CURRENT DECISIONS

ALIEN ENEMIES—RIGHT TO SUE—AUSTRIAN SUING AS NEXT FRIEND FOR INFANT SON.—A native of Austria, residing in North Carolina, brought suit as next friend for his infant son to recover damages for personal injuries sustained by the latter. The United States declared war against Austria-Hungary after the verdict in the suit was returned but before the judgment was entered. Over the defendant's objection judgment was entered for the plaintiff. *Held,* that the suit was maintainable. *Krachanake v. Acme Mfg. Co.* (1918, N. C.) 95 S. E. 851.

The case, which is of first impression in North Carolina, correctly applies the general rule that the right of an alien enemy to sue in our courts turns upon his residence, not his nationality. The opinion contains an interesting review of the authorities, and refers to Mr. Picciotto's article in (1917) *27* YALE LAW JOURNAL, 167.

ALIENS—NATURALIZATION—TEMPORARY NATURALIZATION FOR SERVICE IN ARMY REFUSED.—The Act of May 9, 1918 (Public, No. 144, 65th Congr.) authorized the naturalization of aliens who enter the service of the Army or Navy of the United States. The examination of certain alien soldiers, applicants for naturalization under this statute, disclosed their intention not to remain in the United States after discharge from the service, but to return to their native country to remain there permanently. *Held,* that the applicants were not entitled to naturalization. *In re Naturalization of Aliens in Service of Army or Navy* (1918, E. D. Mo.) 250 Fed. 316.

The decision seems entirely correct. Naturalization obtained without intent to reside permanently in the United States has always been regarded by the State Department as fraudulent. This view is confirmed by section 15 of the Act of June 29, 1906 (34 Stat. L. 601) which construes the naturalization as having been acquired in bad faith if the citizen establishes his permanent residence abroad within five years of his admission to citizenship, and by section 2 of the Act of March 2, 1907 (34 Stat. L. 1228) which provides for a forfeiture of citizenship if the naturalized citizen shall have resided two years in his native country. A person cannot seek temporary naturalization in the United States. See *Luria v. United States* (1913) 231 U. S. 9, 34 Sup. Ct. 10.

ARMY AND NAVY—INDUCTION UNDER DRAFT ACT—COMPULSORY SURGICAL OPERATION ON DRAFTEE.—A registrant was certified into military service, and, though suffering from hernia, the local board and the examining army officers did not reject him. Instead, they ordered him to undergo a surgical operation. He refused to submit, and in *habeas corpus* proceedings claimed his release on the ground that, as he could not be compelled to submit to the operation, he was physically disabled and entitled to discharge from further military duty. *Held,* that the registrant was not entitled to discharge and that the writ must be dismissed. *De Genaro v. Johnson, Brigadier-General* (1918 E. D. N. Y.) 249 Fed. 504.

By the Selective Draft Act and sections 1116 and 1342 of the U. S. Revised Statutes the decision of the examining board, exemption or military, on a question of fact is final and cannot be reviewed on *habeas corpus. In re Traina* (1918, E. D. N. Y.) 248 Fed. 1004. After his induction into service the registrant is subject to military law and cannot obtain his discharge from the army through

the civil courts. By military law a soldier may be required to submit to an operation designed to increase his fitness for service and not endangering his life. See (1917) Manual for Courts-Martial, U. S. Army, 33.

BANKRUPTCY—PREFERENCES—REVIVING BARRED DEBT AS PREFERENCE.—The day before a petition in bankruptcy was filed against him, a debtor made a payment upon a statute-barred debt, intending to revive it. The debtor was aware of his insolvent condition, the creditor was not. The creditor, offering to restore the payment, filed his claim on the revived debt. *Held,* that the claim was allowable since its revival could not be considered a preference, the creditor being unaware of the insolvency. *In re Salmon* (1917, C. C. A. 2d) 249 Fed. 300.

The decision in the instant case overrules the judgment of the lower court reported in (1916, S. D. N. Y.) 239 Fed. 413. There the revival was treated as an "incumbrance" and held void under section 67e of the Bankruptcy Act. This view, as pointed out in (1917) 27 YALE LAW JOURNAL, 126, is highly questionable and unsupported by authority. It is submitted that the Circuit Court of Appeals took the proper view of the situation when it regarded the revival merely as a preference and not as an "incumbrance."

CONSTITUTIONAL LAW—EX POST FACTO LAWS—NEW YORK PAROLE LAW VALID.—The Parole Commission Act of New York (Laws 1915, ch. 579), providing for a system of indeterminate sentence and parole for criminals, does not become actually effective in a given territory until certain local authorities appoint a Parole Commission. The relator in a writ of *habeas corpus* maintained that as applied to him the act was *ex post facto.* The crime for which he was imprisoned was committed after the passage by the legislature of the law in question but before it had become fully operative in the part of the state concerned by the appointment of a Parole Commission. *Held,* that the law was not *ex post facto* as applied to the relator. *People ex rel. Cerzosie v. The Warden of New York County Penitentiary* (1918, N. Y.) 119 N. E. 564.

The decision, which apparently has no exact precedent to support it, seems equally sensible and sound. The law in question obviously does not in any way produce the kind of unfair result against which the constitutional prohibition of *ex post facto* laws is directed. The decision may profitably be compared with *Neal v. Hines* (1918, Ky.) 203 S. W. 578, holding constitutional, as applied to persons already convicted of crime, a statute extending the period during which parole could not be granted. There, however, the original parole statute expressly provided that the persons described should be eligible to parole "as now or may hereafter be prescribed." (The attention of the learned reader is called to an editorial note in (1918) 34 L. QUART. REV. 9, pointing out that the expression *ex postfacto* is in current usage incorrectly written and printed as three words, *ex post facto.* Among the first to commit this error was Lord Coke; he was followed by Blackstone, Bentham and Austin. So it is not surprising that the error became general.)

CONTRACTS—THIRD PARTY BENEFICIARY—SUIT BY DONEE-BENEFICIARY.—A husband promised his wife on her death bed that in consideration of her executing a certain will he would himself bequeath a specified sum to a favorite niece of the wife. The niece sued the husband's executor for breach of the above promise. *Held* (three judges dissenting), that the niece was entitled to maintain an action on the contract. *Seaver v. Ransom* (1918, N. Y.). Decided Oct. 1, 1918.

The Court of Appeals here affirms the decision of the Appellate Division (1918) 168 N. Y. Supp. 454, as to which see note in 27 YALE LAW JOURNAL, 563. See also Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008, which is cited in the opinion. The development of the New York law on this subject is set forth in an excellent opinion of Mr. Justice Pound, and the statement of the lower court that "The doctrine of *Lawrence v. Fox* is progressive, not retrograde" is approved.

DOWER—PERSONS ENTITLED—DESERTING AND ADULTEROUS WIFE.—A married woman deserted her husband in 1871 and never returned to him. For many years she lived in adultery with other men. In 1914 the husband died testate. The wife claimed dower in his estate. The claim was resisted on the ground that under the Statute of Westminster II, 13 Edw. I, ch. 34 (1285), which came to be recognized as part of the common law of England, the desertion and subsequent adultery of the wife operated to bar her claim for dower. *Held,* that the wife was entitled to dower. Eschweiler, J., *dissenting. Davis v. Davis* (1918, Wis.) 167 N. W. 879.

The majority of the court took the view that the statutory system of divorce in Wisconsin, which makes adultery a ground for divorce, had provided a broader remedy than the English law and had therefore superseded it. The dissenting judge took the view that the Wisconsin statutes merely gave an additional remedy without conflicting with the English law in any way. The cases in other jurisdictions are in conflict. Citations are given in the prevailing and in the dissenting opinion. From the point of view of policy there seems no answer to the dissenting judge's view that "the faithless ought not now to be rewarded as though faithful."

INJUNCTION—RESTRAINING ENFORCEMENT OF ALLEGED INVALID ORDINANCE.—The Shredded Wheat Company, a New York corporation, asked in Illinois for an injunction to restrain the City of Elgin from enforcing an ordinance which required the payment of a license fee by any person distributing hand bills, samples, and other advertising matter. The complainant claimed that in distributing its advertising matter it was engaged in interstate commerce and that therefore the ordinance was unconstitutional. It alleged that "irreparable injury" would result from enforcement of the ordinance, but to substantiate this allegation stated no other facts than those given above. *Held,* that the complainant was not entitled to equitable relief. *Shredded Wheat Co. v. City of Elgin* (1918, Ill.) 120 N. E. 248.

The decision in the case is an excellent example of the lack of provision in our system of law for the rendering of declaratory judgments. See Borchard, *The Declaratory Judgment, supra,* p. 1. Relief in equity is here denied on the ground that "there is no reason why the validity of the ordinance may not be determined by a court of law in . . . a [criminal] prosecution. If it is invalid, the prosecution will fail and the complainant will not be injured, and if it is valid, there is no ground upon which its enforcement should be enjoined." Thus the plaintiff is compelled, in order to ascertain whether he is legally privileged to distribute the advertising matter without a license, to run the risk of subjecting himself to a successful criminal prosecution if his attorney's view of a doubtful question of constitutional law turns out to be incorrect.

JOINT TENANCY—PERSONAL PROPERTY—JOINT BANK DEPOSIT PAYABLE TO SURVIVOR.—Mrs. Rusk deposited money in a bank and received a certificate of deposit payable to herself or her daughter, "or the survivor." The bank

thereafter paid interest on the deposit to the daughter. When Mrs. Rusk died the daughter claimed the deposit for her own and a granddaughter claimed it for Mrs. Rusk's estate. *Held,* that the daughter was entitled to the deposit. *Erwin v. Felter* (1918, Ill.) 119 N. E. 926.

The Appellate Court had held that no valid gift of the money had been effected by the deposit. *Felter v. Erwin* (1917) 206 Ill. App. 521. The Supreme Court gives no consideration to the principles relating to gifts but treats the transaction as creating a joint-tenancy. In cases involving joint bank deposits the right of the survivor is usually sustained, but the courts are by no means agreed as to the true grounds for reaching this result. See *Wisner v. Wisner* (1918, W. Va.) 95 S. E. 802; and cases collected in L. R. A. 1917 C, 550.

MINES AND MINERALS—EXTRALATERAL RIGHTS—TWO FISSURES WITH ONE APEX.—Some distance below the apex a true fissure vein separated into two fissures or descending limbs, one of which dipped northerly through one side line and the other of which dipped southerly through the opposite side line. *Held,* that the one apex controlled both descending limbs and that the location of the apex had extralateral rights on both limbs and through both side lines. *Jim Butler Tonopah Mining Co. v. West End Consolidated Mining Co.* (1918) 38 Sup. Ct. 574.

This is quite consistent with previous decisions dealing with veins forming a junction on the dip. Where there are two apices they may be located separately and the elder location gets the entire vein at the line of junction and below. U. S. Rev. St. sec. 2336. In the lower court the vein in this case had been described as an anticlinal fold, the crest of which was held to be an apex. *Jim Butler, etc. Co. v. West End, etc. Co.* (1916) 39 Nev. 375, 158 Pac. 876. That supposed "crest" now appears to be the top edge of a single fissure, splitting below into two descending limbs.

STATUTORY CONSTRUCTION—PRACTICE OF MEDICINE—DIAGNOSING DISEASE.—The defendant, a "chiropractor" who held no license to practice medicine, examined a patient, made a diagnosis of abdominal tumor, and recommended an operation by a competent surgeon. The defendant was convicted of "practicing medicine" without a license. *Held,* that the diagnosis of disease constituted the "practice of medicine" within the meaning of the Minnesota statute. *State v. Rolph* (1918, Minn.) 167 N. W. 553.

The decision follows previous adjudications in Minnesota. Statutes regulating the practice of medicine fall into two classes: (1) those which seek to prevent the use of drugs, surgical instruments, etc., by unlicensed persons; (2) those which seek to prevent the practice of the healing art in any manner by unlicensed persons. Under the first class, the "chiropractor" is not practicing medicine. *State v. Fite* (1916) 29 Idaho, 463, 159 Pac. 1183. Under the second class, he is. *People v. Oakley* (1916) 30 Cal. App. 419, 158 Pac. 505.

WILLS—LEGACIES ON CONDITION—CONDITION DEPENDENT UPON CONDUCT OF LEGATEE'S HUSBAND VOID.—A testator bequeathed property in trust, directing the trustee to pay the income thereof to the testator's two granddaughters upon the condition that they and their husbands, if they should marry, entirely abstain from the use of tobacco and of all kinds of intoxicating liquors as a beverage, and adopt a particular spelling of the testator's surname "Tyrrel"

whenever they should have occasion to write or spell it. The trustee filed a bill to construe the will. One of the granddaughters was married and her husband was living. *Held,* that the conditions were valid in so far as they were made dependent upon the conduct of the beneficiaries themselves, but were void in so far as they were made dependent upon the conduct of the husbands of such beneficiaries. *Holmes v. Connecticut Trust & Safe Deposit Co.* (1918) 92 Conn. 507, 103 Atl. 640.

The court reasons that too great a power of domination would be furnished the husband if he could threaten: "If you don't do as I wish, I'll smoke and you will lose your legacy!" Such power would be conducive of longings to escape from the marital yoke, and provocative of family discord. Hence the conditions are opposed to public policy and void. No precedent is cited; nor has one been found, but the reasoning seems sound. *Cf. Higgins v. Eaton* (1910, C. C. N. D. N. Y.) 178 Fed. 153, where a legacy to a sister, conditioned upon her brother going to live with her, was lost by his electing to live elsewhere. See also *Anonymous* (1913, Surr. Ct.) 141 N. Y. Supp. 700.

WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT—EXERTION RUPTURING DEFECTIVE HEART.—In a proceeding under the Indiana Workmen's Compensation Act (Laws 1915, ch. 106) for compensation because of the death of a coal miner while loading a coal car, it appeared that the death was due to a rupture of the aorta, which was in a diseased condition and apparently liable to be ruptured by any kind of violent or sudden physical exertion. The rupture in fact took place when the workman exerted himself to aid in pushing the car along the track. *Held,* that the accident arose out and in the course of the employment. Dausman, J., *dissenting. Indian Creek Coal & Mining Co. v. Calvert* (1918, Ind.) 119 N. E. 519.

The case turns of course upon the meaning of the words, "accident arising out of the employment." The opinion of the majority contains a review of many of the leading English and American cases, and is in accord with the general trend of the later decisions. *Cf.* (1917) 27 YALE LAW JOURNAL, 144; *ibid.* 578.

WORKMEN'S COMPENSATION ACT—PERSONS ENTITLED TO COMPENSATION—EFFECT OF WIDOW'S REMARRIAGE.—In a proceeding for compensation under the Massachusett's Workmen's Compensation Act (St. 1911, c. 751, pt. 2, sec. 6, as amended) the defense was that the one seeking compensation, the widow of the deceased employee, had remarried and was no longer dependent for her support upon payments under the Act. *Held,* that the remarriage of the widow did not terminate her right to compensation. *Bott's Case* (1918, Mass.) 119 N. E. 756.

The precise question involved in this case seems not to have been previously decided. The court had previously held in *Murphy's Case* (1916) 224 Mass. 592, 113 N. E. 283, that upon a dependent's death the right to payments under the Act did not pass to his personal representatives, as that would frequently result in payments to persons in no way dependent upon the deceased. The present case construes the act to mean that a person who is a "dependent" at the time of the injury remains so in spite of a subsequent change in the condition of actual dependency. The decision seems to carry out the meaning of the words used in the Massachusetts statute. As the court suggests, if it be

thought that the result is undesirable, the only remedy is to apply to the legislature. In some jurisdictions this has already been done. See following note. *Cf. Moore v. Peet Bros. Manufacturing Co.* (1917) 99 Kan. 443, 162 Pac. 295.

WORKMEN'S COMPENSATION ACT—WIDOW'S RIGHT TO COMPENSATION—EFFECT OF STATUTE TERMINATING COMPENSATION AFTER REMARRIAGE.—Section 12 of the New Jersey Compensation Act of 1911 provided for weekly compensation for 300 weeks to the widow of an employee killed in the course of employment. A later amendment provided that the right "under this section" shall cease if the widow shall remarry." The plaintiff's husband was killed prior to the amendment and the defendant paid the compensation until her remarriage. She sued for weekly installments accruing thereafter. *Held,* that the plaintiff was entitled to recover, since her right to compensation for the full 300 weeks was a "vested right." *Hansen v. Brann & Stewart Co.* (1917, N. J. Sup. Ct.) 103 Atl. 696.

The principal case is noteworthy, not because it enunciates any new or striking principle, but because it is concerned with a new phase of the law: workmen's compensation, and an old concept: "vested rights." There is little doubt as to the soundness of the decision; the court follows the general rule as to when a right created by statute becomes "vested" and is-beyond revocation.