Discussion of Recent Decisions

Chicago-Kent Law Review

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol12/iss4/4
DISCUSSION OF RECENT DECISIONS

LIMITATION ON DOCTRINE OF STARE DECISIS IN DECISIONS OF DIVIDED COURTS.—The recent Georgia supreme court case of Scarborough v. Houston introduces a seemingly startling innovation into the doctrine of stare decisis. In choosing between two clearly conflicting precedents, the court followed the earlier one upon the ground that it was concurred in by the full bench of six justices, whereas to the later decision one justice dissented. However, investigation discloses that this doctrine is of legislative rather than judicial creation. The Georgia Civil Code of 1910 provides:

"Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision by permission of the court is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision." This unique statutory provision has been given effect by an unbroken line of Georgia decisions. This doctrine of legislative limitation of the freedom of the judiciary to establish precedents appears to be without parallel in other jurisdictions. The nearest approach to it is the generally accepted rule that where a court is evenly divided in opinion, the judgment of the lower court is affirmed and stands as the decision in the particular case, but does not constitute a precedent. Generally, it is the rule that a deliberate decision of the highest court of a state, although pronounced by a divided court, must be considered as stare decisis upon the questions involved. These rules, of course, are rules of the courts and not of the legislatures.

Since the doctrine of stare decisis is one of judicial growth

1 175 S. E. 491 (1934).
2 Sec. 6207, quoted in part.
rather than of legislative enactment, on general principles of
constitutionality, one cannot but wonder if the Georgia statute
is constitutional. It does not lay down a mere rule of procedure,
but rather a positive rule of decision, purporting to bind the
supreme judicial tribunal of the state. As such it seems a direct
invasion by the legislature of the judicial department of gov-
ernment. Although, so far as the writer can discover, the con-
stitutionality of the statute has not as yet been raised, one
rather ingenious explanation is suggested by the Georgia Court
of Appeals in declaring that a decision by the full bench, not
overruled "speaks with the full force and effect of a statute,
and supersedes subsequent rulings in conflict with it." If, how-
ever, the provision is to be justified as simply adopting in ad-
advance decisions of the Supreme Court and giving to them the
effects of statutes, one cannot but wonder if this might not con-
stitute an unlawful delegation of legislative power. The present
statute must be clearly distinguished from those adopting com-
mon law precedents or statutory interpretations of other juris-
dictions. In such statutes the adoption is of past decisions; the
present statute would constitute blind adoption of future de-
cisions.

However, with the tendency of the courts to distinguish pre-
vious cases rather than to overrule them, the constitutionality
of the statute will probably never be directly questioned. Any
significance the provision may have is as a powerful manifesta-
tion of the tendency—often so futilely expressed—to lend cer-
tainty to the law. Withal, one may conclude that the doctrine
enunciated will continue to be the law and to be followed as
such in Georgia.

Speed of Railroad Trains as Negligence.—When we have
our attention directed to the not-so-distant past when a railroad
company was held to be grossly negligent for not stopping an
already slowly moving train and chasing a herd of cattle off
of its right of way;¹ when a switch engine going six miles per
hour was held by a jury to be going at a grossly careless and
negligent rate of speed;² when city ordinances limiting the speed
of railroad trains to four,³ five,⁴ six, eight, and ten⁵ miles per

¹ Illinois Central Railroad v. Baker, 47 Ill. 295 (1868). But see C. B. & O.
R. R. Co. v. Damerell, 81 Ill. 450 (1876), in which it was held that a train
was not obliged to stop in order to keep from hitting a team of horses that
was on the track a long way off.
² Chicago and Northwestern Ry. Co. v. Ryan, 70 Ill. 211 (1873).
³ Wheaton v. City of Franklin, 34 Ind. 392 (1870).
⁵ Duggan v. P. D. & E. Ry. Co., 42 Ill. App. 536 (1891); City of Lake View
v. Tate, 130 Ill. 247 (1899); Larkin v. Burlington, 85 Iowa 492, 52 N. W. 480
(1894); the cases also show similar ordinances in Minnesota, Missouri, New
Jersey, New York.
hour within their city limits were held to be valid and reasonable measures for the public safety; when a railroad company was grossly negligent in allowing its trains to be run past a crossing at a rate of speed of from twenty-five to thirty miles per hour, such a decision as that recently handed down by the Supreme Court of Illinois (Mr. Justice Shaw) in the case of Provenzano v. The Illinois Central Railroad Company, seems to come from a different world. That case definitely finds that a rate of speed of sixty miles per hour is not such as amounts to willful and wanton conduct on the part of the defendant or even that it is grossly negligent. The accident in that case occurred at noon on a bright day at the main intersection in the town of Hillside. The testimony was conflicting as to whether or not the whistle and bell were sounded, but the jury found that they were.

As cited cases show, there has been a distinct trend in the decisions of the various courts of this country to sanction increased speeds of our passenger railroads. But in spite of such trend the action of the different states has not been uniform. In Illinois in 1873, ten miles per hour was held to be a grossly unsafe rate of speed through a city, the court saying, "It would appear to the minds of all prudent persons that such a rate of speed, at such a place, is reckless, and in total disregard of human life. All must know that it is hazardous almost in the extreme. If such conduct were not attended with disaster, it would be a matter of surprise. . . . Any and all persons would say that it would be reckless for an individual to drive his horses through the thronged streets of a large and populous city at such a rate of speed; and yet he would have his horses under more prompt and immediate control than an engine and train can ever be brought. The individual could check his team on shorter space, and could readily turn it in its course, and thus afford some means of avoiding injury to pedestrians." In 1883, thirty-five miles per hour was held not to be negligence as a matter of law, apparently a relaxation; but in 1896 it was held to be negligence to go twenty miles per hour through a thickly settled

6 Reeves v. Delaware, L. & W. R. R., 30 Pa. St. 454 (1858). See also those cases in which it was held that the mere fact that the train was going faster than the ordinance allowed did not amount to gross negligence; Blanchard v. L. S. & M. S. Ry. Co., 126 Ill. 416 (1888); L. S. & M. S. Ry. Co. v. Bodemer, 139 Ill. 596 (1889); Ill. C. R. R. Co. v. Eicher, 202 Ill. 556 (1903). In Wabash Ry. Co. v. Henks, 91 Ill. 406 (1879), although the speed at which the train was running was not mentioned, the court held that the mere fact that the train was going faster than the law allowed did not amount to the doing of a willful act. The court also said that though the statute allowed trains to go faster than ten miles per hour, that did not mean that they could go faster than that all the time.

7 357 Ill. 192.


part of the city.\textsuperscript{10} New York seems to have been a bit faster than the rest of the country, for in 1891 it was held to be all right to go thirty miles per hour through a town (if there were gates),\textsuperscript{11} and fifty-five to sixty was held not to be negligence per se through the country.\textsuperscript{12} Michigan made a similar decision concerning a speed of twenty-five miles per hour in 1894.\textsuperscript{13} About the same time a Federal court held that forty to forty-five miles per hour was not excessive if the whistle or bell could be heard at least a mile,\textsuperscript{14} while Kentucky held that it was negligence to go thirty miles per hour if there were no bell or whistle;\textsuperscript{15} and Alabama felt it had taken a step forward by finding that a railroad could not be held to have a willful intent to injure persons just because it went fifteen to twenty miles per hour, even if it did so with no bell or whistle.\textsuperscript{16} In 1896 Arkansas

\textsuperscript{14} Griffin v. B. & O. R. Co., 44 F. 574 (1890). And in Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394, 102 P. 988 (1909), it was held that forty-five miles per hour was not per se excessive even though the train was at the time going faster than the schedule called for.
\textsuperscript{15} Louisville, Cincinnati & Lexington R. Co. v. Goetz, Adm'x, 79 Ky. 442 (1881).
\textsuperscript{16} Georgia Pacific Ry. Co. v. Lee, 92 Ala. 262, 9 So. 230 (1891). In Partlow v. Illinois Central R. Co., 150 Ill. 321 (1894), it was held that a speed as high as forty miles per hour was not negligence per se and was not wanton; and in Passwaters v. Lake Erie & W. R. Co., 181 Ill. App. 44 (1913), the court went even further and said that fifty-five to sixty miles per hour was not negligence per se or wanton. One of the few cases where it was found that the railroad company was guilty of wanton conduct for allowing its trains to be driven at a high rate of speed is Mobile, etc. R. Co. v. Smith, 153 Ala. 127, 45 So. 57 (1907), but there there was the additional feature that the railroad, or person in charge of the train, knew of the particular peril to passers-by.
DISCUSSION OF RECENT DECISIONS

held that thirty miles per hour was not negligence,\(^7\) Massachusetts held that forty miles per hour might be unreasonable depending upon the crossing,\(^8\) but Texas gave us the interesting advice that running backwards at the rate of fifteen miles per hour is grossly negligent conduct.\(^9\)

In all of these cases the courts have tried quite carefully to balance the duties of pedestrians and the need of the public for a more safe and yet rapid system of transportation. It makes us wonder with no small degree of apprehension what the result of the use of streamlined trains going eighty or one hundred miles an hour will be on the future court decisions. Will they say that such a speed is extremely excessive and unsafe to the public; will they require the railroad companies to install more safety devices; or will they say that the pedestrian must use a higher degree of care for his own safety when crossing the railroad rights of way?

DOCTRINE OF RES IPSA LOQUITUR IN ACTION AGAINST A MUNICIPALITY.—In the recent Ohio case of Felt v. City of Toledo,\(^1\) a young child of seven years of age was playing in a public playground in the city of Toledo, a playground operated and controlled by the city for the use and enjoyment of the public. While sliding down one of the slides in the park, she caught her foot between the steel plates of the sliding surface, which had become spread apart through some cause unknown, and was thrown to the ground and suffered severe injuries therefrom. In the subsequent action against the city, the plaintiff attempted to rely upon the doctrine or res ipsa loquitur, and rested its case after proving the injury and the operation and control of the park by the city. The court held that the doctrine did not apply and that the city could only be liable upon proof of notice of the defect and negligence in not repairing it. The decision was not expressly grounded upon the fact that the city was a municipal corporation and that the doctrine did not apply for that

\(^7\) St. Louis, etc. Ry. Co. v. Denty, 63 Ark. 177, 37 S. W. 719 (1896). And see Chi. and Northwestern Ry. Co. v. Dunleavy, 129 Ill. 132 (1889), where it was held that a speed of thirty to thirty-five miles per hour was evidence of gross negligence.


\(^1\) 192 N. E. 11 (Ohio, 1934).
reason, nor upon any rule of pleading in that state which precluded the application of the doctrine when any proof of negligence is established. The only reason given by the court for its decision was simply that "since the decision of the Supreme Court, in City of Cleveland v. Pine, 123 Ohio St. 578, there can be no foundation for such claim." We must look, therefore, to the latter case for its reasons.

In that case the plaintiff sued for loss of his wife's services, which loss, he said, was caused by injuries sustained by her when, in a public park, a manhole on which she stepped gave way beneath her weight. The plaintiff relied on the doctrine of res ipsa loquitur to sustain his case, but the court held that the doctrine did not apply because of a statute (Section 3714, General Code) which put parks in the same category as streets and sidewalks, and held that because they are instrumentalities of government the city can only be liable for negligent acts in regard to them when either actual or constructive notice is shown. It then said that the existence of such knowledge or notice is a question of fact for the jury. What the decision would be in the absence of such statute we cannot say, but in Ohio, at any rate, because of the statute, res ipsa loquitur cannot be asserted against a municipality in a case like the present.

Under the doctrine of res ipsa loquitur whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events would not happen if due care had been exercised, the fact of the injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. It is a prima facie presumption of negligence in cases where, in the ordinary course of events, the accident would not have happened if those in control of the instrumentality or appliance had used proper care. It must clearly be shown that the thing causing the accident was under the exclusive control of the defendants or his servants.

In the absence of a statute controlling the liability of a municipal corporation, its responsibilities must fall into one of two distinct categories. If the city, in maintaining a park for the use and enjoyment of the public can be said to be exercising

---


4 Schaller v. Independent Brewing Ass'n, 225 Ill. 492 (1907).
a proprietary function, there would then be no distinction between the city and an individual, and the doctrine would properly apply in the case of an individual. Although there is a respectable group of authorities which holds that the mere fact that the defendant is a city is enough to preclude the operation of the doctrine of res ipsa loquitur, and holds that the mere evidence of the happening of an accident is not sufficient. But what would be the ruling if the city is acting in a governmental capacity? The general rule seems to be that a municipal corporation is not liable in private actions for injuries resulting from the exercise of governmental powers, while it is liable in case of its improper exercise of a power in its private capacity; and there are numerous cases holding that the maintaining of a public park for the purpose of furnishing to the people at large a place for free recreation to promote the health and general welfare of the public, and as a means of adding to the beauty of a city, is a governmental activity—a public duty—and therefore a municipality is not liable for injuries caused through negligent conditions therein. But even this doctrine is not followed by all of the courts, many of them holding that the city is liable for failure to exercise reasonable care in establishing,

5 A municipal corporation owning, leasing, or controlling vacant lots is chargeable with the same duties and obligations which devolve upon individuals in respect to their conditions. City of Pekin v. McMahon, 154 Ill. 141 (1895). And the same doctrine is held applicable in City of Chicago v. O'Brennan, 65 Ill. 160 (1872), where the municipal corporation was in exclusive possession of the property for the benefit of the public.

6 In any event, however, a city or town is liable in such cases (where parks are maintained by the city in its private capacity) only upon proof of negligence; mere evidence of the happening of an accident is not sufficient. City of Denver v. Spencer, 34 Colo. 270, 82 P. 590 (1905), (fall of a stand); McFraw v. Dist. of Columbia, 3 App. Cas. 405, (bathing beach water of uneven depth); Kendall v. Boston, 118 Mass. 234 (1875), (fall of bust at municipal concert); Carey v. Kansas City, 187 Mo. 715, 86 S. W. 438 (1905), (child drowned in reservoir in park surrounded by a fence); Melker v. City of New York, 190 N. Y. 481, 83 N. E. 565 (1908), (fireworks). Notes: 2 L. R. A. (N. S.) 147; 7 Ann. Cas. 1042; 16 L. R. A. (N. S.) 621.

7 City of Chicago v. Seben, 165 Ill. 371 (1897); City of Chicago v. Williams, 182 Ill. 135 (1899); Elmore v. Drainage Comrs., 135 Ill. 269 (1890); Eastern Ill. State Normal School v. City of Charleston, 271 Ill. 602 (1916); Hanrahan v. City of Chicago, 289 Ill. 400 (1919); Johnston v. City of Chicago, 258 Ill. 494 (1913).

8 Emmons v. City of Virginia, 152 Minn. 295, 188 N. W. 561 (1922); Harper v. City of Topeka, 92 Kan. 11, 139 P. 1018 (1914); 29 A. L. R. 860 and note. A municipal corporation maintaining a playground will be liable for the death of a child through the fall of a swing caused by disrepair to the appliances by which it was anchored to the ground so that the swing is liable to tip over when used. Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 P. 710 (1925), 42 A. L. R. 245 and note. A city must exercise reasonable care in construction and maintenance of mechanical appliances used in park operated for public and is liable for injuries caused by a breach of such duties. Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925).
equipping, and maintaining a public park of the nature under consideration. Therefore it is clear that even the strict rule in reference to a governmental function has been modified in many of the states. In none of the cases cited is it definitely decided that the doctrine of res ipsa loquitur cannot be raised against a municipal corporation, nor have any been found in which the question has been passed upon.

The only statutory provision in Illinois in regard to actions for personal injuries brought against a municipality is found in Cahill's Illinois Revised Statutes (1933), Chapter 70, paragraphs 6-8. The Supreme Court has not interpreted this statute to mean that res ipsa loquitur may not be raised against a municipal corporation; and, in fact, there seem to be no cases in which the point has been directly decided. Therefore, it is still an open question in Illinois whether, where the facts are such as to justify the application of the doctrine of res ipsa loquitur in a suit

In Canon City v. Cox, 55 Colo. 174, 133 P. 1040 (1913), in an action against the city for injuries to a child playing on a merry-go-round, evidence held to sustain the finding that the city maintained the appliance in a defective condition. And see City of Flora v. Pruett, 81 Ill. App. 161 (1898), where the defendant city maintained a park in one corner of which it had piled lumber so stacked that it leaned and was in danger of falling. Against the lumber the defendant leaned a heavy timber, and boys climbing thereupon pushed the lumber upon plaintiff's intestate, killing him. Held that defendant was liable.

And the general rule seems to be that whether or not the city was negligent in maintaining a park or public place is held to be a question for the jury. Woodward v. City of Des Moines, 182 Iowa 1102, 165 N. W. 313 (1917); Nelson v. City of Duluth, 172 Minn. 214 N. W. 774 (1927); Capp v. City of St. Louis, 251 Mo. 345, 158 S. W. 616 (1913).

10 These paragraphs, which are Laws of 1905, p. 111, secs. 1, 2 and 3, read:

6. Suits to be commenced within one year. No suit or action at law shall be brought or commenced in any court within this state for damages against any incorporated city, village or town unless such suit or action be commenced within one year from the time such injury was received or the cause of action accrued.

7. Notice of suit to be filed within six months. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any).

8. Dismissal of suit for failure to file notice. If the notice provided for by section two of this act shall not be filed as provided in said section two, then any such suit brought against any such city shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing.
against an individual, the right to rely on the doctrine will be
denied when the suit is against a municipal corporation.

COMPETENCY OF ATTORNEY TO GIVE EXPERT TESTIMONY REGARDING NEGLIGENCE OF ANOTHER ATTORNEY.—The recent case of Olson v. North\(^1\) permitted an attorney as a witness to answer a hypothetical question concerning the negligence of another attorney in a prior case. While there is abundant authority that doctors and scientists may testify as experts, few cases are found which touch upon the competency of attorneys as expert witnesses.

In Pennsylvania, where the question came up in 1844, the court held that the testimony of a witness versed in legal affairs could not be given in evidence, saying, ""The proper exercise of such discretion depends not on technical skill, and it is therefore not a subject for the opinion of an expert.""\(^2\) A like decision was given in New York in 1858 in Clussman v. Merkle\(^3\) where the court decided that the opinions of attorneys as to what constitutes negligence on the part of another attorney in conducting litigation are not admissible, since the subject is not a proper one for expert testimony. On the other hand in England in 1862, in the case of Fletcher v. Winter,\(^4\) the court found no difficulty in holding that a testimony of lawyers was admissible on a question of the negligence of an attorney. The court repeated its decision on a second hearing of the case.

In Illinois, in 1892, in Artz v. Robertson,\(^5\) the court, citing no authorities, said, ""As to whether work and services performed in a law suit and money expended by an attorney for his client has been properly performed and expended according to good practice in the special profession and occupation of a lawyer are certainly expert questions, and a lawyer may be called on to testify to such matters as an expert. It is as much an expert's question as it would be in case of a physician as to the proper treatment of disease or wounds and injuries.'"

There is clearly no weight of authority on this question, but the Illinois courts have been uniform, and the decisions appear more readily justified under the general doctrine of opinion evidence.

A WIFE'S RIGHT TO SUPPORT AND MAINTENANCE AS A PROPERTY RIGHT.—In a suit by a wife seeking an injunction to close a gambling house as a common and public nuisance, on the ground that it deprived her of her husband's support and maintenance,

---

\(^1\) 276 Ill. App. 457.  
\(^2\) Livingston v. Cox, 8 Watts & S. 61.  
\(^3\) 16 N. Y. Super. 402.  
\(^4\) 3 F. & F. 138.  
\(^5\) 50 Ill. App. 27.
it was decided that there was not such a property right involved as to entitle her to the relief sought.¹

The decision is one in accord with the general trend of decisions of the Illinois courts. The court found that the plaintiff was seeking to enjoin a public nuisance, and that, without showing an injury to a property right and a peculiar damage to herself, she could have no relief in equity but must follow the statutory remedy.² The court could not find any precedent showing that a wife's right to support and maintenance was a property right and therefore refused to take jurisdiction to restrain a mere criminal or immoral act.³

Just what is a property right as to be protected by a court of equity, is a question that has confronted courts of equity since 1818, when, in Gee v. Pritchard,⁴ Lord Eldon, by a dictum, incorporated into the law the doctrine that equity protects only property rights. While continually adhering to this principle, the courts of equity have extended the idea of a property right until in many cases a mere personal right is protected.

The question whether a wife's right to maintenance and support would be included in this extended doctrine, would be answered differently by the various jurisdictions. Certainly some of the decisions infer that such a right exists as a property right. In Snedaker v. King⁵ the majority opinion refused an injunction to a wife against a woman who was attempting to alienate the husband's affections. The decision was based on the feasibility of enforcing such an injunction, ignoring the question of property right. There were two very powerful dissenting opinions, however, which discussed the very problem. Judge Woodward said, 'A contract right has uniformly been held to be a property right, and it has further been held that inducing a breach of such a contract is an actionable tort. While injunction does not lie in all such cases, it is very generally held that an injunction will lie to restrain third persons from inducing the breach of a lawful contract by one of the parties thereto, when it will result in irreparable injury. . . . These principles have been uniformly enforced in labor strikes.⁶ . . . Surely the rights

¹ Koch v. McClugage, 276 Ill. App. 512 (1934).
² Cahill's Ill. Rev. Stat. (1933), Ch. 38, pars. 148 and 149.
³ Sheridan v. Colvin, 78 Ill. 237 (1875); Hoyt v. McLaughlin, 250 Ill. 442 (1911); People v. Condon, 102 Ill. App. 449 (1902); Stead v. Fortner, 255 Ill. 468 (1912); Earp v. Lee, 71 Ill. 193 (1873); Pittsburgh, Ft. W. & C. Ry. Co. v. Cheevers, 149 Ill. 430 (1894).
⁴ 2 Swans. 403 (Eng. 1818).
⁵ 111 Ohio St. 225, 145 N. E. 15 (1924).
DISCUSSION OF RECENT DECISIONS

of an employer to the fruits of his contract with his employees are no more sacred than the rights of a wife to the consortium and support of her lawful husband."

In the foregoing case the plaintiff had not shown any pecuniary damage. Pomeroy's Equity Jurisprudence lends support to the probable extension of Judge Woodward's reasoning to the present case, as is shown from the following quotation: "Where the injury resulting from the nuisance is, in its nature, irreparable, as when . . . destruction of the means of subsistence . . . will ensue from the wrongful act . . . courts of equity will interfere by injunction in furtherance of justice and the violated rights of property." Cases so holding there is a property right in the husband's or wife's name are not infrequent.

Where there is pecuniary damage resulting from the wrongful use of one's name, it is well established that equity will give relief. In *Ex parte Warfield*, although proceeding under a statute, a Texas court found a property right in a husband's right to his wife's services; in fact, this was grounds for taking the case out of the doctrine of *Hodecker v. Striker*, following which the courts have refused injunctions to a wife when the only grounds relied on was a claim of a privacy right in a name.

The right to enjoin a proposed defamation, to enjoin a competitor from conducting an illegal lottery injuring plaintiff in his business, and the right of a member of a lodge to an injunction restraining the lodge from illegally selling beer are other cases in which the equity courts restrained the commission of illegal and immoral acts.

---

6 LaFrance Electrical Construction & S. Co. v. International Brotherhood of Electrical Workers, Local No. 8, 108 Ohio St. 61, 140 N. E. 899 (1923); Trua v. Raich, 239 U. S. 33 (1915); American Steel Foundries v. Tri-City C. T. Council, 257 U. S. 184 (1921); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917).

7 (1st Ed.) V, Ch. 21, sec. 478.


11 39 N. Y. S. 515 (1896).

12 29 Harv. Law Rev. 690; Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804 (1892).
