CURRENT DECISIONS

ARMY AND NAVY—DRAFT ACT—"WAR MARRIAGE" DOES NOT EXEMPT DRAFTEE.—The petitioner, having been directed to report for military service, sought by *certiorari* to review the action of a District Board which had placed him in Class 1. He had claimed deferred classification as a married man but his marriage took place June 27, 1917. Section 72, rule 5, of Selective Service Regulations directs draft boards to scrutinize marriages contracted since May 18, 1917, and to determine whether such marriage was entered into with a view to evading military duty, "and unless such is found not to be the case" to disregard the marriage in the classification of the registrant. *Held*, that the petitioner was properly classified, since the registrant must prove affirmatively that his marriage was not contracted with a view to evading the draft. *Boitano v. District Board* (1918, N. D. Cal.) 250 Fed. 812.

So-called "war marriages" gave the local draft boards much trouble. This decision seems clearly correct. Indeed, as the court says, the discharge of the petitioner's writ might have been rested upon the finality of the finding by an administrative board such as are the draft boards. See (1918) 27 YALE LAW JOURNAL, 683, at 686.

ATTORNEYS—POWERS AND COMPENSATION—APPOINTMENT BY COURT TO PROTECT INTEREST OF SOLDIER DEFENDANT.—Pursuant to the Soldiers' and Sailors' Civil Relief Act (Act Cong. Mar. 8, 1918), an attorney was appointed by the court to represent and protect the interest of a defendant who was in military service. Questions as to the attorney's authority to serve a notice of appearance for the defendant, and as to his compensation were presented on motions. *Held*, that while the appearance of such attorney might properly be noted at any stage of the proceeding, he had no right to serve a notice of appearance or answer binding upon the absentee; also that no provision was made by the laws of New York for compensation for services rendered by such attorney. *Davison v. Lynch* (1918, Sup. Ct. Sp. T.) 171 N. Y. Supp. 46.

The general features of the Soldiers' and Sailors' Civil Relief Act were discussed in (1918) 27 YALE LAW JOURNAL, 802. The principal case appears to be the first reported decision construing the Act in respect to the questions here involved. As to the first point, the subject is clearly covered by the terms of the Act that "no attorney appointed under this Act . . . shall have power to waive any right of the person for whom he is appointed or bind him by his acts." On the subject of compensation the court says that "every member of the bar should regard it as his patriotic duty to devote his best efforts to the protection of a defendant in the military service regardless of compensation." To this call the profession is certain to make a patriotic response.

BILLS AND NOTES—PAYEE AS HOLDER IN DUE COURSE—EFFECT OF N. I. L.—The defendant endorsed for accommodation a note in which the name of the payee had not been filled in. His endorsement was obtained by the fraudulent delivery to him of a worthless mortgage as security, and by the false promise of the maker's agent that the plaintiff's name should not be inserted as payee. The note was complete when delivered to the plaintiff, who took it in good faith in settlement of a claim against the maker. The plaintiff recovered judgment and

the defendant appealed. *Held,* that the judgment was correct, as the payee of this promissory note was a holder in due course. *Johnston v. Knipe* (1918, Pa.) 103 Atl. 957.

That a payee might be a holder in due course at common law was undoubted. Whether he may still be such under the N. I. L. depends on whether sec. 30 (original notation) is held by its enumeration to exclude every other form of negotiation, such as, *e. g.,* that to a payee. Here, as in other connections, the saner and sounder result seems to be obtained by regarding the N. I. L. not as a codification intended to be exhaustive, but as legislation which left the common law in force in *all* points not fairly covered by the language of the statute. See Comments (1918) *27* YALE LAW JOURNAL, 686. The instant case applies this salutary principle. There is not over-much authority on the precise point. See (1915) 24 YALE LAW JOURNAL, 429, and (1918) *27 ibid.* 558.

CONTRACTS—DEFENSES—EPIDEMIC OF INFANTILE PARALYSIS EXCUSING NON-PERFORMANCE.—The plaintiffs agreed to manage and provide prizes for a baby show at Charter Oak Park in Hartford on September 6, 1916. The defendant promised to supply a room for the show and to pay the plaintiffs $600. About the middle of August the defendant notified the plaintiffs that it wished to cancel the contract because of an epidemic of infantile paralysis which would make it dangerous to health to hold the baby show at the time proposed. To an answer setting up these facts the plaintiffs demurred. *Held,* that the defense was good, since the holding of the proposed show under the circumstances would, as matter of law, be contrary to public policy, and therefore the abandonment of it upon such contingency was an implied term of the contract. Two judges *dissenting. Hanford et al. v. Connecticut Fair Ass'n* (1918) 92 Conn. 621, 103 Atl. 838.

The dissenting judges in a very persuasive opinion combat the broad principle that whenever an otherwise lawful act becomes dangerous to public health because of an external temporary condition it automatically becomes contrary to public policy and therefore unlawful, without any statute or order from health officials declaring it to be so.

CONSTITUTIONAL LAW—INDIANA PROHIBITION LAW VALID.—The Prohibition Law of Indiana (Acts 1917, ch. 4) prohibits the manufacture, sale, gift, advertisement or transportation of intoxicating liquor except for certain specified purposes. The plaintiffs, brewers, sought an injunction to restrain the superintendent of police of an Indiana city from enforcing the law, on the ground that it violated the state constitution. *Held,* that the law was a valid exercise of the police power. Spencer, J., *dissenting. Schmitt v. F. W. Cook Brewing Co.* (1918, Ind.) 120 N. E. 19.

This case is of interest for the reason that almost alone among the authorities stands the case of *Beebe v. State* (1855) 6 Ind. 501, holding that the state legislature had no power to prohibit the manufacture and sale of intoxicating liquors. The principal case overrules that decision. Mr. Justice Spencer dissented not merely on the ground of *stare decisis* but upon what he believed to be sound constitutional principles.

COURTS—CIRCUIT COURT OF APPEALS—FOLLOWING PRECEDENTS FROM OTHER CIRCUIT COURTS.—The state of Arkansas imposed an annual tax on a railroad company for the privilege of exercising its franchise within the state, making the tax a first lien on the property of the corporation, whether in its own hands or

those of an assignee, receiver, etc. Receivers were appointed in a creditors' suit. The state intervened, praying that the receivers be ordered to pay the franchise taxes for the years since their appointment, with the penalties for non-payment. From such an order the receivers appealed. *Held*, that the order was correct, the court following a decision by the Circuit Court of Appeals of another Circuit decreeing payment of the taxes and penalties. *Bright v. State of Arkansas* (1918, C. C. A. 8th) 249 Fed. 950.

In view of the conflict of authority on the point at issue, the court followed by preference a decision of the Circuit Court of Appeals of the Ninth Circuit. Its sane pronouncement on such action is worthy of note. "In deciding questions of policy and practice which involve no vital moral issue, certainty in the law and uniformity of decision are often more essential to the wise administration of justice and to the interests of business men than a particular policy or practice. Where the correct decision of such a question is doubtful, and one of the United States Circuit Courts of Appeals has decided it in a considered opinion, it is the duty of the others to follow that decision, unless it clearly appears to them, or to some of them, to be unfair or unwise, and it is the duty of the courts at all times, in the consideration of such issues, to lean towards uniformity of decision and practice."

COURTS-MARTIAL—PERSONS SUBJECT TO MILITARY LAW—COOK UPON ARMY TRANSPORT.—The petitioner, a civilian, was employed in time of war by the U. S. Quartermaster's Department and was assigned as cook upon an army transport lying at the Bush Terminal, Brooklyn. Just before the ship was to sail he attempted to desert, was arrested by military police and held for trial by court-martial. He petitioned for a writ of *habeas corpus*. *Held*, that he was "a person serving with the armies of the United States in the field" and therefore was subject to military law and to trial by court-martial. *Ex parte Falls* (1918, D. N. J.) 251 Fed. 415.

In holding that service "in the field" may be performed at any place, whether on land or on water, where such service is required for the good of the regular army, the court gives a liberal but sensible interpretation to section 2 of the Articles of War. The decision finds support in *Ex parte Gerlack* (1917, S. D. N. Y.) 247 Fed. 616, noted in (1918) 27 YALE LAW JOURNAL, 968.

GARNISHMENT—EFFECT OF GOVERNMENTAL CONTROL OF RAILROADS FOR WAR PURPOSES.—In an action against the Pennsylvania Railroad Company certain other railroads were summoned on January 29, 1918, as garnishees. Prior thereto all the companies had been taken under federal control pursuant to the President's Proclamation of December 26, 1917. The garnishees admitted traffic balances owing to the Pennsylvania but contended that they could not be subjected to garnishment because of that provision of the Proclamation which declared that "except with the prior written consent of [the Director General], no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers. . . ." *Held*, that such traffic balances were not subject to garnishment. *Dooley v. Pennsylvania Railroad Co. et al.* (1918, D. Minn.) 250 Fed. 142.

The legality of the above quoted provision of the President's Proclamation was questioned in a *dictum* in *Muir v. Louisville & N. R. R. Co.* (1918, W. D. Ky.) 247 Fed. 888, 896. The principal case sustains it as incidental to the general power to take possession of the railroads conferred upon the President

by act of August 29, 1916. 39 U. S. Stat. at L. 645. If this be sound, the decision that traffic balances form part of a revolving fund which is as necessary to the operation of the road as are cars and engines, seems also correct.

LIBEL AND SLANDER—ACTIONABLE WORDS—STATEMENT THAT CANDIDATE FOR OFFICE IS NOT A CITIZEN.—The defendant published in its paper a statement that the plaintiff, who was a candidate for the office of village clerk, was not a citizen of the United States. Citizenship was a requisite of eligibility to the office in question; the plaintiff was a naturalized citizen. *Held*, that under the circumstances the words were libelous. *MacInnis v. National Herald Printing Co.* (1918, Minn.) 167 N. W. 550.

The decision seems clearly correct. As the court said, there was no need to find a case precisely in point. The meaning of language depends, of course, upon the circumstances under which it is uttered. While the words in question under ordinary circumstances would clearly not be libelous, it is equally clear that as here used they charged the plaintiff with seeking an office for which he was ineligible, and thus lessened him in public esteem and confidence. It should be noted that the appellate court sustained a verdict for punitive damages, on the ground that the circumstances attending the publication of the statement showed "actual malice."

RECORDING ACTS—NOTICE BY RECORD—MORTGAGE RECORDED IN WRONG COUNTY COMMONLY BELIEVED THAT IN WHICH LAND WAS LOCATED.—A mortgage was recorded in the county in which it was commonly believed the mortgaged land was situated. The mortgage deed described the land as in that county. Later the Supreme Court decided that the strip of land of which the mortgaged property was a part was in another county. Subsequently the mortgagor conveyed to a purchaser who had no actual notice of the mortgage. This grantee recorded his deed in the county where the land was. Still later the mortgage was also recorded in that county. In the present action for foreclosure of the mortgage the defendant claimed title under the deed first recorded in the proper county. *Held*, that the record of the mortgage in the county commonly believed to be the one in which the land was situated was constructive notice to subsequent purchasers. Whiting, P. J., *dissenting*. *Hulsether v. Peters* (1918, S. D.) 167 N. W. 497.

There is apparently little authority upon the point. The principal case is in accord with the view taken in *Stewart & Theus v. Walsh* (1871) 23 La. Ann. 560. A strict construction of the language of the recording acts, however, would lead to the opposite conclusion. *Adams v. Hayden* (1883) 60 Tex. 223. If the object of recording is to give intending purchasers opportunity to examine into the title, the decision seems sound, for obviously they would examine the records of the county in which the community believed the land to be situated. The only doubtful point is raised by the fact that plaintiff, a non-resident, failed to record the mortgage in the proper county for nearly two years after the Supreme Court's decision settling the boundary, and it was during this interval that the subsequent grant was made. However, it may well be argued that intending purchasers who knew of the decision ought to examine the records of the county in which the community previously supposed the land lay. If so, the result reached is sound.

TORTS—PICKETING—INJUNCTION AGAINST PICKETING BY UNION WORKMEN.—Upon the plaintiff's refusal to unionize his restaurants, most of his employees

went out on strike and caused his places of business to be "picketed." The pickets patrolled the sidewalks in front of his premises and carried placards reading, "This café is unfair to union labor." There was some evidence of disorder and of attempts to intimidate patrons. The plaintiff's business fell off largely. An injuction was issued forbidding, among other things, picketing or patrolling the sidewalks adjacent to the plaintiff's premises with such placards, or dissuading persons who sought to enter the premises from patronizing or working for the plaintiff. *Held*, that the injunction was properly granted. Two judges *dissenting*. *Local Union No. 313, etc. v. Stathakis* (1918, Ark.) 205 S. W. 450.

The subject of enjoining picketing had not before been passed upon by the Arkansas court. The opinion lays down the principle that a labor union which is on strike is privileged to give publicity to that fact but, in doing so, must not disregard the "right of the employer to employ whom he pleases" and to carry on business with the public free from coercive molestation. The actual decision, affirming the sweeping injunction, seems in fact to go beyond this principle and to forbid any kind of picketing immediately adjacent to the premises. Picketing there, the court treats as *per se* coercive; while picketing at a distance "gives the member of the public whose support is thus solicited an opportunity for reflection." That picketing is *per se* coercive is likewise held in *Webb v. Cooks', Waiters' etc. Union* (1918, Tex. Civ. App.) 205 S. W. 465.

TRUSTS—CONSTRUCTIVE TRUST—ORAL PROMISE OF HEIR TO HOLD LAND IN TRUST.—The plaintiff was sole heir to her father. The latter when about to die asked plaintiff to promise to divide all his property equally between herself and the defendant. The plaintiff so promised, assuring the father that no will would be necessary to carry out his wishes. Defendant knew nothing about the promise until after the death of the father and the probate of the will. The plaintiff purchased with a portion of the funds, not amounting to half, a piece of real estate and placed defendant in possession of the same, stating at the time that she gave it to her. In no other way did she give the defendant any portion of the property inherited from the father. Plaintiff, who had never conveyed the legal title to the land, brought the present action to recover possession of the same. *Held*, that plaintiff had only a bare legal title and was not entitled to possession. *Barrett v. Thielen* (1918, Minn.) 167 N. W. 1030.

The court reached its conclusion on the following grounds: (1) that an heir, who makes an oral promise to his ancestor to dispose of the property for the benefit of certain persons and thereby leads the ancestor to refrain from making a will, is in equity a constructive trustee for the intended beneficiaries; (2) that the land in question was therefore purchased with funds and under the circumstances belonged in equity to the defendant; (3) that under Minnesota code procedure an "equitable title" may be set up as a defense to an action for possession brought by the holder of a "legal title without beneficial interest." The view of the court as to the first point is the prevailing one. (1918) 27 YALE LAW JOURNAL, 389. It was applied in the recent case of *Arntson v. First Nat. Bank* (1918, N. D.) 167 N. W. 760. The second proposition follows if the first be admitted. Upon the third point the law in Minnesota differs from that in many, perhaps most, code jurisdictions. See (1917) 26 YALE LAW JOURNAL, 592.

TRUSTS—UNINCORPORATED ASSOCIATIONS—DISPOSITION OF PROPERTY ON DISSOLUTION.—Funds were held in trust for a constantly changing group of beneficiaries—injured employees of a mining company and their dependents in case

of death. The company and each employee contributed to the fund. On leaving the service of the company an employee ceased to have any claim for injury or death benefits. The company went out of business, at which time there was on hand in the fund nearly $55,000. Those who were employees when the company ceased doing business claimed that the whole fund was held in trust for them; the company claimed that a resulting trust for it existed for a share proportioned to its contribution; persons previously employed also made claims for shares. The plaintiff, trustee of the fund, filed a bill of interpleader. *Held*, that there were resulting trusts in favor of all who had at any time contributed to the fund, in proportion to the contributions of each. *Walters v. Pittsburgh & Lake Angeline Iron Co.* (1918, Mich.) 167 N. W. 834.

The agreements entered into by the contributors in this case were not very definite and no provision was made for the distribution of any surplus. The decision follows the view taken in the case of *Coe v. Washington Mills* (1889) 149 Mass. 543, 21 N. E. 966, upon the principle that where an express trust comes to an end without exhausting a fund, there is a "resulting trust" for the grantor. If there is anything in the agreement of the contributors which indicates an intention that no trust shall result—as may well happen in cases similar to the one in hand—that intention will be given effect. See *In re Customs & Excise Officers Fund* [1917] 2 Ch. 18, commented upon in (1918) 27 YALE LAW JOURNAL, 418.

WILLS—TESTAMENTARY CAPACITY—SOLDIER UNDER AGE EXERCISING POWER OF APPOINTMENT BY WILL.—An English officer under age, while on active service with the army, made his will, duly executed and attested, by which he exercised a power of appointment over personal property. After the will was admitted to probate, proceedings in chancery were instituted by persons who would be entitled to the property if the power were invalidly exercised, claiming the will was void. *Held*, that the power was validly exercised. *Re Wernher* (1918, C. A.) 118 L. T. 388.

The same decision had been reached by the lower court, but Younger, J., there expressed the opinion that the practice of the Probate Court of admitting wills of infant soldiers was not warranted by the Wills Act of 1837. See Comment in (1918) 27 YALE LAW JOURNAL, 806. Following the handing down of this opinion the Wills (Soldiers' and Sailors') Act of February 6, 1918, was enacted "in order to remove doubts as to the construction of the Wills Act of 1837." It declared that Section 11 of that Act had always authorized the infant soldier in actual military service to dispose of his personal estate by will. This legislation, the court now says, puts to rest the question of the validity of the will; and it was held also that the power to dispose of "his personal estate" included the power to appoint personal estate. In America it would seem that such retroactive legislation could hardly be sustained. If the will were invalid at the time of the testator's death, any subsequent statute declaring it operative would run foul of constitutional prohibitions. See *Greenough v. Greenough* (1849) 11 Pa. St. 489.