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CONSTITUTIONAL LAW—EMINENT DOMAIN—RESTRICTION OF APARTMENT-HOUSES AS AESTHETIC USE.—A state statute provided for the designation of residence districts by city councils, from which apartment-houses and other unwelcome erections were excluded. Compensation was provided for the property owners who might be out of pocket thereby. The plaintiff, after being refused a permit to build an apartment-house in a restricted district, brought *mandamus* against the inspector of buildings to compel the issuance of one. *Held,* that the writ should be refused, this being a public use and a proper subject for the exercise of eminent domain. Brown and Dibbell, JJ., *dissenting. State v. Houghton* (1920, Minn.) 176 N. W. 159.

In the original hearing the court held this to be an aesthetic use merely, and not a public use, classing it with the billboard cases. *State v. Houghton* (1919, Minn.) 174 N. W. 885. The same court had previously held that such statutes restricting the building privileges of property owners were not to be sustained under the police power. *State v. Houghton* (1916) 134 Minn. 226, 158 N. W. 1017. No previous decision has been found openly holding a use admittedly aesthetic, unaccompanied by any other advantage to the public, to be a proper subject of eminent domain. *Cf.* Larremore, *Public Aesthetics* (1906) 20 HARV. L. REV. 35. Yet the use in the instant case is mainly, if not wholly, aesthetic, and the Minnesota court, without subterfuge, declares it public. The decision is sound and welcome. It is submitted that similar statutes may ultimately be sustained, even in Minnesota, under the police power. *Cf.* Freund, *Police Power* (1904) 165. For an excellent discussion of the billboard cases, see Terry, *Constitutionality of Statutes Forbidding Advertising Signs on Property* (1914) 24 YALE LAW JOURNAL, 1; also (1917) 26 *ibid.,* 420; (1919) 28 *ibid.,* 835.

CONSTITUTIONAL LAW—STATE CONSTITUTIONAL PROVISION REQUIRING DEFENCE OF CONTRIBUTORY NEGLIGENCE TO BE LEFT TO THE JURY.—Article 23, section 6 of the Constitution of Oklahoma provides that "the defence of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times be left to the jury." *Held,* that this provision did not violate the federal Constitution. *Chicago etc. R. R. v. Cole* (1920) 40 Sup. Ct. 68.

In the words of Justice Holmes: "There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are all familiar between the functions of the jury and those of the Court." See COMMENTS, *supra,* p. 896.

CONSTITUTIONAL LAW—STATE SEDITION ACT VALID.—Prior to the federal Espionage Act Montana enacted a statute in similar terms, under which the present petitioner in *habeas corpus* was convicted. When called on by a mob to kiss the flag, he had objected that it was "nothing but a piece of cotton with a little paint on it . . . It might be covered with microbes." *Held,* that the writ would not issue, as a state may legislate in protection of the flag. *Ex parte Starr* (1920, D. Mon.) 263 Fed. 145.

This case brings out once again, and forcibly, that the question of free speech is primarily not one of law or constitutionality, but of policy and community ideals. See (1920) 29 YALE LAW JOURNAL, 337; Hart, *Power of Government over Speech and Press* (1920) 29 *ibid.,* 410.

CONTRACTS—DISCHARGE—IMPOSSIBILITY.—The plaintiff, a mining company, sued to recover damages for loss of profits resulting from a breach of the defendant's

contract to furnish them with continuous electric power. The defendant company sought to excuse themselves by showing that the interruptions in the service were due to the inability to obtain proper insulators owing to the war, and that they made diligent effort to, and did procure other insulators as soon as possible. *Held,* that the plaintiff should recover. *Coal District Power Co. v. Katy Coal Co.* (1920, Ark.) 217 S. W. 449.

The defence set up in the instant case is that usually known as impossibility of performance, but more accurately described as greatly increased difficulty. See Corbin, *Discharge of Contracts* (1913) 22 YALE LAW JOURNAL, 513, 519; (1918) 27 *ibid.*, 953. Anything short of absolute physical or legal impossibility is usually held an insufficient excuse, and the court reached that result here by construing it as a contract to furnish electricity at all events. For a discussion of impossibility with respect to war contracts, see COMMENT (1919) 28 *ibid.*, 399.

CONTRACTS—SURETY BOND TO SECURE PERFORMANCE—LABORERS AS THIRD-PARTY BENEFICIARIES.—The defendant company executed a bond to the state to secure performance of a contract for building a highway. The bond was conditioned on such performance by the contractor, and also, in a separate clause, on payment by the contractor of every laborer employed. A laborer who had not been paid by the contractor brought suit against the surety on the bond. *Held,* that no one other than the state can maintain suit on the bond. *Fosmire v. National Surety Co.* (May, 1920, N. Y. Ct. App.) not yet officially reported.

In two similar cases the Supreme Court of Ohio has lately held that laborers and material men can maintain suit on such bond as the intended beneficiaries thereof. See COMMENTS, *supra,* p. 914.

DEEDS—DELIVERY—DESCENT AND DISTRIBUTION.—The grantor owned farm land and certain lots. Several years before his death he and his wife executed deeds, conveying to each of his children a remainder in equal parts of his property, excepting one, to whom he conveyed a life estate with remainders in her brothers and sisters. Each deed recited that it was not to take effect during the life-time of the grantors. The grantor then delivered the deeds to his attorney and directed him to deliver them at his death to the respective grantees. After his death the daughter to whom he had conveyed a life estate brought a bill for the partition of this real estate, alleging that the grantor had died seized of all the real estate and that it had descended to his heirs at law. *Held,* that there was a good delivery of the deeds and the estate of which the grantor died seized was not an estate of inheritance. *Bullard v. Sudmeier* (1920, Ill.) 126 N. E. 117.

For a discussion of the validity of such delivery and of other similar recent cases, see COMMENT (1920) 29 YALE LAW JOURNAL, 549; and Ballantine, *Delivery of Deeds in Escrow* (1920) 29 YALE LAW JOURNAL, 826.

EQUITY—QUIETING TITLE—CONTRACT TO RENEW LEASE.—The plaintiff had leased mining land to the defendant for a period of thirty years, the lease containing an option to renew for a like period upon certain conditions. Suit was brought five years before the expiration of the first term to have the agreement to renew cancelled, on the ground that the conditions precedent to the defendant's privilege to renew had not been complied with. *Held,* that the agreement to renew did not constitute such a cloud on the title as equity would remove. *Elkhorn Valley Coal Land Co. v. Empire Coal & Coke Co.* (1920, App. Div.) 181 N. Y. Supp. 132.

The decision was based on the ground that the record of the lease was not constructive notice to subsequent purchasers of an incumbrance. It is difficult to see from a business stand-point how such a power, valid on its face, would not constitute sufficient danger of a cloud to give equity power to act. See,

Pomeroy, *Equity Jurisprudence* (4th ed. 1919) secs. 2147-2148. A similar option has been held sufficient to offend against the rule of perpetuities. See COMMENT (1919) 29 YALE LAW JOURNAL, 87. As to a suit to cancel an instrument void on its face, see (1914) 24 *ibid.*, 82.

INSURANCE—EXEMPTION CLAUSE—DEATH WHILE ENGAGED IN MILITARY SERVICE.—A life insurance policy exempted the insured from liability except for the reserve in case of "death while engaged in military or naval service in time of war, or in consequence of such service." The insured died of pneumonia while in service during the war. *Held,* that the plaintiff should recover. Smith, J. *dissenting. Benham v. American Central Life Ins. Co.* (1920, Ark.) 217 S. W. 462.

In a similar policy the exemption clause read "death while engaged in such [naval or military] service." *Held,* that the plaintiff should recover. McCulloch, C. J., and Jones, J. *dissenting. Nutt v. Security Ins. Co. of America* (1920, Ark.) 218 S. W. 675.

Where the exemption clause implies that exemption shall be conditional upon proof of a causal connection between the military service and the death, a cause peculiar to the service must be shown. *Kelly v. Fidelity Mutual Life Ins. Co.* (1919, Wis.) 172 N. W. 152. The defendant must prove the connection *conclusively. Malone v. State Life Ins. Co.* (1919, Mo.) 213 S. W. 877. The instant cases indicate that where the clause appears merely to cover the time of service, or even, as in the first case, almost excludes a requirement of a causal connection, it will be implied by the courts if possible. This is probably just, in view of the relatively lower death rate in the army from natural causes, but it is difficult to find any distinction from a recent case in the same court. *Miller v. Illinois Bankers' Life Assn.* (1919, Ark.) 212 S. W. 310; *cf.* also (1918) 28 YALE LAW JOURNAL, 193.

MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTIONS DISTINGUISHED FROM MINISTERIAL—LIABILITY TO ONE INJURED BY THE NEGLIGENT DRIVING OF A HOSE TRUCK.—A hose truck returning to its station was negligently driven by a fireman in the employ of the defendant, and the plaintiff was struck and injured. *Held,* that the operation of fire apparatus is ministerial and corporate and not governmental in character, and that the city must pay damages to the plaintiff. *Fowler v. City of Cleveland* (1919, Ohio) 126 N. E. 72.

The court overrules *Frederick v. City of Columbus* (1898) 58 Oh. St. 538, 51 N. E. 35. See COMMENTS, *supra,* p 911.

RESTRAINT OF TRADE—COLD STORAGE BEYOND STATUTORY LIMIT—POWERS OF EQUITY.—A Cold Storage Act provided that if an owner of certain food products should store them for as long as six months, it should be illegal for him to offer them for sale thereafter. An Anti-Trust Act made combinations of two or more persons to restrict trade, raise prices, or prevent competition punishable by civil damages and by fine and imprisonment. Equity jurisdiction had been conferred upon the lower court to enforce the latter Act. A packing company stored 150,000 pounds of pork with a warehouse company for more than six months, and at suit of the State the lower court granted an injunction against sale of the pork by the owner and appointed a receiver with direction to sell the pork in the market. *Held,* that this decree was within the court's equity powers, even though no statute authorized the particular remedy. *Columbus Packing Co. v. State* (1919, Ohio) 126 N. E. 291.

See COMMENTS, *supra,* p. 913.

SPECIFIC PERFORMANCE—DEFENDANT WILL NOT BE COMPELLED TO BREAK SECOND CONTRACT.—The plaintiff made a contract with the defendant for the purchase of real estate. When the time for performance arrived, the defendant refused to make a deed, as he was under a subsequent contract duty to convey to another, who had no notice of the contract with the plaintiff. The plaintiff requested specific performance of the contract. *Held,* that specific performance should not be decreed, with a *dictum* that equity will not and cannot compel the defendant to break this second contract even had a conveyance not been made. *Saperstein v. Mechanics' and Farmers' Savings Bank of Albany* (1920, N. Y.) 126 N. E. 708.

It would seem that this dictum is unsound, as the plaintiff and the second purchaser have equal equities and the equity of the plaintiff, being prior in time, should prevail.

STATUTE OF LIMITATIONS—REVIVAL OF OLD DEBT.—The plaintiff had conveyed to the defendant a tract of coal land. The consideration had not been paid, and after the statute of limitations had run, the defendant promised to pay a much larger sum for the same land. *Held,* that this subsequent promise, even though verbal and for a larger consideration than the original promise, revived the old debt. *Abdill v. Abdill* (1920, Ill.) 126 N. E. 543.

The plaintiffs were the grandchildren of the defendant's housekeeper, to whom the defendant was indebted for $3,900 for services rendered in the past. After the death of the housekeeper and the running of the statute of limitations, the defendant verbally promised to pay the housekeeper's daughter the $3,900, payable at the death of the defendant if she survived him, otherwise to her children, the plaintiffs. *Held,* that the plaintiffs should not recover because the subsequent promise had to be in writing because of a statute; also because the existing debt was not consideration for a promise by the debtor to pay the heirs of the creditor, since such promise could not bind the creditor's estate. *Mortenson v. Knudson* (1920, Iowa) 176 N. W. 892.

The directors of the plaintiff corporation turned over a sum of money to its president to pay its debts without specifying any particular debts. The president, who owned all the stock in the defendant corporation, paid a claim of the defendant which had been barred by the statute. This suit was brought to recover the money so paid. *Held,* that the plaintiff could not recover. *Kelly Asphalt Block Co. v. Brooklyn Alcatraz Asphalt Co.* (1920, App. Div.) 180 N. Y. Supp. 805.

For discussion of the interesting questions here involved with reference to the revival of debts barred by the statute of limitations, see COMMENT (1915) 24 YALE LAW JOURNAL, 242; see COMMENT (1919) 28 YALE LAW JOURNAL, 817; (1919) 29 YALE LAW JOURNAL, 237; (1920) 29 YALE LAW JOURNAL, 804.

SURETYSHIP—JOINT PROMISORS—DEFENCES.—The plaintiff sued on a written document by which, in consideration of the plaintiff's making advances to the Interboro Brewing Company, the defendant assumed "a joint and several liability with said company for the repayment" of advances made in pursuance of this agreement. The defendant set up several matters which would amount to a defence for a surety. To these defences the plaintiff demurred. *Held,* that the defences were good. *Fischer v. Mahland* (1920, App. Div.) 181 N. Y. Supp. 179.

It has been held that where one becomes a *joint* obligor with another his promise cannot be within the statute of frauds as a promise to answer for the debt of another. *Gibbs v. Blanchard* (1867) 15 Mich. 292. In so holding the court sacrificed substance to mere form. See Anson, *Contract* (3d Am. ed. by Corbin, 1919) 388 note. In the instant case the court declares that the promise "is not strictly a guaranty," but it very properly holds that the contract is one of suretyship and that the defendant has the usual defences of a surety.

TAXATION—MEMBERSHIP IN NEW YORK STOCK EXCHANGE AS TAXABLE PROPERTY—TAXATION AT DOMICIL OF OWNER.—The plaintiff was owner of a seat on the New York Stock Exchange, his domicil being in Ohio. He sued to enjoin the listing for taxation in Ohio of the membership in the exchange. *Held,* that such membership was personal property and was taxable at the domicil of the owner under a statute that "All real or personal property in this state . . . . and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation." *Anderson v. Durr* (1919, Ohio) 126 N. E. 57.

See COMMENTS, *supra,* p. 916.

TORTS—JOINT TORT-FEASORS—RELEASE OF ONE OR COVENANT NOT TO SUE AS A DISCHARGE OF OTHERS.—The plaintiff was injured by the concurring fault, as he claimed, of the defendant and two railway companies. In consideration of $7,500 he made a written covenant not to sue one of the railway companies, expressly reserving his right of action against the others. *Held,* that this did not operate as a discharge of the defendant. *Adams Express Co. v. Beckwith* (1919, Ohio) 126 N. E. 300.

The plaintiff was riding on a truck laden with inflammable waste and was severely burned when the waste caught fire. The plaintiff alleges that the fire was caused by the falling of the defendant's defective trolley wire upon the truck; but there was a possibility that the truck driver was concurrently negligent. In consideration of $75 the plaintiff executed a sealed release of the owner of the truck, without reservation. *Held,* that the defendant was also thereby released, even though the owner of the truck was not in fact responsible for the injury and the defendant was so responsible. *Cormier v. Worcester St. Ry. Co.* (1919, Mass.) 125 N. E. 549.

See COMMENTS, *supra,* p. 909.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE.—The plaintiff's decedent was driving a dump cart along a road in the center of which was a double-track trolley line. The decedent turned to cross the tracks when a car was approaching about three hundred feet away at more than twenty miles an hour. The motorman shouted a warning but when it was seen that the decedent would continue to cross, it was too late to bring the car to a stop. A verdict for the plaintiff was set aside as being against the evidence. *Held,* that there was no error. *Buijnak v. Connecticut Co.* (1920, Conn.) 109 Atl. 244.

See COMMENTS, *supra,* p. 896.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE—REQUIRES ONLY MEANS OF KNOWLEDGE OF PERIL.—Employees of the plaintiff stopped to change an automobile tire at the side of a road, about three feet away from the defendant's trolley tracks. It was dark and the headlights of the machine were lighted. While so engaged two of the employees were killed by the defendant's trolley car which approached at a speed of fifteen miles an hour, with a low-power light in the place of the usual high-power light. The motorman did not see the decedents until too late to stop the car. The plaintiff having been compelled to pay compensation to the dependents of the decedents sued the defendant company. *Held,* that the plaintiff should recover. *Tullock v. Connecticut Co.* (1919, Conn.) 108 Atl. 556.

See COMMENTS, *supra,* p. 896.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE—NECESSITY OF AN OPPORTUNITY TO AVOID HARM AFTER KNOWLEDGE OR MEANS OF KNOWLEDGE.—The plaintiff was seriously injured by being struck by the defendant's trolley car, while he was lying asleep at night in the grass by the side of the trolley tracks with one or both of his feet extending over one of the rails. In an action for damages, the

trial court charged the jury that although the plaintiff was guilty of continuing negligence, yet if his position was one which was or ought to have been obvious to the motorman and if the latter was found to have been negligent, the motorman's negligence was the proximate cause of the injury, without reference to the plaintiff's conduct. *Held,* that this charge was erroneous as it enabled the jury to find a verdict for the plaintiff, although the motorman could not have avoided the accident when the moment arrived at which he knew or should have known of the presence of the plaintiff. *Carlson v. Connecticut Co.* (1919, Conn.) 108 Atl. 531.

See COMMENTS, *supra,* p. 896.

WILLS—REVOCATION—INTENT OF THE TESTATOR.—The testator wrote a letter to his attorney directing him to "Please destroy a will I made in favor of Thomas Hart." The letter was signed in the presence of two witnesses and was attested by them. The attorney received the letter but failed to destroy the will. The statute provided that a will should not be revoked "otherwise than by some other will in writing or some other writing of the testator declaring such revocation . . . and executed with the same formalities with which the will was required by law to be executed or unless such will be . . . destroyed . . . by the testator himself or by another person in his presence and by his direction." *Held,* that the will was not revoked. *In re McGill's Will* (1920, App. Div.) 181 N. Y. S. 48.

The general rule is that there must be an intention to revoke accompanied by one of certain physical acts required by the statute. Mere intention to revoke presently or at a future time is not sufficient. See 3 A. L. R. 833, note; *In re Voorhis' Will* (1889, Sup. Ct.) 7 N. Y. S. 596, 54 Hun, 637. An instrument not a will but executed with the same formalities was held to have revoked a previous will. *In re Backus' Will* (1900, Sup. Ct. App. Div.) 63 N. Y. Supp. 544, 49 App. Div. 410. The rule is the same under the Wills Act (1837) sec. 20. *Toomer v. Sobinska* [1907] P. 106. In the instant case the writing was of sufficient formality had it manifested a present intention to revoke. *Tynan v. Paschal* (1863) 27 Tex. 286. At best it intended a destruction of the will by the attorney not in the presence of the testator as required to constitute a valid destruction under the wording of the statute.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—Appeal from probate of a will on the ground that it was obtained by undue influence. The facts only showed that the defendants had had ample opportunity to influence the testator. *Held,* that the will should stand. *Rice v. Rice* (1920, Ore.) 188 Pac. 181.

Mere proof of opportunity to exercise undue influence does not sustain the burden of proving the same. *Sturdevant v. Sturdevant* (1919) 92 Ore. 269, 178 Pac. 192; *Downey v. Guilfoile* (1919, Conn.) 107 Atl. 562, (1919) 29 YALE LAW JOURNAL, 133. For discussion of the probative value of "presumptions" in such cases, see COMMENT (1916) 26 YALE LAW JOURNAL, 62, 777; (1908) 18 *ibid.,* 55.

WORKMEN'S COMPENSATION ACT—INJURY ARISING "OUT OF THE EMPLOYMENT" —PLAYFUL SHOOTING OF WATCHMAN.—The plaintiff was employed by the defendant to take care of the latter's grounds, to drive off trespassers, and to protect the property generally. Mischievous boys were shooting air guns from adjoining land in the general direction of the plaintiff, endangering both the glass in the defendant's buildings and the plaintiff who was engaged in laying a brick walk. He drove the boys away and returned to his work on the walk. The boys resumed firing in the hope of being pursued again and the plaintiff was hit by a shot, for which injury he sought compensation. *Held,* that compensation should be granted, as the injury "arose out of the employment." *Munro v. Williams* (1920, Conn.) 109 Atl. 129.

See COMMENTS, *supra,* p. 901.