. *Redeker,* 67 Tex. 190; *Railroad Co.* v. *Carlton,* 60 Tex. 397; and *Railroad Co.* v. *Brick,* 83 Tex. 526, etc., but these cases go no further than to hold that consent of the father will prevent a recovery for injury to a minor child where the ground of the recovery alleged consists alone in the fact that the minor had been employed in a dangerous employment. The court holds that a parent may consent to the assumption of the ordinary risks of the minor's employment, but to give effect to an agreement on the part of the parent, exempting the company from the consequences of negligence would be contrary to public policy.

LANDLORD AND TENANT—BREACH OF LEASE—ELECTION OF REMEDIES.—MCCREADY V. LINDENBORN, 71 N. Y. Supp. 355.—Where in the terms of a lease the parties stipulated, in case of refusal of the tenant to occupy the premises and pay rent, as to what should be the remedy of the landlord, the measure of damages and how and when ascertained, it was *Held,* that the landlord need not follow the stipulations of the lease as to the remedy but could bring an action for breach of contract.

A rather unusual situation in regard to election of remedies is presented in this case. For failure to perform an ordinary contract, the injured party may always elect whether he will sue upon the contract to enforce the covenants or treat the contract as broken and sue for damages. *Railway Co.* v. *Richards,* 152 Ill. 59; and the same principle applies to leases. *Driggs* v. *Dwight,* 31 Am. Dec. 283. The court here extends the principle somewhat, holding that a right of election exists even where the terms of the lease specifically provide for the remedy which shall follow the breach. The position of the dissenting judge would seem to be the correct view, that where parties make a contract they should be held to its terms and the remedy stipulated should be exclusive. *Hall* v. *Gould,* 13 N. Y. 127.

LARCENY—EVIDENCE—TRAILING BY BLOODHOUND—STATE V. MOORE, 39 S. E. 626 (N. E.).—In a trial for larceny the prosecution introduced evidence of the conduct of a bloodhound to corroborate the testimony of an accomplice. *Held,* that such evidence was inadmissible.

The exercise by animals of an instinctive power, not possessed by human beings, is a novel feature of evidence in our jurisprudence. It was rejected in this case, however, not upon the ground that the dog, being an animal of instinct and not possessed of reason, his conduct would not be a circumstance to be considered in connecting a person with an act, but upon the ground that the conduct in question did not in reality corroborate the testimony offered. The cases in which the conduct of a dog has been used as evidence are very rare. In *Hodge* v. *State,* 98 Ala. 10, it appears that tracks of a peculiar character was found near a house in which murder was committed; that a dog

trained to follow human tracks was put upon them and that they were trailed by him to the house of the defendant, who, when arrested, had on shoes that made tracks precisely like those traced by the dog. In that case the court held that the conduct of the dog was competent to go to the jury as a circumstance tending to connect the defendant with the crime. See also, *Pedigo* v. *Com.*, 44 S. W. 143.

LAW GOVERNING CONTRACT—STIPULATION FOR EXEMPTION FROM LIABILITY PER NEGLIGENCE—CARRIERS OF PASSENGERS—LOSS OF BAGGAGE—VALIDITY OF LIMITATION.—THE NEW ENGLAND, 110 Fed. (Mass.), 415.—A provision in a steamship ticket, issued by an English company to a passenger in the United States from America to an English port, that the company would not be liable for loss or injury to baggage in excess of fifty dollars, and that all questions arising under the contract should be determined according to English law. *Held,* to be ineffectual to exempt the company from liability for the negligence of its servants in respect to such baggage, and, that the limtiation to fifty dollars was unreasonable and therefore invalid.

In England such a provision relating to the liability of a common carrier is invalid, and inasmuch as the parties to the contract expressly stipulated the law by which it was to be governed the provision would have been good in so far as the question of intention enters into the case, but such provisions are held to be contrary to public policy in the United States and cannot stand. The case of *The Oranmore* (D. C.) 24 Fed. 922, affirmed in 92 Fed. 396, (but without any statement of reasons), disregarded this question of public policy and based a contrary decision wholly on the expressed intention of the contractors. The authority of this case is clearly outweighted by the views of other inferior federal courts in *The Kensington,* 94 Fed. 885; *The Energia* (D. C.) 56 Fed. 124; *Lewisohn* v. *S. S. Co.* (D. C.), 56 Fed. 602; *The Hugo* (D. C.) 57 Fed. 403; *The Tleumavis* (D. C.) 56 Fed. 472. The Supreme Court has declined to pass directly on the question, but if there is any implied opinion one way or another it favors the view of the judge in this case. In *Knott* v. *Worsted Botany Mills,* 179 O. S. 69, a stipulation that the law of England should govern was held ineffective against the provisions of the Harter Act.

A valuation agreed upon by both parties is in some cases taken as a reason for permitting the carrier to limit his liability. *Graves* v. *Ry.*, 137 Mass. 33, 34. But to be valid such limitation must be reasonable. *The Majestic,* 166 O. S. 375, expresses a doubt as whether it was reasonable in the case of a first-cabin passenger crossing the Atlantic in a first-class steamer. A $100 limit is reasonable in the case of a passenger on a Fall River steamboat. *The Priscilla* (D. C.) 106 Fed. 739.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EXEMPTION FROM LIABILITY—CONSTITUTIONALITY.—MATTSON V. CITY OF ASTORIA, 65 Pac. 1066 (Os.).—A city charter, vesting in the mayor and council the control of streets, but providing that neither the mayor nor any member of the council should be liable in damages for injuries arising from any defective street, is in violation of Art. 1, Sec. 10 of the State Constitution, which guarantees to every person a remedy by due course of law for any injury done him.

It is settled that the legislature may exempt a city from liability for injuries caused by defective streets. *O'Harra* v. *City of Portland,* 3 Or. 525. But

unless otherwise provided by statute officers, to whom is delegated the duty of keeping the streets in repair, are liable in damage to those injured by their neglect. *Bennett* v. *Whitney*, 94 N. Y. 302; *Amy* v. *Supervisors*, 11 Wall. 136; *Tearney* v. *Smith*, 86 Ill. 391; *Shear & R. Neg.* (5th ed.) Sec. 313.

Similar provisions are contained in the constitutions of many states, and are to the intent that courts must afford a remedy for every wrong that is recognized by the law of the land. *Landis v. Campbell*, 79 Mo. 433; *Flanders v. Town of Merrimack*, 48 Wis. 567; *Fitzpatrick v. Slocum*, 89 N. Y. 358.

MUNICIPAL CORPORATIONS—GRANTING OF FRANCHISE TO A WATER COMPANY—SUBSEQUENT REDUCTION OF RATES BY ORDINANCE—FREEPORT WATER COMPANY V. CITY OF FREEPORT. 21 SUP. CT. 493.—Under a statutory provision the defendant had enacted an ordinance giving to the plaintiff company the exclusive right to supply the City of Freeport with water for thirty years. The statute provided that "the rates to be charged shall be such as may be fixed by ordinance." The ordinance granting the charter fixed the rates, but subsequently the city passed another which substantially reduced them. *Held*, that such an ordinance did not violate the United States Constitution, as impairing the obligation of a contract. White, Brown, Brewer, and Peckham, J. J., dissenting.

The above decision centered around the words of the statute, "rates — — — — fixed by ordinance," i. e.; whether they were to be construed to mean fixed by ordinance, once for all to endure during the whole period of thirty years; or fixed by ordinance from time to time as might be deemed necessary. It is elementary that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. *Detroit Citizens' Street R. Co. v. Detroit R. Co.*, 171 U. S. 48. Following out this principle, the majority of the court maintained that if the power given to the municipalities of the state had been intended to have but one exercise, and, having exercised it, the municipalities were to be bound for thirty years, it would have been plainly so expressed in the statute.

MUNICIPAL CORPORATIONS—IMPROVEMENT ORDINANCE—SUNDAY PUBLICATION—DUMARS ET AL. V. CITY OF DENVER ET AL., 65 PAC. 580 (COLO.).—Where a city charter provided that no ordinance should take effect until published in some newspaper, *held* that one publication, in a Sunday newspaper, of an ordinance authorizing the construction of a sewer, being in the nature of service of process, was of no effect and rendered void all the proceedings which followed it.

At common law no judgment could be rendered or process awarded by a court on Sunday. *Swan v. Broome*, 3 Burrow 1595; *Hiller v. English*, 4 Strob. L. 486. Whether or not civil processes and summons may be issued on Sunday depends upon whether the particular state has adopted the statute 29 Car. II c. 7. In Ohio, the statute 29 Car. II c. 7 is not in force, and hence the publication in a Sunday newspaper of an ordinance with respect to a street improvement, such ordinance being a civil process, is valid. *Hastings v. City of Columbus*, 42 Ohio St. 585. The present decision follows. *Ormsby v. City of Louisville*, 79 Ky. 197. See also *Schwed v. Hartwitz*, 23 Colo. 187; *Scammon v. Chicago*, 40 Ill. 296: *McLaughlin v. Wheeler*, 50 N. W. 834.

OFFICERS—INSPECTION OF VESSELS—RIGHT TO SALARY—JOHN GLAVEY, SUPT., V. UNITED STATES; 21 SUP. CT. 891.—The plaintiff was a local inspector of vessels at New Orleans. At the time he entered upon his office his duties did not extend to vessels of a foreign nation. Subsequently, however, Congress passed an act making such vessels liable to inspection, and, to carry into effect its provisions, appointed officers, designated as special inspectors of foreign vessels, at a salary of two thousand dollars per annum. While still being retained as local inspector the plaintiff was appointed special inspector of foreign vessels in New Orleans, with the stipulation, however, that he should exercise the functions of this office without additional compensation. He served three years in his two-fold capacity, and then sued for his salary as foreign inspector. *Held*, that he could recover. Brewer, Brown, Peckham, and McKenna, J. J., dissenting.

This case involves the interesting discussion of whether an appointee under a statute can be compelled to accept a less salary than the statute prescribes. From the cases it would seem that the mere acceptance and discharge of the duties of the office is not a waiver of the statutory provisions fixing the salary therefor. *People ex rel Satterlee v. Board of Police*, 75 N. Y. 38; *United States v. Bostwick*, 94 N. S. 53. In *Miller v. United States*, 103 Fed. Rep. 413, the court said, "any bargain whereby, in advance of his appointment to an office with a fixed salary, the appointee attempts to agree with the individuals making the appointment that he will accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. The reasoning of the dissenting judges does not appear.

STABBING—INDICTMENT—HENDERSON V. STATE, 39 S. E. 446 (GA.).—An alternative charge in an indictment that the accused cut and stabbed a named person with a knife "or some other like instrument," renders the accusation bad on special demurrer. Lewis, J., dissenting.

In *State v. Gilbert*, 13 Vt. 647, it was held that an indictment describing a stolen horse as of a "bay or brown" color was not bad, the disjunctive being really synonymous with "to wit." And if that which follows the disjunctive can be properly construed to be merely descriptive of that which precedes it, or if it can be considered mere surplusage, the alternative statement will not make the indictment fatally defective. *State v. Hester*, 48 Ark. 40; *State v. Corrigan*, 24 Conn. 286. Here it cannot be said that the alternative means the same thing as "knife," nor are the words explanatory, for they distinctly refer to some other instrument. And while in fact such words add little, yet no averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it is committed. *Hornsby v. State*, 74 Ala. 56.

TRADE NAME—WRONGFUL USE—RIGHT OF DESCENDANTS TO NAMES—ABBREVIATION. WYCKOFF V. HOWE SCALE CO., OF 1886, 110 FED. 520.

Defendant was engaged as sales agent of the Remington-Scholes Company, and justified its use of the name "Remington-Scholes" under that company. Plaintiffs acquired from the original manufacturers of the Remington typewriters the sole right to use the name "Remington" as a name for typewriters. Thereafter descendants of the original manufacturers, also named "Remington," became members of a corporation making typewriters under the

name of Scholes, whereupon the name was changed to the "Remington-Scholes." Later the abbreviated form "Rem-Sho" was adopted. *Held*, that since ultimate purchasers of typewriters might be led to think that the addition of the name "Scholes" was a new style of the old machine coming from the same source, such use of the name "Remington" was an attempt to deceive the public, and unwarranted. No special right to use a family name which has become a trade-name accrues by virtue of the relation which the descendants bear to the original manufacturer of the same name, such descendants being entitled to no other than their natural rights to use their own names in the transaction of their own business. The subsequent shortening of this name to "Rem-Sho" was not such a change of the term as would guard purchasers against the belief that these were not Remington machines.

That the name "Remington-Scholes" was actually deceptive appears in the evidence of this case. In the case of *Howe v. The Howe Machine Company*, 50 Barb. 236, it was *held*, that where a certain A. B. Howe manufactured a machine for several years under the name of "Howe," his brother, Elias Howe, Jr., who was the inventor and who had given his brother license to use the patent, had no right to use his own surname in such a way as to deceive the public and deprive his brother of the notoriety and market which his machines had gained. So he was restrained, although he used the name in good faith. See also *Crofut v. Day*, 7 Bear, 184, where bad faith was evident.

TELEGRAMS—NEGLIGENCE IN TRANSMISSION—CONDITIONS—WESTERN UNION TEL. CO. V. WAXELBAUM, 39 S. E. 443 (GA.).—A telegram written upon the printed form of the Postal Tel. Co. was given to the Western Union for transmission. *Held*, in an action against the Western Union for negligence in transmission, that the sender was bound by all reasonable conditions printed on the form used.

Where the message is not written on the blanks provided by the company, and yet is received for transmission by the company's agent, the sender is in general not bound by the stipulations printed on the usual message blanks. *Pearsell v. Western Union Co.*, 124 N. Y. 256. This rule applies, although a regulation of the company forbids its employes to transmit messages unless they are written on the printed blanks. *Beasly v. Western Union Co.*, 39 Fed. Rep. 181. But in this case the court declines to hold that the telegram in question was as to the Western Union Co. one not upon condition. For although it was in form a contract with an entirely different company, yet the delivery and acceptance of the message was in effect an adoption by the parties of the blank contract made in the name of the other company, and the parties were bound by its reasonable terms.

TRUSTEE—INTEREST ON FUNDS.—MATHEWSON ET AL, V. DAVIS ET AL., 61 N. E. 68, (ILL.).—The defendant received from a third party money to be paid the plaintiff for certain lands on the perfecting of the title thereof. This money he deposited in his own name with money of his own, and for several years, the title to the land not having been perfected, drew checks against the deposit. Several times there was less money on his account than the amount of the trust fund. *Held*, that he was not liable for interest upon it. Magruder, J., dissenting.

Where a trustee deposits trust funds in his own name and mingles them with his own funds, he is liable for interest. *Bispham on Eq.* §*142*; *Perry on Trusts*, §*468*; *Utica Ins. Co. v. Lynch et al.*, *11*, *Page 520*. A distinction is sought to be drawn on the ground that at any time the defendant might have been called upon to pay over the money. He had the credit and use of the money for several years, with the profit necessarily resulting therefrom. This decision seems too great a softening of the strict rule that a trustee may not take profit from his position.