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A SIAMESE PENAL CODE.

The Siamese Government has appointed a High Commission to report on a draft of a penal code prepared sometime since by Judge Tokichi Masao of the Court of Appeals (Y. L. S., D.C.L. 1897). Judge Masao, who is also Legal Adviser to the Government, is one of the Commission. An English translation of the draft code has been published at Bangkok.

BREACH OF MARRIAGE PROMISE—INCURABLE TUBERCULOSIS AS A DEFENSE.

The decision of the Supreme Court of Washington, in *Grover v. Zoak*, 87 Pac. 638, seems to present a striking instance of the encroachment of the judiciary upon the powers of the legislative branch of government. In that case it was held, on grounds of public policy, that a man was not liable for breach of a marriage promise when the woman was suffering from incurable pulmonary tuberculosis although he knew, at the time of the engagement, that she had the disease.

While the cause of action for breach of promise of marriage has, under conditions of American life, fallen into much discredit, yet such a right of recovery should be abolished, in any particular instance or upon the existence of any special circumstance, by legislation and not by judicial subterfuge. Broad questions of public policy and distinct progressive steps in public policy are matters that fall more properly within the

cognizance of a legislature than of the courts. It is for the legislature to determine what laws are required to protect and secure the public health, comfort, and safety; its determination, of course, subject to review by the courts where constitutional rights are involved. *In re Jacobs*, 98 N. Y. 98. In matters which are committed to the legislature, the courts have no jurisdiction. *Bradshaw v. City of Omaha*, 1 Neb. 16. The courts cannot usurp the powers of the legislature by decisions which in effect amount to enactment of laws and the exercise of legislative powers. *State v. Blasdell*, 4 Nev. 241.

Therefore, while the present decision seems open to objections because not strictly and properly within the powers of the judiciary, yet it may be justified on account of the fact that it is aided by certain legislation of the State of Washington recognizing the infectious nature of tuberculosis and providing elaborate and systematic precautions against the spread of the disease.

The court cites many cases, and the principle of them is well established, that a party to a marriage contract may break it upon discovering the existence of a disease that would render the marriage relation improper or dangerous, but in the principal case this doctrine is extended to hold that the contract may be abandoned although the existence of a incurable disease necessarily inimical to marital welfare was known at the time when it was made.

The following language from the opinion of the Washington court, seems, in view of the facts of the case as disclosed by the record, to be reasonable and sound, although it is clear that the doctrine of the case might easily be carried to extreme length:

"Counsel for respondent cite us to cases where a man, promising to marry a woman whom he knew to have been formerly unchaste, was held to be bound by such promise. Such a case and this are not analagous. There the man by his promise overlooks the former shortcomings of the woman, and it is a matter concerning him only. She would have the ability to, and presumably would, reform and become a good wife and worthy mother. This is to the advantage of society and not inconsistent with sound public policy, and the law should interpose no hindrance thereto. But a consumptive woman is physically incapable of becoming a healthful companion or the mother of healthy issue. It is not a condition that she voluntarily created or can change at will. The evils to follow her marriage could not be confined to herself and husband, but must of necessity concern and injuriously effect others. The nature and natural consequences of a contract of marriage are such that the state is of necessity a third party to and interested in every such agreement. Its interests forbid the enforcement of such a contract between parties physically incapable of making the married state beneficial to themselves or society. We are not disposed to take into consideration any matters personal only to the ap-

pellant. If he knew of the nature of respondent's ailment when he agreed to make her his wife, notwithstanding the same, he ought not to escape responsibility by reason of any inconvenience affecting only himself. But the interests of community and state step in, and, with the dictates of humanity, demand that no human compact shall be upheld that has for one of its principal objects the bringing into the world of helpless, hopeless, plague-cursed, innocent babes. We can sanction the breaking of a promise and relieve from the terms of a deliberate agreement only when the alternative involves results more deplorable. Had these parties married it is inconceivable that any of the important ends of marriage could have been attained. It is morally certain that sickness, grief and sorrow must have been the sequence of such a union. These considerations, with the possibility and probability of issue, afflicted with this terrible malady, constrain us to hold that the marriage agreement was not binding—that it was the privilege of either party to withdraw therefrom."

INJURIES RECEIVED BY PERSONS ON PUBLIC SCHOOL PREMISES

A general discussion as to who is liable in the case of injuries received upon public school property, is suggested by the case of *Alfred Wahrman v. The Board of Education of the City of New York*, recently decided by the Court of Appeals. The Statutes of New York authorizing the control of the Department of Public Instruction have been frequently brought before the courts for interpretation in cases involving the liability of various officers for injuries received by persons attending the schools. Many such actions have been brought against the city corporation, in which cases it has been held that the rule of *respondeat superior* does not apply to make the city liable for the negligent acts of the agents and servants of the department as for example that of Public Charities and Corrections, *Maxmilian v. The Mayor*, 62 N. Y. 160; and the Board of Education, *Terry v. The Mayor*, 8 Bosw. 504. Chap. 386 Laws of 1851, 301 Laws of 1853, 101 Laws of 1854, 574 Laws of 1871, 112 Laws of 1873 have been construed as vesting in the "Board of Education" the general control and care of school buildings and property "for the purposes of public education," while the especial care and safe keeping of such buildings in the respective wards is committed to the "ward trustees," who are also authorized to make repairs. *Donovan v. Board of Education*, 85 N. Y. 117, points out that, for the negligent acts of the ward trustees or their agents, the Board of Education is not liable as their functions are distinct. *Donovan v. McAlpin*, 85 N. Y. 185, lays down a rule exempting the "ward trustee" from liability for the injuries caused by the negligence of a janitor or workman employed by him on a school building. The principle of this exemption seems to have been the general rule that public officers are not liable personally for the malfeasance or misfeasance of their employees or agents. *Story, Agency*, 321. And the only remedy the injured person has,

where the public officer is without compensation and derives no benefit from the acts of the negligent agent, is against the immediate wrong-doer. *Jones v. Bird*, 5 B. and Ald. 837. Of course the public or administrative character of a person or body affords no immunity against the consequences of its own negligence. *Story, Agency*, §320. And it was with this doctrine in mind that the Court of Appeals decided the present case holding the Board of Education liable. The plaintiff, a pupil in the public schools, had been injured by the falling of the ceiling in the school-room while he was occupying the seat assigned him. The holding points out that it was the duty of the "trustees" or other officers to repair this ceiling and that "the board" is in no way chargeable for the negligence of the "trustees" but that it is liable for its own negligence in this case for failing to close the room until the repairs should have been made.

TRADE NAMES.

The doctrine of unfair trade, which has of late years been so greatly developed, and its application or lack of application to a copyright, were lately discussed in the case of *Ogilvie v. G. & C Merriam Co.*, 148 Fed. Rep. 858. There it was decided that the G. & C. Merriam Co. at the expiration of their copyright did not have a right to the exclusive use of the name "Webster" in the title of dictionaries of the English language and that the printing of the publisher's name (George W. Ogilvie) on the back or cover and title page was enough to distinguish the dictionaries published by him from those of the original publishers (G. & C. Merriam Co.) who had been owners of the copyright during its life.

The contention was that, in as much as the G. & C. Merriam Co. had had a copyright, and, that during the running of that copyright, had established a reputation for "Webster's" dictionaries, which were published only by said company, they should be protected in the reputation thus acquired by having the sole right to the use of the word "Webster" in that connection, even after the expiration of the copyright. This claim Colt, Circuit Judge, disposed of by saying that to give the public "the right to publish the book, and not the incidental right to use the name by which it is known, is in effect to destroy the public right, and to perpetuate the monopoly." This is but in accord with the opinion of Mr. Justice Miller in *Merriam v. Holloway Pub. Co*, 43 Fed. Rep. 450, when he says, in effect, that a man has no right to continue his monopoly under the pretence that it is protected by a trade-mark, trade-name, or anything of that sort.

Indeed, the present case cannot be differentiated from the patent cases, such as the *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, and *Fairbanks v. Jacobus*, 14 Blatchford 337. The doctrine laid down, in such cases, is, that, on the expiration of a patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

In *Linoleum Mfg. Co. v. Maine*, 7 Ch. Div. 834, the same doctrine was applied but Fry, J., said (p. 837):

"If I found they were attempting to use that name (Linoleum) in connection with other parts of the trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different."

As early as 1783, there are dicta regarding the doctrine of unfair trade, though that term was then unknown. In the case of *Singleton v. Bolton*, 3 Douglas 293, decided in that year, it was said that if a defendant sold an article of his own under the plaintiff's name and mark, that would be fraud for which an action would lie. And, later in 1824, this principle was restated with the qualification that the goods so marked must be sold as those manufactured by the plaintiff, to give him a right of action. *Sykes v. Sykes*, 5 D. & R. 292.

From that time to the present day the doctrine of unfair competition, though in various disguises, has been the object of ever increasing application until, at this time, it occupies a prominent place in the law. Stated in brief, and in its most comprehensive form, it is that no man has a right to pass off his goods upon the public as and for the goods of another, and thereby work a fraud upon both the public and his rival in trade. This principle is broader than the rules applicable to strict, technical trade-marks, but it is not something separate and apart from trade-mark law. Rather it may be said, it lies at the very foundation of trade-mark law, and covers besides a large field to which some of the technical trade-mark rules do not extend.

Independently of the existence of any technical trade-marks, no manufacturer or vendor will be permitted to so dress up his goods, by the use of names, marks, letters, labels or wrappers, or by the adoption of any style, form or color of packages, or by the combination of any or all of these indicia, as to cause purchasers to be deceived into buying his goods as and for the goods of another. *McLean v. Fleming*, 96 U. S. 245; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537.

So in the case of *Genesee Salt Co v. Burnap*, 20 C. C. A. 27, it was held that a manufacturer of salt in the Genesee valley will not be enjoined from using the word Genesee in connection therewith, but he will be restrained from using it in any color, style or form of letters, or in combination with other words, so as to imitate a combination previously used by another maker of salt in the same locality.

So Mr. Justice Brown in *Coats v. Merrick Thread Co.* 149 U. S. 562, says that irrespective of any question of trade-marks, "rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals."

In the case in question the above principles were fully recognized and the court held that Ogilvie had done all that the law required to distinguish his dictionaries from those of the Merriams.

Naturally, it is a question of fact in each particular case, whether or not one manufacturer has or has not distinguished his goods from those of a rival manufacturer, where the same name is used describing both. The great trend of recent decisions is emphatically to broaden the doctrine of unfair competition and protect those injured. But, where the goods are distinguished, in one way or another, in such manner as the court thinks proper and fair, it will not interfere though the complainant is somewhat injured.