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REWARD TO PUBLIC OFFICERS; PUBLIC POLICY; EXCEPTION TO THE COMMON LAW RULE. The general rule of common law that it is against public policy to permit a public official to recover a reward for doing any act which he should have done in the ordinary course of his duty is well known. Originating in England—*Bridge* v. *Cage*, Cro. Jac. 103 (1654)—it has been repeatedly affirmed in this country: *In Re Russell*, 51 Conn. 577 (1884); *Pool* v. *Boston*, 5 Cush. (Mass.) 219 (1849); *Pilie* v. *New Orleans*, 19 La. Ann. 274 (1867).

A case which involved this doctrine was decided in the Supreme Court of the United States in March, 1899. In *Matthews* v. *The United States*, 173 U. S. 381, 19 Sup. Ct. Rep. 413, certain circumstances were present which, in the minds of the majority of the

court, removed the case from the general rule of the common law above mentioned, and necessitated the establishment of certain exceptions to it.

Matthews v. *The United States* arose in the Court of Claims (32 Ct. Cl. 123). The two plaintiffs were, one a regular, and the other a specially appointed deputy marshal. The Sundry Civil Appropriation Act of 1891 had appropriated money for the prosecution of crimes against the United States. The present plaintiffs claimed a reward offered under this act by the Attorney-General of the United States for the arrest and conviction of a man who had murdered a revenue officer in Florida. Their efforts resulted in the arrest and conviction of the criminal. Payment of the reward was refused by the Attorney-General and this action was brought in the Court of Claims. That court found for the plaintiffs mainly on two gronnds: (1) that as a deputy is employed and paid by the marshal and not directly by the United States, he is not such an officer of the United States as is by law prohibited from receiving any reward beyond his salary; (2) that "a deputy is not an officer upon whom, as such, the law places any official duty," nor is he "the prescribed official agency of the Government for making arrests, like a constable or police officer."

On appeal to the Supreme Court, the United States relied for reversal solely on two propositions: 1. That as at common law it was against public policy to allow an officer to receive a reward for doing his legal duty, therefore the statute under which the Attorney-General acted, and the offer made by him should be so construed as to exclude the right of the plaintiffs, who were under a duty to make arrests, to the reward; 2. That even if otherwise the deputies might take the reward, they were incapacitated because of the general statute forbidding officers in any branch of the public service from receiving any additional pay in any form whatever (Rev. Stat. § 1765), and because of the further provision that no civil officer shall receive any compensation from the Treasury of the United States beyond his salary (18 Stat. 85, 109).

The majority opinion of the court was delivered by Mr. Justice White. It was briefly as follows: The first contention of the United States amounts to this, that although the Appropriation Act vested entire discretion in the Attorney-General as to those whom he would include in his offer of a reward, and although he exercised his right by including all persons whether or not they were officers, yet it is the duty of the court to read into the statute on the ground of public policy, a qualification which it does not contain, that employes of the Government are excluded from participating in the offered reward. This is to ask the judicial power to exert a discretion not vested in it, but lodged by the law-making power in a different branch of the Government. Further, the contention that it is against public policy in all cases to enforce, in favor of a public officer, a contract by which he claims to receive an offered reward for doing his duty, is unwarranted. It is only against public policy

when the reward is offered by a *private individual.* But there is a broad difference where the reward is expressly authorized by competent legislative authority. Further, by examining the past action of Congress on similar occasions, it becomes clear that rewards have often been allowed to public officers. As the Attorney-General chose not to exclude in his offer deputy marshals, it is not necessary to determine whether the plaintiffs are officers of the United States within the meaning of the Statute cited. The Appropriation Act being a special and later enactment operates necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred on the Attorney-General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the later act. The judgment of the Court of Claims is affirmed. Mr. Justice Brown arrived at the same conclusion, but dissented from the argument. Justices Harlan and Peckham dissented from the conclusion on the ground that such a payment was contrary to public policy and not authorized by the Appropriation Act.

The question presented by the principal case has often come before the courts of the United States and of the separate states. The decisions are not in perfect accord. One of the earliest cases is *Pool* v. *City of Boston*, 5 Cush. 219, decided in 1849. There the Supreme Court of Massachusetts held that a promise of a reward offered by the Mayor of Boston for the detection of incendiaries would not be enforced in favor of the plaintiff, a duly appointed watchman, because there is no consideration for a contract to do one's legal duty. The United States Supreme Court in *Matthews* v. *The United States*, distinguishes that case from *Pool* v. *Boston*, where the facts are practically the same, on the ground that while the city had power to offer a reward, yet no legislative act had intrusted the municipal authorities with the discretion of including in such an offer officers whose official duty it was to aid in the detection of criminals. In *Railway Company* v. *Grafton*, 51 Ark. 504 (1889), the court held that the plaintiffs were not entitled to recover a reward offered by the Railway Company for the apprehension of any one caught tampering with the railroad switches during a strike. Plaintiffs were acting as a *posse comitatus* under the direct supervision of the sheriff when they made the arrests in question, and the court decided that they could not be heard to say that although under the direct command of the sheriff, they had acted independently of him; and on the broad grounds of public policy that a public officer, or those called to aid him, cannot recover any extra reward for doing what is but their legal duty, their claim was disallowed.

Spinney v. *The United States* and *Lees* v. *Colgan* are two cases very close to the principal case. In the former, decided in 1897 (32 Ct. Cl. 397), a postmaster, whose office had been robbed, secured the conviction of the burglars and claimed the reward offered by the Postmaster General under a Congressional Appropriation Act. The court held that the postmaster was a public

officer; and on grounds of public policy should not be allowed to receive rewards for doing his duty in securing the safety of the mails. The court distinguished this case from *Matthews* v. *The United States* on the ground that there no duty devolved by law upon the deputy marshals as such, while such a duty did devolve upon the postmaster.

In conclusion let us note a case where the court came to the opposite conclusion from that reached in *Matthews* v. *The United States*. *Lees* v. *Colgan*, 120 Cal. 262, decided in 1898, is very similar to the principal case which was decided only a year later. Colgan was a captain of police in San Francisco. The Governor of California, acting under a section of the penal code which authorized the offering of rewards for the apprehension of criminals, proclaimed a reward for the arrest of certain persons who had committed a murder. Colgan apprehended the men and claimed the reward, which was refused on the ground that his legal duty required him to act as he had. The court, through Garroutte, J., affirmed the judgment of the lower court on the ground that it was against public policy to allow such a reward. "No appellate court," said the learned judge, "has declared the existence in principle of any well defined distinction as to public officers, in cases where rewards have been offered by the state or municipality, and where rewards have been offered by private parties." The statute did not specifically include peace officers, and the implication cannot be made that it is meant to include such persons when it has been declared a vicious public policy elsewhere. To take such a step the interest must be plainly manifest.

On this subject see, also, *Smith* v. *Whildin*, 10 Pa. 39; *Davies* v. *Burns*, 5 Allen, 349; *Pilie* v. *New Orleans*, 19 La. Ann. 274; *Harris* v. *More*, 70 Cal. 503; *Harris* v. *Beaven*, 11 Bush, 254. These cases together with those noted above outline the trend of judicial opinions in this country. As the matter has now come before the Supreme Court, we may consider the question settled as laid down in the majority opinion in *Matthews* v. *The United States*.

SURFACE WATERS; ADJOINING PROPERTIES; RIGHT OF LOWER OWNER TO PREVENT THE FLOW FROM UPPER PROPERTY. In *Lampe* v. *City of San Francisco*, 57 Pac. 461 (May 31, 1899), a property owner in the city of San Francisco brought an action against the city, averring in his complaint that he was the owner of land abutting on a street; that the surface waters from his land had been accustomed to drain into the street; that the city raised the level of the street; and that, in consequence of such change of level, the surface waters were backed up over plaintiff's land, causing damage. A demurrer to plaintiff's complaint was sustained by the Superior Court of California, and, on appeal to the Supreme Court, the judgment was

affirmed on the ground that plaintiff had no vested right to have an outlet for his surface water over the adjoining street.

The right which plaintiff claimed in the above case falls within that diversion of the law of Easements entitled "Natural Easements," or "Natural Servitudes." Mr. Addison says of them in his work on Torts (p. 271) that they are "derived from the situation of places and are a natural and necessary adjunct to the property to which they are annexed. . . . The right and burden of natural servitudes are contemporaneous with the right of property itself." Among these natural servitudes he mentions the servitude of surface drainage from an upper property to a lower one, and he explains its existence upon the ground that the upper land cannot be cultivated or enjoyed unless the surface water is allowed to escape over the lower.

The rule that the upper owner possesses the easement of surface drainage was fully recognized by the Roman Law. In *Martin* v. *Riddle*, 26 Pa. 415, Justice Lowrie said, "I shall now speak of the general principles of the law in the matter of rain water and drainage, and of the respective rights and duties of adjoining proprietors in relation thereto. . . . Not readily finding the subject treated of in any of our usual books of reference, I venture to extract the law from books of a foreign origin.—Corp. Jur. Civ., 39, 3, 1, and 43, 21; Code Nap. § 640; Pothier, *du Voisinage*;" the authorities supporting the proposition that the servitude exists. Also in *Kauffmann* v. *Greisemer*, 26 Pa. 413, the Supreme Court of Pennsylvania quotes Pardessus on the Civil Code to the same effect.

In America the civil law rule has found the greatest favor among the agricultural states of the west, where the huge grain fields would be utterly ruined, were the owners of the adjoining properties at liberty to raise the surface of their ground without providing for the escape of the water, converting the fields into lakes whenever a heavy rain should fall. Thus in *Wharton* v. *Stevens*, 84 Iowa, 107, the Supreme Court of Iowa went so far as to declare that, "It would be a bold counsel who would advocate, and a bold court which would decide that water from rains and falling snows, which are called by counsel, "surface water," when it finds swales provided by nature to bear it away, may be arrested in its natural course and made to flow back again upon the land which these swales are intended to drain. The effect of such a decision would be stupendous. It would subject millions of acres of the best agricultural lands to destruction. . . . This court is not prepared to recognize a rule so detrimental to the interests of the state and in conflict with sound legal principles and precedent." See also *Boyd* v. *Conklin*, 54 Mich. 583, and *Gormley* v. *Sandford*, 52 Ill. 158, in which latter case the principles applicable to running streams are held to govern the case of surface water. "As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human laws, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws."

On the other hand, several of the eastern courts have laid down what they term the "common law rule," to the effect that, as the owner of property has the right to improve it as he sees fit, he cannot be prevented from raising its level, and the mere fact that such change of level blocks the flow of surface water from an upper property and causes the water to collect on the latter affords no right of action by the upper owner, but is *damnum absque injuria*. The leading authorities in support of this proposition are *Gannon* v. *Hargadon*, 10 Allen (Mass.), 105; *Barkley* v. *Wilcox*, 86 N. Y. 140; *Bassett* v. *Salisbury Co.*, 43 N. H. 569; *Bowlsby* v. *Spear*, 31 N. J. L. 351; Washburn on Easements, 431.

Although these cases have given the rule laid down by them the name of the "common law rule," yet it is very uncertain whether it is any more in accord with the principles of the common law than the rule which recognizes the existence of the easement in favor of the upper owner. Indeed in *Gilham* v. *M. C. R. R.*, 49 Ill. 486, it was said that, "The doctrine of these cases (*Gannon* v. *Hargadon, supra, et al.*) wholly ignores the most valued and favored maxim of our law, *Sic utere tuo ut alienum non laedas*, a maxim lying at the very foundation of good morals, and so preservative of the peace of society." See also *Butler* v. *Peck*, 16 Ohio St. 363; *Bellows* v. *Sackett*, 15 Barb. 101, and *Boyd* v. *Conklin*, 54 Mich. 583, in which cases the rule of the common law is declared to be identical with that of the civil law and the use of the term, "common law rule," as above indicated, is declared to be unfounded. Curiously enough, the question does not seem to have been ever raised in England, but a writer in the American Law Review does not hesitate to express his opinion that the English courts will follow the rule of the civil law, preventing the lower owner from obstructing the flow of the surface water: 23 Am. Law Rev. 391. The same view is expressed in Wood on Nuisance, § 396, and 24 Am. & Eng. Enc. of Law, 917, n.

Perhaps the fairest and most reasonable view to take of the subject has been adopted by those courts which make a compromise between the civil law and common law rules. They say as regards lands in the country, where improvements and changes of level are comparatively infrequent, it is proper to allow the existence of the easement over the lower property; but as regards town and city lots, where changes and alterations are essential to their enjoyment, their owners may improve them as they see fit, and each man must look after his own surface drainage. In support of this view see *Bentz* v. *Armstrong*, 8 W. & S. (Pa.) 40; *Davidson* v. *Sanders*, 1 Pa. Super. Ct. 432; *Clark* v. *Wilmington*, 5 Har. (Del.) 243; *Waters* v. *Bay View*, 61 Wis. 642; *Cemetery* v. *Los Angelos*, 103 Cal. 467, and *Lampe* v. *San Francisco, supra*. This distinction commends itself to common sense and will probably be the one adopted by those states which are not yet bound by decisions in favor of either of the so-called civil or common law rules.

NEGLIGENCE; JUDGMENT AGAINST ONE TORT-FEASOR NOT A BAR TO AN ACTION AGAINST THE OTHER. In the case of *Parmenter* v. *Barstow*, 47 Atl. 1035 (1899), the plaintiff claimed damages for personal injuries caused by the negligence of the defendant's servants in cutting stone on the sidewalk, a piece of which struck her in the eye. The defendants pleaded a former judgment against Chace, a joint tort-feasor with the defendants, in the plaintiff's favor for the same cause of action which was claimed in this suit. The plaintiff demurred to this plea on the ground that the judgment against Chace did not bar a recovery in this action.

The demurrer was sustained by the Rhode Island Supreme Court. The grounds upon which the court based its decision are best stated by Stiness, J. "The only two American cases which directly hold in favor of the bar of the former judgment are *Hunt* v. *Bates*, 7 R. I. 217 (1862) and *Wilkes* v. *Jackson*, 2 Hen. & M. (Va.), 355 (1808). The rule in this country is that joint tort-feasors may be sued separately. *Hunt* v. *Bates*, and, indeed, the English cases only hold the contrary in cases of trover and trespass. As to other torts there is a practical unanimity. Virginia stands alone in holding the judgment to be a bar in all cases. This it did in *Wilkes* v. *Jackson*, which was an assault case. That case has been recently reviewed and affirmed in *Petticolas* v. *City of Richmond*, 95 Va. 456, 28 S. E. 566 (1897), which was trespass on the case for negligence. The court rests wholly on the ground of the English cases and acquiescence for nearly a century in *Wilkes* v. *Jackson*. The court further based its decision on the general rule and, sustaining the demurrer, concluded its opinion with the statement that a judgment against one joint tort-feasor did not bar an action against another joint tort-feasor.

The English rule, as laid down in one of the best and latest cases on the subject, *Brensmead* v. *Harrison*, L. R. C. P. 547 (1872), is that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. See also *Adams* v. *Ham*, 5 U. C. Q. B. 292 (1849), and *Sloan* v. *Creasor*, 26 U. C. Q. B. 127 (1863).

This is also stated in the text books to be the English rule to-day; see Webb's Pollack on Torts, p. 231; Baylies' Addison on Torts (6th Ed.), p. 94; Cooley on Torts, * page 138; 2 Kent's Commentaries, 388, 389, and Underhill's Summary of the Law of Torts, p. 113, art. 35.

The American rule was first laid down by Chief Justice Kent. That rule, which, as stated by the eminent jurist is generally followed in the United States, is that the party injured may bring separate suits against the wrong-doers and proceed to judgment in each case; and that no bar arises as to any of them until satisfaction is received.

This is admitted to be the general rule in the United States, as in the text books above cited and the cases to be cited, except in Virginia, as pointed out by Justice Stiness above.

Golding v. *Hall*, 9 Port. (Ala.) 169 (1839); *Blann* v. *Cocheron*, 20 Ala. 320 (1852); *Morgan* v. *Chester*, 4 Conn. 387 (1822), approved in *Ayer* v. *Ashmead*, 31 Conn. 447 (1863); *Union, Etc., Co.* v. *Sacklett*, 19 Ills. App. 145 (1886); *Fleming* v. *MacDonald*, 50 Ind. 278 (1875); *Turner* v. *Hitchcock*, 20 Iowa, 310 (1866); *United Soc.* v. *Underwood*, 11 Bush. (Ky.) 265 (1875), 21 Am. Rep. 214; *White* v. *Phillbrick*, 5 Me. 147 (1827); *Aldrich* v. *Parnell*, 147 Mass. 409 (1888); *Kenyon* v. *Woodruff*, 33 Mich. 310 (1876); *Page* v. *Freeman*, 19 Mo. 421 (1854); *Lord* v. *Tiffany*, 98 N. Y. 412 (1885); *White* v. *Lathrop*, 2 O. St. 33 (1825); *Fox* v. *Northern Liberties*, 3 W. & S. (Pa.) 103 (1841); *Sanderson* v. *Caldwell*, 2 Aik. (Vt.) 195 (1826); *McGehee* v. *Shafer*, 15 Texas, 198 (1855); *Griffie* v. *McClung*, 5 W. Va. 131 (1872).

In Tennessee it is agreed that a judgment against one joint wrong-doer is not of itself a bar to suits against the others, but it is said that "the more reasonable doctrine on the other hand is, that as each of the wrong-doers is liable for his own act, separate actions may be brought at the same time or successfully, in each of which the plaintiff may proceed to judgment. But he claim or enforce only one satisfaction:" *Christian* v. *Hoover*, 6 Yerg. (Tenn.) 505 (1834).

The Federal Courts follow the general rule laid down by Chief Justice Kent. The first case on the point under discussion is *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1 (1865), wherein it is held that such a judgment (as the one spoken of in the case under discussion) against one joint tort-feasor is no bar to an action against the other. "Nothing short of full satisfaction," said Miller, J., "or that which the law must consider as such can make such judgment a bar." This case has been followed in *Sessions* v. *Johnson*, 95 U. S. 347 (1877), and *Birdsell* v. *Shaliol*, 112 U. S. 485, 489 (1884).

It is to be regretted that in *Parmenter* v. *Barstow*, nothing was said as to the satisfaction of the prior judgment against Chace. In England satisfaction was held to be not necessary in a judgment in trover, because title was held to have passed by the mere rendering of such judgment. This rule was extended, but wrongfully, as Kent shows, to all cases of tort.

We are of opinion, then, that the present case goes too far in holding that a judgment against one of two joint tort-feasors does not bar recovery in an action against the other. The court should have inserted in its opinion the saving proviso in *Lovejoy* v. *Murray*, namely, that such judgment is a bar only where full satisfaction has been recovered.

FOREIGN CORPORATIONS; WHAT CONSTITUTES "DOING BUSINESS." An interesting question as to the meaning of the term "business" within statutes regulating foreign corporations is dis-

cussed in the case of *Delaware and H. Canal Co.* v. *Mahlenbrock* (N. J., 1899), 43 Atl. 978.

The plaintiff was a Pennsylvania corporation, in which state its mines were situate, and its principal offices were in New York. The coal for the price of which the suit was instituted was delivered to a resident of New Jersey. The defence was that the plaintiff company was a foreign corporation which had not complied with the New Jersey laws in its failure to file with the Secretary of State a copy of its certificate of incorporation, and was therefore disabled from suing in the state. The defence was based on a statute which provided that "until such corporation so transacting business in this state" shall have obtained from the Secretary of State a certificate authorizing it to do business, "it shall not maintain any action in this state upon any contract made in this state." The court, after deciding that the case did not fall within the statute, as the contract was made in New York, went on to discuss, *obiter dictum*, how the section would apply if the contract had been made in New Jersey. The conclusion reached is in accord with that enunciated by most courts where analogous cases have arisen; and declares, that the doing of a single act is not "transacting business" within the meaning of the act.

The provisions of statutes such as this are intended to affect foreign corporations entering the domestic state by their agents and engaging in the general prosecution of their ordinary business therein: *Knitting Co.* v. *Bronner* (Sup.), 45 N. Y. Suppl. 714 (1897); *Potter* v. *Bank of Ithaca*, 5 Hill, 80 (1843). To "transact business" means, according to the dictionaries, "to carry on, or to prosecute that which occupies the time, attention and labor of a man for the purpose of a livelihood or profit." The term must then comprise more than a single act unless there is an intent to continue in the doing of those acts coupled with the necessary preparation therefor: *Abel* v. *State*, 10 Ala. 631 (1890). But apart from the evidenced purpose to do more it may be stated as a rule that "isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by the foreign corporation within the state:" 6 Thomp. Corp. Sec. 7936.

Where the statutes prohibits the doing of *any* business in the state, some courts follow the lead of Alabama and interpret them as applying to a single act of business, if it be in the exercise of a corporate function: *Farrior* v. *Security Co.*, 88 Ala. 275 (1889), and *Hacheny* v. *Leary*, 12 Oregon, 40 (1885). Though under a similar statute the contrary was held in *Gilchrist* v. *Helene, H. S. & S. Rwy. Co.*, 47 Fed. 593 (1891).

WITNESSES TO A WILL; THEIR IGNORANCE OF THE NATURE OF THE DOCUMENT. The case of the *Missionary Society of the Methodist Episcopal Church* v. *Ely*, Ohio, Oct. 3, 1899 (not yet

reported), is an important and interesting case bearing upon the requirements of law as to witnesses to the signature of a testator. In this case Albert C. Ely died, leaving a will by which the Missionary Society was made one of the beneficiaries. In the Probate Court it was shown that the witnesses who acknowledged their signatures did not know they were witnessing a will. The probate judge, therefore, refused to admit it to probate, holding that the law requires witnesses to know that it is a signature to a will which they are witnessing. This decision was sustained by the lower court and by the Supreme Court of the State.

In the case of *White* v. *Trustees of British Museum*, 6 Bing. 310 (1829), the court said: "The testator need not sign his name in the presence of the witnesses, but a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of the signing." To the same effect are *Wright and Wright*, 7 Bing. 457 (1831); *Dewey* v. *Dewey*, 1 Met. 349 (1840). In *Hogan* v. *Grosvenor*, 10 Met. 56 (1845) the court said: "His acknowledgment that the instrument is his, with a request that they attest it, is sufficient."

In the case of *Brown* v. *McAllister*, 34 Ind. 375 (1870), there was no declaration by the testatrix, or any one else, as to whether there was any writing on the paper other than the signature of the testatrix, and no statement as to the object in requesting the witnesses to attest the signature. The court held that the statutory requirements had been complied with, and that the will should be admitted to probate.

In a Vermont case—*Roberts* v. *Welch*, 46 Vt. 164 (1873)—the rule laid down is, that subscribing witnesses to a will must subscribe as intending a testamentary execution; and hence they must know the character of the act they are to perform, and that the instrument was a will. In Missouri, under an enactment which is nearly a transcript of the Statute Charles II, it was held—*Odenvaelder* v. *Schorr*, 8 Mo. App. 458 (1880)—"that a subscribing witness must know the instrument to be a last will, and must subscribe at the testator's request."

The New York and New Jersey statutes expressly provide that the testator shall declare the paper to be his last will and testament.