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## COMMENT.

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### "VOLENTI NON FIT INJURIA."

In case of a violation of a specific statutory duty by an employer, resulting in an injury to an employee, is the latter deprived of his remedy for private injury by his knowledge and appreciation of the risk? If the master intentionally disregards the statute, does his servant being fully aware of the violation of law and appreciating the resulting condition and dangers, continue in the employment at his own risk or at the risk of his employer?

The authorities are in sharp conflict on this proposition. On one hand are arrayed the courts of Massachusetts, New York and Iowa; on the other the English courts and those of Illinois, Missouri, Ohio and Indiana, as well as the United States Circuit Court of Appeals.

(See *Am. & Eng. Enc. Law* 121 (2nd ed.). 47 L. R. A. 190, note.)

The first of these two opposing theories insists that the distinction is not to be drawn between employment under conditions con-

demned as dangerous at the common law and those prohibited by statute; that in the absence of an assumption of the risk an omission of duty implied by law is precisely as effective in fixing liability as though enjoined by statute; that the statute does not deprive individuals of the free agency and right to manage their own affairs and establish such of their respective rights and duties as they may choose; that "there is no rule of public policy which prevents an employee from deciding whether in view of increased wages, the difficulties of employment, or other sufficient reasons it may not be wise and prudent to accept employment subject to the rule of obvious risks"; and that the maxim "*Volenti non fit injuria*," in such cases will apply notwithstanding the master's violation of statutory requirements.

The second line of cases which, adopting the theory and reasoning of the English courts, maintain that there ought to be no encouragement given to the making of an agreement between two persons that one of them shall be at liberty to break the law which has been passed for the protection of the other, hold that such an agreement would be in violation of sound public policy and ought not to be listened to; that it must be assumed "that the manifest legislative purpose was to protect the servant by positive law because he had not shown himself capable of protecting himself by contract, and that it would entirely defeat this purpose to permit the servant to contract the master out of the statute"; and that the master may not be allowed to set up a defense that he has violated no legal duty because the servant by express or implied contract lifted off his shoulders that which the statute had laid upon them.

The leading decision affirming the application of the maxim in such cases is that of *O'Malley v. Gaslight Co.*, 158 Mass. 135. In New York the doctrine laid down by the Massachusetts court was adopted in *Knisley v. Pratt*, 148 N. Y. 372. It has been emphatically reaffirmed in Iowa in *Martin v. Chicago, R. I. & P. R. R. Co.*, 91 N. W. 1034 (Oct. 1902) wherein the Court say, "It would be quite as obnoxious to public policy, independent of the penalty imposed, for an employee to aid and encourage the employer in his disregard of ordinances, as for the employer to violate it. . . . In the matter of assumption of risks, it is immaterial whether they arise from violation of common law duty or an obligation imposed by statute." The Court also criticize the opinion of Judge Taft in *Narramore v. Railroad Co.*, 37 C. C. A. 499.

Taking the other view is another recent case, in Indiana, *Monteith v. Kokomo Wood Enameling Co.*, 64 N. E. 610 (Sup. Ct. Ind. 1902), which was an action for injuries from saw-mill machinery operated in an unguarded manner in violation of statute. It was there held that the maxim "*Volenti non fit injuria*" is not applicable in cases where injury arises from the breach of statutory duty, and the workman was allowed to recover.

It thus appears that the rule of the English cases and the Massachusetts doctrine are too completely contrary to be reconcilable other than by specific statutory enactments with such an end in view.

It will be interesting, however, to watch the spread of the two opposing opinions to other states.

FOREIGN CORPORATIONS—RIGHT OF ACTION AFTER FAILURE TO COMPLY WITH STATE REGISTRY LAW.

The courts of the various States have long been in conflict as to the right of a foreign corporation to sue on a contract when it has failed to comply with the requirements of the State in regard to acquiring the right of doing business in the State.

In a recent case in Pennsylvania—*Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Railway Co. et al.*, 53 Atl. 533—this subject is again brought to our notice.

In this case a New Jersey corporation had constructed a railroad for a Pennsylvania company without having registered in Pennsylvania, which was required as a condition precedent to the right of doing business in that State. It was held that the company could not sue on a *quantum meruit* to recover for labor and materials and that any contract, express or implied, made by this company, within the State, was absolutely void. The reasoning of the court is to the effect that this is a contract made in violation of the provisions of the constitution and laws of the State, and, therefore, it is against public policy to enforce it. *Parish v. Wheeler*, 22 N. Y. 494; *Whitmore v. Montgomery*, 165 Pa. 253.

In direct conflict with this doctrine is that upheld in Tennessee and Alabama—*Trust Co. v. Willhoit*, 84 Fed. 514; *Sherwood v. Alvis*, 83 Ala. 115—which follows the same reasoning as that laid down in the Supreme Court of the United States, *Fritts v. Palmer*, 132 U. S. 282, where the leading cases on the subject are cited. Here it is held that a contract of this nature is not against public policy, is not invalid as between the parties and can only be interfered with at the instance of the State. This holding is in exact accord with the doctrine in regard to the restriction on the holding of real estate by national banks. *Gold Mining Co. v. National Bank*, 96 U. S. 640.

Another line of cases, following a decision in New York—*Cresfield Mills v. Goddard*, 69 Fed. 141—hold that a State law of this kind is merely a State regulation, and that its only effect is to suspend the right to sue until the requirements are complied with. *Sullivan v. Beck*, 79 Fed. 200; *Gas Pipe Co. v. Connell*, 33 N. Y. Supp. 482.

The practical result of the holding in New York seems to vary but slightly from the result of that in Tennessee. Both States make it possible for a corporation to disobey the law and still, by a subsequent compliance, lose nothing by such action; while that in Pennsylvania goes to the other extreme and by declaring all such contracts absolutely void, bars the plaintiff from the protection of the rule that estops the defendant from claiming immunity after having received some benefit, and of that principle which fixes a

liability upon executed contracts; and it also works a great hardship on any foreign corporations that have unknowingly failed to carry out the State requirements.

However, under the latter holding, the law would almost invariably be obeyed, while under the former, no corporation would feel called upon to obey the statutes until it became necessary for them to bring some action or suit.

THE EXTENT OF THE POSTMASTER GENERAL'S RIGHT TO REGULATE  
THE USE OF THE MAILS.

How wide a discretion has the postmaster general in determining what are fraudulent enterprises? Can he supplement the regulations of Congress in determining what is second-class matter? These two questions have been decided in the recent cases of *American School of Magnetic Healing v. McAnnulty*, 23 Sup. Ct. Rep. 33, and *Payne v. United States*, 30 Wash. L. Rep. 791. In the first case the delivery of mail addressed to the plaintiff was prohibited by the postmaster general on the ground that its business of practicing and teaching by correspondence a system of healing diseases through the influence of the mind over the body was fraudulent. The Supreme Court regarded this action as in excess of authority and granted injunctive relief. While refusing to discuss whether the statute under which the Department acted, sec. 3929 U. S. Revised Statutes, is in conflict with the provisions of the Constitution against the deprivation of property without due process of law, the court, White and McKenna, J. J., dissenting, holds that the authority to exclude extends only to cases of fraud in fact, and that the question as to whether magnetic healing is a fraud, is one of opinion depending entirely upon individual belief and differing only in degree from a belief in any particular theory of medicine, electrical treatment, vaccination, or homeopathy, and is, therefore, not a proper subject for the decision of either an administrative officer or the courts. The attitude of the Missouri Supreme Court toward Christian science in the very recent case of *Wetmer v. Bishop*, 71 S. W. 167, is of interest in this connection as expressing the view that those claiming medical powers must prove them to the court on a basis of natural power and that the fact that witnesses claim to have benefited thereby is not of itself sufficient. The opinion reads, in part: "If there was anything in the plaintiff's business, which they called magnetic healing, that entitled it to the protection of the law and which was not perceptible to the un instructed, the burden was on them to show the *rationale* of it, and failing to do so the court should close its door against them."

In the second case, that of *Payne v. United States*, *supra*, the Court of Appeals of the District of Columbia holds that the postmaster general has not the right to add to the regulations of Congress as to what shall constitute second-class matter, a provision that "periodical publications having the characteristics of books"

shall not be so admitted. The decision is based on the rule laid down in *Morrell v. Jones*, 106 U. S. 466, that all an administrative officer can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. The case arose from an attempt to exclude the "Travellers' Official Guide," a publication issued quarterly in large volumes. At second-class rates it was being transmitted for only forty cents per number a year whereas it was costing the government two dollars a year. But it seems that the only remedy to cure this inequality lies in the hands of Congress.

HUSBAND'S LIABILITY FOR WIFE'S TORTS AS AFFECTED BY MARRIED  
WOMEN'S PROPERTY ACTS.

A recent California case decides that the husband is still liable jointly with his wife for torts committed by her and not connected with her separate property, notwithstanding recent legislation in that State giving the wife the right to sue and be sued, and contract in respect to her own property, as if she were a *feme sole*. *Henley v. Wilson*, 70 Pac. 21. This case raises the very interesting question as to how far the marital relation and the common law liabilities accruing from it, have been affected by these Married Women's Property Acts. The question has been decided both ways and even those cases which hold that his liability has been removed assign varying reasons.

In an English case decided in 1900, the court was asked to overrule a previous case (*Seroka v. Kattenburg*, 17 Q. B. D. 177), in which it was held that the effect of the Married Women's Act was not to change the husband's liability; but the court declined to do this, saying that since those acts did not expressly remove his liability, it still existed. *Earle v. Kingscote*, 1 Ch. 203. See also *Fowler v. Chichester*, 26 Ohio St. 9. The court in these two cases was content with saying that his liability was due to the common law rule which could not be repealed by implication. And the courts taking this view, generally refuse to go behind the common law rule in search of the reason for it.

But the courts (and they are in the minority) which hold that the husband's liability has been removed, do go behind the rule for its reasons, and say that its further application is inconsistent with the spirit of the acts in question. But even these courts disagree as to what the reasons for the rule are. Some find it to be that the husband had possession and control of the wife's property. This view is taken by *Martin v. Robson*, 65 Ill. 129, and the court proceeds to justify its finding that the common law was abrogated by this legislation, in these words: "A liability which has for its consideration rights conferred, should no longer exist when the consideration has failed [the husband's right to the control and possession of her property is taken away by these acts]. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time,

every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved."

But others of these courts trace his liability to the common law conception of the marriage itself, and especially of the status of the wife during coverture. A reference to a few of the cases will show why, upon this view, the courts hold that the husband is not liable. In the eye of the common law the personal existence of the wife was fused into that of the husband. 1 *Bl. Comm.* 442-444. Hence it is said that the husband is liable for the ante-nuptial debts of his wife, not because he, through marriage, becomes entitled to her personal property, but because that during coverture the legal existence of the wife is suspended. *Alexander v. Morgan*, 31 O. St. 548; *Com. v. Feeney*, 13 Allen 560. And so he is liable at common law for his wife's torts, not because her wrong is imputed to him; nor because the influence he is supposed to exert over her is inseparable from her wrong doing, but for the sole reason that during coverture, the wife is incapable of being sued alone. *Capel v. Powell*, 17 Q. B. (N. S.) 744; *Kowing v. Manly*, 49 N. Y. 201. From this view of the question—and only from this view—we get the following well established propositions: 1. That if a married woman be divorced, or her husband die, after she had committed a tort, action would lie against her alone and would not abate. *Douge v. Pearce*, 13 Ala. 127. 2. That if the husband should die pending an action *ex-delicto* against both, the action would survive him and be good as against her. *Cozens v. Long*, 3 N. J. Law 764. 3. But should she die pending the suit, it would not survive as against him. *Roberts v. Lisenbee*, 86 N. C. 136. 41 Am. Rep. 460.

The legitimate inference to be drawn from these propositions, the soundness of which is not questioned, is that she herself was personally liable—the husband being joined merely to reach her. That this was the case, would seem to be proved by the further fact that formerly in England she could have been imprisoned for failure to satisfy a judgment obtained against her and the husband jointly in an action *ex-delicto* (on the ground of non-payment of debt—a judgment being in the nature of such), and that too, regardless as to whether the husband was thus imprisoned or not. *Newton v. Boodle*, 4 C. B. 359. If it then be true that the husband's being joined was merely for the purpose of obtaining procedure against her, one inclines to admit the logic of the view that holds him no longer liable for her acts, now that she may possess and dispose of property, contract, proceed and be proceeded against "as if she were a *feme sole*."

#### ORNAMENTS AS FIXTURES.

The decisions in England on the subject of fixtures annexed to the freehold for the purpose of ornament are very conflicting. An early case, *Herlakenden's Case*, 2 Coke 443, expressly denied the

right to remove fixtures put up for the purpose of ornament, while *Squier v. Mayer*, 2 Freem. 249, on the other hand, gave to an executor, hangings nailed to the walls, and a furnace fixed to the freehold and purchased with the house. In *Cave v. Cave*, 2 Vern. 508, (1705), pictures put up as wainscot were held a part of the realty, Lord Keeper saying, "the house ought not to come to the heir maimed and disfigured." Just one year after this decision, *Beck v. Rebow*, 1 P. Wms. 94, was decided. This case held that a covenant to convey a house and all things affixed to the freehold did not include hangings and looking glasses fixed to the walls with nails and screws, and which were placed as wainscot, there being no wainscot beneath.

In *D'Eyencourt v. Gregory*, L. R., 3 Eq. 382 (1866), it was held that tapestries and pictures in panels, which were essentially a part of the house, attached to the walls by a tenant for life, however fastened, were fixtures and could not be removed. To the same effect was *Norton v. Dashwood*, (1896) 2 Ch. 497.

*Leigh v. Taylor*, 86 Law Times Reports, 239, brings up this question once more. A tenant for life, for the purpose of decorating the walls of a mansion-house, fixed small strips of wood by means of nails and screws to the walls and nailed canvass to them. He then fastened tapestries to the canvass by very small tacks and fixed mouldings around the strips of wood by thin nails and screws, some of which penetrated the face of the wall. The tapestries became an essential feature to the general scheme of decoration. The House of Lords, however, held that these tapestries, being fixed for the purpose of ornament in the only way in which it was possible to use and enjoy them as such, remained part of the personal estate, and did not pass to the remainder-man.

The true criterion of an immovable fixture consists in the united application of several tests: 1. Real or constructive annexation to the realty. 2. Adaptation to the use or purpose of that part of the realty with which it is connected. 3. Intention to make the article a permanent accession to the freehold. *Ewell on Fixtures*, p. 23. The tendency of modern authority seems to be to give pre-eminence to the question of intention, the other tests deriving their chief value as evidence of such intention.

The House of Lords did not hesitate to follow this tendency. It maintained that whether or not a chattel is so annexed to the freehold as to be intended as an improvement to it and to pass with it, or is annexed only for the purpose of temporary ornament, is to be derived from the facts of each particular case. No rule can be laid down which will in itself solve the question. Yet the law as to ornamental fixtures does not change. It is the same now as it was in former times. The apparent change of law is due to the change in the mode of living, the increase of luxury making things matter of ornament which were not so in earlier days.

That the tapestry was never intended to remain a part of the house is evident from the nature of the attachment, the extent and degree of which was as slight as the nature of the thing would

admit. Since the intention was to put up the tapestry for ornamentation, and for the enjoyment of the person while occupying the house, it is not under these circumstances a part of the house.

There are American cases very similar to *Leigh v. Taylor*, although they are not identical, which hold that ornamental fixtures constitute a part of the realty. In *Columbia Insurance Co. v. Kneisley*, 9 Ohio Dec. 432, bookcases and a hatrack built into a room of a house, and which if removed would also remove a part of the base-boards around the floor of the room, were held a part of the realty. Mirrors set in the wall of a dwelling house, the removal of which would leave the walls unfinished, can not be removed. *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674.