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LIABILITY OF MASTER FOR EMPLOYING SERVANT UNABLE TO COMPREHEND THE ENGLISH LANGUAGE.

The Supreme Court of Massachusetts, in the case of *Beers v. Prouty & Co.,* 85 N. E. 864, rendered a very practical decision on the doctrine of master and servant, which will be of particular importance to manufacturers and insurance companies. In that case, the plaintiff was engaged as a feeder of a machine for making pasteboard, which two men were required to operate, while his assistant, called the "catcher," was charged with the duty of turning off and on the power for starting or stopping the machine. While the plaintiff was cleaning this machine, his fingers became caught, and he called to the catcher to shut off the power. The catcher, being unable to comprehend English, turned on the power, and the fingers of the plaintiff were severed. The court held that the sending of a catcher incapacitated in that manner, when it was necessary for him to receive directions by word of mouth in that language, was sufficient evidence of the employment of an incompetent servant to render the employer liable.

This question, as to the liability of the employer for sending a man, who could not comprehend English, or the language of the man in charge of the machine, in a case of this kind, has but seldom arisen and must be conceded to have been properly de-

cided. It has been recognized for many years that the plaintiff in such a case must not only show the incompetency, but also that the defendant failed to exercise proper care and diligence to ascertain the qualifications and competency of the servant prior to his appointment. *Wabash R. R. v. McDaniel,* 107 U. S. 454 (1882); *Tarrant v. Webb,* 18 C. B., 797 (1856). The degree of care to be exercised by the employer in engaging employees must be commensurate with the nature and dangers of the work, the position for which the servant is intended, and the hazards to which the other servants are to be exposed from the employment of a careless and incompetent person, this degree, being measured by the care which a reasonably prudent man would exercise in the same business or undertaking. *Wood on Master and Servant,* Sect. 418, p. 799. This is not confined to the knowledge of any-one accomplishment, such as the working of the machinery in this case, but it must be extended so that the employer may ascertain the ignorance of the applicant on all subjects which are essential to the performance of the required duty. Thus the inability to comprehend English, where co-operation with other employees is not necessary, as in manual labor, would not render the servant incompetent, and employees speaking divers tongues could be engaged to work together, whereas in the case recently decided, where co-operation was necessary, this inability was fatal. This idea may even be applied to work of a higher character, for as the court aptly says: "Ignorance of the English language in an experimental chemist working by himself for a steel manufacturer might not render him incompetent, but it could not be contended that one unfamiliar with that language would make a suitable teacher for the public schools." *Beers v. Prouty & Co., supra.* When a servant lacking these qualifications is thus employed, and his co-worker is injured, the employer should be, and is liable, for the servant has a right to rely on the assumption that the master will perform his duty by appointing competent servants.

Among the various mental qualities which affect the competency of servants probably one of the most important is nervousness. This and lack of judgment on the part of a stationary engineer, *Olsen v. Andrews,* 168 Mass. 261, and weakness, infirmity and excitability in an elevator man, *Ledwidge v. Hathaway,* 170 Mass. 348, have been held to render them incompetent; but the mere fact that an employee because of nervousness is

more than ordinarily careful in the performance of the work to which he is assigned is no evidence of his incompetency, *Bruce v. Penn. Bridge Co.*, 197 Pa. 439 (1900). Accidents resulting from the mere temporary excitement and nervousness of the employee, such as, where an employee, in the excitement of fire, forgot to shift a belt before stopping a machine, thus causing a co-employee injury, when the machine was again started, have been held not to render the employer liable, as there was nothing to show that the employee was not mentally fit for his position. *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471. The case of *Burke v. Syracuse, Boston & New York R. R.*, 69 Hun. 21 (1893), in which a robust boy of seventeen, who had successfully operated a telegraph station and single track siding for two and one-half months, was one day seized with the thought that the switch was wrong, and rushing out to change it to prevent a catastrophe, switched the train on a side track and caused a collision, illustrates the same principle, for the court held that the employer was not liable. It would seem that incapacity under this head must be of an exceptional nature to justify the inference of negligence on the part of the master, for it is generally impossible to perceive such inefficiency by merely using reasonable care.

Developing this line of incapacity because of inferior mental qualities from nervousness and excitement to the stage of lack of education, we find a rather different situation, for in these cases we may consider the physical and nervous systems of the servant satisfactory, but attribute the incompetency to the lack of proper education for the assigned position. Probably the best illustration of this is the case of *Taylor v. Western Pacific R. R.*, 645 Cal. 323 (1873), in which a railroad company, whose road formed a junction with another road, entrusted a person employed by the other company to attend to their trains at this point. He was given the time-tables of both roads so he could be informed regarding the arrival and departure of trains. But, owing to his inability to read the time-tables, he became confused and a collision occurred which killed the fireman. In an action by his family to recover, the court held that it undoubtedly would be gross negligence for the defendant to knowingly place the attendant at this position without ascertaining whether he was able to read, but that it was a question for the jury, for the defendant may have taken all reasonable precautions and still have

been deceived by the fraudulent practices of the attendant or others.

These principles can readily be applied to the case under discussion, for just as the ability to read the time-table was a most important element in ascertaining the competency of the switchman; so was the ability to comprehend English an essential qualification for the catcher, for by lacking this knowledge, he could not obey his orders and as a result, the accident occurred. Probably the case most analogous to this one is *Lantry & Sons v. Lowrie,* decided by the Texas Court of Civil Appeals in 1900; 58 S. W. 837. It was there held that the liability for an injury occasioned by the employment of a co-laborer of a low order of intellect, and one who could not understand the English language, in a position in which the co-operation of the laborers was necessary, where the evidence was conflicting as to whether the injury was due to ignorance or carelessness, was a question which should be submitted to the jury.

Thus, both by weight of authority and good reasoning, the court seems to be justified in rendering this decision, and although it may cause employers to be more diligent in selecting men who will be competent for their positions, nevertheless, it seems to be only a logical deduction from the previous decisions on this doctrine, which must develop as labor and capital become more diversified.

LIABILITY OF CHARITABLE CORPORATION FOR TORTS OF ITS AGENTS.

Within a few months the Appellate Division of the Supreme Court of New York was called upon to decide the question as to whether a charitable corporation is liable to answer in damages for torts committed by its agents. The particular delict in the case of *Kellogg v. Church Charities Foundation of Long Island,* consisted in negligence on the part of the defendant's servant. The trial court dismissed the complaint at close of evidence, and the Appellate Division reversed this in a lengthy, elucidative and logical opinion reported in 112 N. Y. Supp. 566.

The cases of actions against public eleemosynary corporations of this sort are usually divided into two classes, first, suits arising by reason of negligence on the part of physicians doing work gratuitously for the institution, and second, those arising through negligence of its servants properly speaking. The reasoning of the line of demarcation is somewhat vague and illogical, but such

as it is, such a distinction is clearly drawn in the principal case. And in this case the Appellate Division permitted the plaintiff to recover, notwithstanding that such recovery might result in the depletion of trust funds in satisfying the judgment. That is the reason usually advanced by the courts which refuse to permit a recovery in such cases, following *McDonald v. Mass. Gen. Hospital,* 120 Mass. 432 (decided in 1876), which was the first reported case in this country on this subject. The McDonald case followed the case of *Feoffees of Heriot Hospital v. Rees* (decided in 1846), and reported in 12 Clark and Fin. 507. The court there held that one could not recover from a charitable corporation for acts of its agents under the *respondeat superior* doctrine, on the theory that to so permit would result in the depletion of trust funds and the diversion of the funds from the purposes for which their donors gave them. Whether that case is law in England to-day is doubtful. That it was not overruled by *Mersey Docks v. Gibbs,* L. R. 1 H. L. 93, is the statement made in *Fire Patrol v. Boyd,* 120 Pa. St. 649 (1888), in a decision disaffirming the contentions upheld in the principal case, but that the Pennsylvania court must have been wrong becomes apparent at once when we read from the opinion of Justice Blackburn in *Foreman v. Mayor of Canterbury,* L. R. 6 Q. B. 214 (1871), wherein he says: "*Holliday v. St. Leonard's* follows the *Heriot case,* in that it decides that a body like a local board of health who were made surveyors of the highway, were not responsible for negligence of those who were their servants; but upon looking at the reason of the decision we consider it overruled in the case of *Mersey Docks v. Gibbs, supra.* It is not overruled by name but the principle upon which that case was decided in the House of Lords does overrule it, because it was decided that a public body, like a board of health, are answerable for the acts of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course, the individuals composing the body are not responsible, it is the local board of health that are responsible, and they would have to pay the damages out of the funds in their hands as a local board of health." If this be so, it would appear that the *Heriot case* is no longer law in England, the Pennsylvania court's view to the contrary notwithstanding.

Whatever be the law in England, undoubtedly it has been held in some six or seven states in this country that a charitable cor-

poration is not liable for torts committed by its agents. It has been so decided in Massachusetts, Kentucky, Maryland, Pennsylvania, Michigan, Virginia, and Connecticut, and as far as these states, and Rhode Island where the contrary has been held, are concerned, any discussion of this question must be purely academic.

The holding of the Connecticut Supreme Court of Errors is refreshing for its frank reasoning, in *Hearns v. Waterbury Hospital,* 66 Conn. 98 (1895), where it said: "It is, perhaps, immaterial whether we say that the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule, or say that the public policy which encourages public enterprises for charitable purposes requires an exemption from the operation of the rule based on legal fiction, and which, as applied to the owners of such enterprises is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable on grounds of public policy for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it selected with due care, but in such case the servant is alone responsible for his own wrong. This result is justified by *Hall v. Smith,* 2 Bing. 156; *Holliday v. St. Leonard,* 11 C. B. N. S. 192, and *Union Pacific Railway Co. v. Artise,* 60 Fed. 365, substantially upon the grounds above stated and is reached *for one reason or other* (the italics are ours) by the greater number of courts that have dealt with the particular liability of a corporation for public or charitable purposes."

The logic of this, *i. e.,* its bold acceptance of the doctrine "for one reason or other," is better than that in the McDonald case, *supra,* where it is held that exemption exists lest there be a depletion of trust funds, and that the rule applies only so long as the corporation used due care in the selection of its servants. The query naturally suggests itself, that if, as the court suggests, the eleemosynary corporation is guilty of negligence in selecting its agents, and a liability subsequently ensues therefrom, then, are not the trust funds depleted and used for a purpose different from that for which they were raised? The court did not meet this view at all. And the next question which properly arises is, how will the court deal with suits on contract violation by public corporations,

as far as the argument concerning depletion of trust funds is concerned. We merely suggest this as deserving of thought.

It is submitted that the reasoning in *Glavin v. R. I. Gen. Hospital,* 12 R. I. 411 (decided in 1879), three years after the McDonald decision is infinitely better. There the court said: "In our opinion, the argument will not bear examination. The public is doubtlessly interested in the maintenance of a great public charity such as the hospital is, but it also has an interest in obliging every person and every corporation that undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person, and any such corporation from liability for its negligence. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is a question, not for the court, but for the legislature."

This reasoning seems better than that advanced in the McDonald case. For in that case and the line of cases that follow it, a liability is admitted to exist if the corporation failed to use reasonable care in selecting its agents. If liability exists in such case, how, we repeat with full deference to the learning of the courts that have adopted that view, will there be any the less a depletion of trust funds, if recovery is permitted for negligence, in such cases as the corporation has been careless in selecting its agents? And why, admitting for purposes of argument the logic of such reason, should depletion of trust funds be permissible in the one event and not in the other? These questions appear unanswerable.

Moreover, we are unable to see how it will follow that the permitting of suits in these cases will necessarily result in the depletion of trust funds. It is a matter of common knowledge that such charitable corporations have other sources of revenue than these trust funds, and no valid reason suggests itself why such revenues should also be preserved intact from execution on a judgment.

It is readily admitted that the buildings of such corporations as are used for public purposes, having been dedicated for such use, must be exempt from execution and attachment, but that is no reason why property not so appropriated and dedicated should not be liable, such property for example as annual state appropriations, current receipts from patients, etc.

If the doctrine of *respondeat superior* is to be upheld, and

after such long acquiesence, it cannot ever be called into question, we are unable to see how courts can consistently refuse to admit the liability of public corporations for the delicts of their servants. For if the doctrine be in force, the reasons for its enforcement in such cases is as strong as in any case of principal and agent, whatsoever. And the very same reasons are applicable. Refusing enforcement, a premium is put upon official carelessness in the case of charitable corporations, which would never be permitted to exist in any other case of similar relation.

It will be interesting to see how the Court of Appeals of New York will dispose of this troublesome question, whether it will follow the clear reasoning of the Glavin case, *supra,* or fall in with the majority holding, the logic of which is so assailable.

H. F.

STATE PROHIBITION LAWS APPLIED TO UNITED STATE MAILS.

The right of a state to punish for infractions of its criminal laws by residents of other states, when the mails are used as a medium, is upheld by the Court of Appeals of Georgia in *Rose v. State,* 62 S. E. 117.

The defendant, a corporation doing business in the state of Tennessee, mailed to residents of Bartow county, Georgia, circulars advertising their various brands of intoxicating liquors, and invited orders, enclosing a self-addressed stamped envelope. The letters were received in due course of mail by the persons to whom they were addressed in Bartow county, Georgia, and the venue of the crime alleged is there laid. It is charged that defendant violated Section 428 of the Penal Code of Georgia, which prohibits the "soliciting, personally or by agent, the sale of spirituous liquors, where the sale of such liquors is prohibited by law." By recent legislative enactment the sale of intoxicating liquors is entirely prohibited within the state of Georgia.

This is a case of first impression to the extent that such a prohibition may be extended to the use of the mails as a medium of solicitation, but it appears to be supported by analogous decisions of the Supreme Court of the United States.

That a state may prohibit, within its borders, the solicitation of orders, for intoxicating liquors, cannot be denied. And under the terms of the *Wilson Act* (U. S. Comp. Stat. 1901, p. 3177), although a state may not forbid a resident therein from ordering

for his own use, intoxicating liquors from another state, it may forbid the carrying on within its borders, the business of solicitation of orders for intoxicating liquors, although such orders may only contemplate a contract resulting from final acceptance in another state. *Delameter v. South Dakota,* 205 U. S. 93; *Vance v. Vandercook,* 170 U. S. 438, distinguished.

In the cases above cited, either the principal or the agent was personally present within the state. A new difficulty arises when the offender never comes within the territorial boundaries of the state. Unquestionably the laws of a state can have no extra-territorial force. But when one personally out of the state puts in motion a force which takes effect within the state, he is answerable where the evil is done, though his presence was elsewhere. *Bishop's New Criminal Law,* Vol. I, Sect. 110. Personal presence within a state is not necessary to commit crime. *Burton v. United States,* 202 U. S. 389. If a person standing in one jurisdiction fires a gun and kills another who is in a different jurisdiction, the court of the government where the bullet took effect, alone has jurisdiction. *United States v. Davis,* 2 Sumner, 482. In the sending of a telegram, the company is the agent of the sender. *Brookes v. Western Union Tel. Co.,* 46 S. E. 826. As in this case the solicitation moved from the defendant to the citizen of Georgia, it is clear that the mails were the agent of the sender. The defendant's connection with the act, the solicitation by letter, commenced when the letter was written and mailed, and did not end until the letter reached its destination in Bartow county, Georgia, where it was intended to accomplish its purpose.

Unquestionably, the state may punish for a crime committed through the mails as a medium, without in any sense infringing the undoubted right of the national government to control the mails. Freedom to use the mails does not extend to their use as a means of committing crime. *In re Palliser,* 136 U. S. 266, and cases there cited. In the course of this opinion Justice Gray stated that while the sender of a letter might be punished at the place where the letter was mailed, yet it was settled by an overwhelming weight of authority, that he might be tried and punished at the place where the letter was received by the person to whom it was addressed. This seems to be authority for the jurisdiction of the courts of Bartow county, over the offense.

In the recent case of *United States v. Thayer,* 209 U. S. 39, it was ruled that it is possible to solicit by letter as well as in

person. The solicitation was not accomplished until the letter was received, and had the letter been lost in the mails the crime could never have been committed. In this case the act was not completed until the letter had been received and read in the state of Georgia.

It cannot be doubted that the shipments of liquor by a person in one state to a resident of another state, constitutes interstate commerce. And as a rule the negotiations in one state of sales of goods, which are in another state, for the purpose of their introduction into the former state, also is a portion of interstate commerce. *17 Am. and Eng. Encyc of Law,* 2nd ed., 65. The case at bar comes dangerously close to that line of demarcation that separates the powers of a sovereign state to control its intrastate police regulations, and the protection which the Constitution of the United States throws around interstate commerce. But since the passage of the *Wilson Act,* all negotiations that lead up to a transaction in intoxicating liquors are not interstate commerce, though the liquor and the person selling it are in a different state from the purchaser. See *Delameter v. United States, supra.*

As by the terms of the *Wilson Act,* liquors lose their interstate character as soon as they reach the borders of a state, the decisions of the courts in insurance cases become pertinent. In *Massachusetts v. Nutting,* 175 Mass. 156, confirmed in 183 U. S. 553, it was held that while the legislature could not impair the freedom of its citizens in their election with whom they would contract, it could prevent the foreign insurer from sheltering himself under that protection to solicit contracts which otherwise the citizens might not have thought of making. The law cannot impair the freedom of the citizen of Georgia, guaranteed him by the Constitution of the United States, to order liquor from other states for his private consumption, but the state can prohibit others from sheltering themselves under this freedom for the purpose of soliciting his orders, when such solicitation is a crime. Neither does this decision take away from the citizens of Tennessee any of the rights or privileges granted the citizens of Georgia, for the right of soliciting orders is denied in both cases.

MISCONDUCT OF JURORS.

Between the natural dislike of the average citizen of serving on a jury and the vigilance of astute counsel in detecting any

short-coming on the part of the juror, it is not surprising that occasionally we find reports of alleged misconduct. The most recent illustration is in *Continental Casualty Co. v. Semple,* 112 S. W. (Ky.) 1122. During the trial of the action, one of the jurors closed his eyes and in an effort to have the judgment reversed, affidavits were made by the counsel for the appellant that the juror was actually asleep. The counsel for the appellee and the juryman, both made affidavits that the latter was not asleep but merely listening with his eyes closed. The court refused to reverse the judgment.

There seems to be no similar case reported, but the cases of alleged misbehavior by jurors are numerous. Misconduct in the jury box is rare, and is usually occasioned by the efforts of members of the jury to direct counsel in their conduct of the case. Thus, in *Chicago City Railway Co. v. Brecher,* 112 Ill. App. 106, during the trial of the case one of the jurors interrupted to inform the court that he would not believe certain evidence already admitted, and that it was useless for the court to receive the same. Such remarks were clearly reprehensible, as a juror should not form a final conclusion until all the evidence has been received. There are but few early cases relating to the misconduct of jurors, probably because juries were formerly subject to a more rigid guardianship than at the present time. Two hundred years ago, Justice Treby in the trial of one Peter Cook, at the Old Bailey, said to the impanelled jury: "If any man in this panel have any particular displeasure to the prisoner or be indifferent, or have declared himself so, I do admonish and desire him to discover so much in general, for it is not fit nor for the honor of the King's Justice that such a man should serve on the jury." In a case which arose in Connecticut in 1789, a juror was charged with having conversation with strangers before the verdict was rendered. In its opinion, the court declared that such conduct was a violation of his oath, and if such a practice were permitted, the purity of trials by jury would be perverted and corrupted. *Dana v. Roberts,* 1 Root (Conn.) 134. See also *Bow v. Parsons,* 1 Root (Conn.) 429 (1792).

The devices to which jurymen will resort in order to be released from their duties, oftentimes border upon the ridiculous. In *White v. Martin,* 3 Ill. 69, the court at the conclusion of its charge, directed the jury to return a sealed verdict and then disperse. After the jury had been out several hours, they had the result of

their deliberations set forth in a writing, and this was placed in a sealed envelope. When the envelope was opened the following day the writing was found to contain the words: "Can't agree." Needless to say the action of the jury was severely condemned by the court, and characterized as a gross violation of the duties of their office. Although the foregoing incident occurred in 1839, the spirit which moved the jury to adopt such a plan still seems to survive, for a similar affair happened in New York City last December. At the time of writing, it appears probable that the erring jurors will be committed to jail for a short period to expiate their offence. The courts have always been very strict in forbidding communication with a jury while their verdict is pending. There is an Illinois case holding that the nature of the conversation had with the jury is immaterial. *Martin v. Morlock,* 32 Ill. 485. But in this case the jury had attempted to trick the court immediately after a conversation with one of the parties, so that fact probably influenced the decision. But at the present day, the mere fact that communication has been had with a juror, is not of itself sufficient ground for setting aside the verdict. The subject of the conversation may be shown, and if its character is such that it would probably not influence the decision of the jury, a new trial will not be allowed. In *Fleischman v. Samuel,* 18 App. Div. (N. Y.) 97, the foreman of the jury was seen in conversation with the plaintiff. The juryman claimed he said to the plaintiff: "It is a long sit to sit here all day." The plaintiff denied having had any conversation whatsoever. The court sustained the verdict for the plaintiff, saying that the conversation was only an inadvertent indiscretion and could have no effect upon the conclusion reached.

A verdict will be set aside if a juror ask a stranger concerning public sentiment. *Churchill v. Emerick,* 56 Mich. 536. A premature disclosure of a verdict to counsel for one of the parties is not a reason for reversal. But such a proceeding will be carefully scrutinized, and if there is the least reason to infer that the defeated party has suffered damage because of such a disclosure, the verdict will be set aside. *Ingersoll v. Truebody,* 40 Cal. 603.

The question of keeping newspaper notices referring to the matter at issue from the attention of the jury, has always been a troublesome one for both court and counsel. Unless the jury is completely isolated, it is practically impossible to prevent the members reading newspaper accounts of the trial, though the latter

be even of the smallest importance. The Federal courts have adopted a rule which may seem a little severe, but as it applies to only one phase of this topic its application is seldom required. In a case being tried where the jury separated each night, certain apparently "inspired" articles appeared in the leading local papers of such a nature that they would probably influence the minds of those reading them. The court set aside the verdict saying that it would presume the jury saw and read these articles. *Meyer v. Cadwalder,* 49 Fed. Rep. 32. The wisdom of such a rule is doubtful, however, unless there is very clear proof that the publication of the articles was instigated by one of the parties. If such a rule is carried out to its logical consequences, we might have the curious spectacle of one verdict being set aside, because a party to the action procured the publication of matter likely to influence the minds of the jurors, and then on a retrial of the same case, if the newspaper publishes the identical matter again but of its own motion, the verdict will be sustained. While it is undoubtedly desirable to have jurors refrain from reading newspaper comments on the trial, yet if they do so, in the absence of express directions to the contrary, it can hardly be said that they are guilty of misconduct.

Besides being guilty of contempt in misconducting himself, a juror may be subject to a criminal prosecution for acts that may seem but of very small importance to the layman, and which, indeed, are far from being criminal *per se.* In the early part of the last century, we find a case holding a juryman guilty of a misdemeanor who asked a stranger what he thought of the evidence. *Barlow v. State,* 2 Blach (Ind.) 114. But to-day, when the act is occasioned through ignorance or want of judgment rather than any wilful intent to do wrong, it is probable that a juror would not be punished as having committed a criminal act.