RECENT CASE NOTES

ADMIRALTY—AFFREIGHTMENT CONTRACTS—PREPAID FREIGHT UNRECOVERABLE ALTHOUGH VESSEL DID NOT SAIL.—A sailing vessel in New York had loaded a cargo for Bordeaux and was about to sail when the Government embargoed all voyages of sailing vessels to the war zone. The ship thereupon discharged the cargo. The freight had been prepaid, under a bill of lading containing the clause "Freight . . . to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost," and the usual "restraint of princes" exception. The cargo-owners libelled the vessel for the return of the prepaid freight. *Held,* that they were not entitled to recover. Hand, J., *dissenting. The Gracie D. Chambers* (1918, C. C. A. 2nd) 253 Fed. 182.

On analogous facts, a similar result was reached in *The Bris* (1918, S. D. N. Y.) 253 Fed. 259.

It is admitted that in these cases the freight had not been earned and, if not prepaid, could not have been recovered by the shipowner. *The Tornado* (1882) 108 U. S. 342, 2 Sup. Ct. 746. Even though prepaid, if the voyage remain uncompleted without any participation in the default by the cargo-owner, the prepaid freight may in the United States be recovered from the shipowner. *Watson v. Duykinck* (1808, N. Y. Sup. Ct.) 3 Johns. 335; *Griggs v. Austin* (1825, Mass.) 3 Pick. 20. The decision in the instant case, therefore, must rest on the exceptional agreement to the contrary in the bill of lading, and to reach this conclusion the majority interpolated the word "retained" after "irrevocably," to make the phrase read "irrevocably retained." An analogous, though less doubtful, clause was similarly construed in *National Steam Nav. Co. v. International Paper Co.* (1917, C. C. A. 2nd) 241 Fed. 861. This concededly inequitable result of denying the recovery by the shipper of unearned but prepaid freight is reached in England without any special agreement to that effect. *Coker v. Limerick S. S. Co.* (1918, H. L.) 34 Times L. R. 296. The Court of Exchequer has admitted that the rule is unsatisfactory in principle but considered it too well-established to overrule. *Byrne v. Schiller* (1871, Exch.) 1 Aspinwall Mar. Cas. 111. The dissenting judge in the instant case, in view of the doubtful wording of the clause, construed it to apply only after the vessel had broken ground. See *The Tornado.* (1882) *supra,* at p. 349 (as to time of commencement of the contract of affreightment), and *The Allanwilde* (1917, D. N. J.) 247 Fed. 236 (where the vessel put back to port on account of distress). The court's *dictum* that "freight is earned only upon delivery of cargo" has many exceptions; it does not apply, for example, where *force majeure* terminates the voyage before completion, the shipper waiving delivery or voluntarily accepting his cargo at an intermediate port, or where the non-delivery is in part due to the act or default of the shipper. See *The Nathaniel Hooper* (1839, C. C. Mass.) Fed. Cas. 10,032, an able opinion by Mr. Justice Story; *Hunter v. Prinsep* (1808, K. B.) 10 East 378, 394; *Cargo ex Galam* (1863) 33 L. J. Adm. 97.

ALIEN ENEMIES—SUIT IN NEUTRAL FORUM—CHANGE IN STATUS OF FORUM FROM NEUTRALITY TO BELLIGERENCY PENDING APPEAL.—The plaintiff, a British company, sued out a libel in the federal District Court in New York against a vessel there in port belonging to the defendant, an Austrian company, to enforce payment for coal delivered at Algiers by the plaintiff to the defendant before the declaration of war between Great Britain and Austria. From a

judgment dismissing the libel an appeal was taken. While it was pending, war on Austria was declared by the United States. *Held*, that in view of the change of status of the United States from neutrality to co-belligerency with the plaintiff's country against the defendant's country, the decree of dismissal must be reversed, but that action upon the libel should be suspended until peace should remove the difficulty of communication between the defendant's officers in Austria and its American counsel. *Watts, Watts & Co. Ltd. v. Unione Austriaca di Navigazione* (1918, U. S.) 39 Sup. Ct. 1.

The case is divisible into two distinct parts, covering (1) the period of American neutrality, and (2) the period of belligerency. A United States court is privileged in its discretion to assume jurisdiction over a suit between foreigners, although the contract out of which it arose was made and was to be performed in a foreign country. Such jurisdiction is usually assumed unless reasons of expediency or treaty provisions forbid. *The Elwine Kreplin* (1872, D. C. E. D. N. Y.) 9 Blatch. 438 (treaty). Reasons of expediency forbid the assumption of jurisdiction, for example, when access to the national courts of the parties is easy, the cause of action being governed by their national law, and when the suit is for seamen's wages. See *Montalet v. Murray* (1807, U. S.) 4 Cranch, 46 (suit on promissory notes made in St. Domingo); *Willendson v. The Försöket* (1801, D. C. Penn.) 1 Pet. Adm. 197 (seaman's suit for wages); see also *Panama Railroad Co. v. Napier Shipping Co.* (1896) 166 U. S. 280, 285, 17 Sup. Ct. 572. Jurisdiction is never declined where the case arises *communis juris* and involves the application of law common to all nations. *Mason v. Blaireau* (1804, U. S.) 2 Cranch 240, 264 (salvage); *The Belgenland* (1884) 114 U. S. 355, 365, 5 Sup. Ct. 860 (involving a collision on the high seas between foreign vessels) and other cases there cited. Inasmuch as in the instant case the general rule of international law and the law of the country of the plaintiff, of the defendant and of the forum were in harmony, to the effect that the payment of money during war by the subject of one belligerent to the subject of another is unlawful, it is unquestionable that the District Court had power to assume jurisdiction, although the refusal to exercise it to enforce payment by the defendant during the war was a proper use of its discretion as a court of a neutral nation. This was the ground of decision dismissing the libel. See 224 Fed. 188. After war broke out between the United States and Austria, the legal situation of the parties changed. The case became a suit by one belligerent in the court of a co-belligerent against a common enemy. The refusal to exercise jurisdiction must then rest on other grounds. It is a common rule that in the case of contracts executed prior to war, a state of war does not render them void, but merely suspends the remedy for their enforcement. *Ex parte Boussmaker* (1806, Ch.) 13 Ves. 71. This rule suspends suits brought by alien enemy plaintiffs. Plaintiffs are also barred by the rule that non-resident alien enemies have no standing *in judicio*. Neither rule grants to alien enemy defendants immunity from suit. See *Robinson v. Continental Insurance Co.* [1915] 1 K. B. 155, 161; *McVeigh v. United States* (1870, U. S.) 11 Wall. 259, 267; and article by C. M. Picciotto in (1917) 27 YALE LAW JOURNAL, 167, 173. But principles of civilized justice require that an enemy defendant have full opportunity to be heard in defence and to communicate with counsel. *Windsor v. McVeigh* (1876) 93 U. S. 274, 280; *The Kaiser Wilhelm II* (1917, C. C. A. 3rd) 246 Fed. 786, 790. This principle was applied by the Supreme Court in the instant case, notwithstanding a stipulation as to the facts and the proof of foreign law entered into at the beginning of the suit by the defendant's counsel. The decision is novel but seems in accord with established principles.

CONSTITUTIONAL LAW—ADMIRALTY JURISDICTION—ACT OF CONGRESS REVIVING STATE COMPENSATION LAWS FOR MARITIME INJURIES.—The claimant, a stevedore, was injured while at work on board ship on February 26, 1918. By Act of October 6, 1917, Congress amended the Judicial Code dealing with the grant of admiralty jurisdiction to federal courts, so as to save "to claimants the rights and remedies under the compensation law of any state." On April 17, 1918, the New York Legislature re-enacted the compensation law previously held unconstitutional as to maritime injuries in the *Jensen* case. *Held,* that the claimant was entitled to compensation under the New York Workmen's Compensation Law. *Cimmino v. John T. Clark & Son* (1918, App. Div.) 172 N. Y. Supp. 478.

This is another attempt to evade the unfortunate results of the decision in *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524, discussed in (1917) 27 YALE LAW JOURNAL, 255. The court relies without comment upon the Act of Congress of Oct. 6, 1917, 40 U. S. St. at L. 395. It does not discuss the questions as to the constitutionality and effectiveness of this Act, referred to in the Comment thereon in (1918) 27 YALE LAW JOURNAL, 924, 926. It merely cites and relies upon the case there criticised, *Veasey v. Peters* (1918, La.) 77 So. 948. Assuming the constitutionality of the Congressional Act, an interesting question arises whether the remedies it purports to save to claimants can be availed of without a re-enactment after the passage of the Act of Congress of the state compensation laws. Apparently in order to avoid giving the New York law of April 17, 1918, a retroactive operation, the court held that it was unnecessary to re-enact the provisions of the prior compensation law relating to maritime injuries and that these provisions were revived and made operative by the mere passage of the Act of Congress. This, it is submitted, raises a very debatable question. The analogy, suggested by the court, of state statutes validly passed but suspended while acts of Congress are in force, seems not well taken. In view of the *Jensen* case, the situation is rather one of "a law enacted in the unauthorized exercise of a power exclusively confided to Congress." See *Re Rahrer* (1891) 140 U. S. 545, 565, 11 Sup. Ct. 865, 875. Nor does the case which the court relies upon—*Allison v. Corker* (1901) 67 N. J. L. 596, 600, 52 Atl. 362, 363—supply authority for the proposition claimed, for that case held only that a statute which is unconstitutional may, after removal of the constitutional restriction, be imported into valid legislation by appropriate reference, the matter being one purely of identification. It is commonly declared that an unconstitutional statute is absolutely null and is not validated by subsequent removal of the constitutional restriction. *Norton v. Shelby County* (1886) 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125 (*semble*); *State v. Tufly* (1890) 20 Nev. 427, 22 Pac. 1054 (statute void *in toto*); Cooley, *Const. Limitations* (7th ed.) 259. This principle, if sound as applied to a statute unconstitutional in part, as Cooley declares, is contrary to the court's decision. But at least one New York case, though not cited by the court, furnishes some support for its opinion. *People v. Roberts* (1896) 148 N. Y. 360, 42 N. E. 1082 (state civil service law unconstitutional as applied to a certain office). The problem can scarcely be settled by logic. A statute void *in toto* may well be treated as thrown into the discard, and it would be inconvenient, when a constitutional restriction is removed, to have to search all such discarded legislation to see if it were not revived. But where a statute has in the main remained operative, the extension of it to a new field, within its terms but excluded by a constitutional restriction now removed, seems somewhat less unreasonable.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—JURISDICTION TO ASSESS STOCKHOLDERS.—In proceeding against a Minnesota corporation, a Minnesota court which had jurisdiction of the corporation entered an order appointing a receiver and laying an assessment on the stockholders. The receiver brought suit in North Dakota to enforce the assessment against one of the stockholders who apparently had not been served personally in the Minnesota proceedings. The North Dakota court found that the corporation was a manufacturing corporation within the meaning of a provision of the constitution of Minnesota, which declares that all stockholders in any corporation other than those organized for manufacturing and mechanical purposes, shall be liable to creditors to the amount of their stock, and concluded that the order laying the assessment was made without such jurisdiction as was necessary to bind the defendant. A writ of error was taken to the Supreme Court of the United States. *Held,* that the court of North Dakota had denied to the Minnesota proceedings the faith and credit to which they were entitled under the constitution and laws of the United States. Brandeis, Clarke and Pitney, JJ., *dissenting. Marin v. Augedahl* (1918) 38 Sup. Ct. 452.

The order of the Minnesota court was entitled to enforcement against the defendant in North Dakota only if it was made by a court having jurisdiction of the subject matter and of the defendant. As regards personal service upon the defendant it had been settled by various decisions of the Supreme Court of the United States that "as to all matters relating to the amount, propriety and necessity of the assessment," with respect to which the order of the court was expressly made conclusive by the laws of Minnesota, the stockholders are so far in privity with the corporation as to be represented by it. *Hawkins v. Hamilton* (1889) 131 U. S. 319, 9 Sup. Ct. 739; *Selig v. Hamilton* (1914) 234 U. S. 652, 34 Sup. Ct. 936; see also *Royal Arcanum v. Green* (1915) 237 U. S. 531, 35 Sup. Ct. 724, and Comment in (1916) 25 YALE LAW JOURNAL, 324. The order could not be attacked therefore for want of jurisdiction over the defendant either under the due process clause or the full faith and credit clause of the federal constitution. Did the Minnesota court have jurisdiction over the subject matter? There is no reasonable doubt that the corporation was a manufacturing corporation within the meaning of the constitutional provision of Minnesota. The order of the court was therefore erroneous. But unless the court was without jurisdiction the error could be corrected only by a direct application to the court or by appeal. A judgment cannot be impeached collaterally within or without the state with respect to the merits of the case. Black, *Judgments,* secs. 245, 857. The order laying the assessment involved necessarily a decision by the Minnesota court that the corporation belonged to the class whose stock was assessable. Such a finding was clearly binding in Minnesota upon all stockholders. *Merchants' Nat. Bank v. Minn. Thresher Mfg. Co.* (1903) 90 Minn. 144, 149, 95 N. W. 767, 769. Was the finding also binding in North Dakota? On this point there is much obscurity in the decisions. *Thompson v. Whitman* (1873, U. S.) 18 Wall. 457, laid down the doctrine that the record of a sister state might be contradicted as to jurisdictional facts asserted therein and even as to the facts stated to have been passed upon by the court. A more recent case holds that there has been no departure from that doctrine. *National Exchange Bank v. Wiley* (1904) 195 U. S. 257, 25 Sup. Ct. 70. It is submitted, however, that the doctrine should be limited to cases in which the facts are necessary to confer jurisdiction in the international sense. Whenever jurisdiction exists from an international point of view a finding of facts necessary to confer jurisdiction in the municipal sense should be conclusive until set aside by the courts of the state in which it was rendered, not only within the state but also outside of the state, under the full faith and credit clause. See *Pemberton v. Hughes* (C. A.)

[1899] 1 Ch. 781. Minnesota was competent, as regards international jurisdiction, to impose a statutory liability upon the stockholders of a Minnesota corporation. Whether it had exercised that power with respect to a particular corporation was purely a question of internal law. A decision on that point by the local courts should be free from collateral attack everywhere. In reaching the result that the order of the Minnesota court was entitled to full faith and credit in North Dakota the Supreme Court did not base its conclusion upon the distinction suggested above, although much of the reasoning of the court is in accord with such distinction. The decision rests nominally upon the ground that it was not the intention of the constitutional provision of Minnesota to affect the jurisdiction of the state courts. Applying the test laid down in *Fauntleroy v. Lum* (1908) 210 U. S. 230, 28 Sup. Ct. 641, the court regarded the provision as going to the *duty* of the court and not to its *power*. The question, from this point of view, is one of construction which, when its affects a court of general jurisdiction, will be resolved in favor of jurisdiction. In view of the fact that the constitutional provision did not deal expressly with the jurisdiction of courts, but with the liability of stockholders, and the further fact that the order in question was made by a court of general jurisdiction in connection with proceedings for sequestration, the case would seem to fall reasonably within the rule just stated.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—SUIT IN ILLINOIS ON ALABAMA JUDGMENT FOR WRONGFUL DEATH.—The defendants by their acts in Alabama had caused the death in that state of the plaintiff's intestate. The plaintiff obtained judgment in Alabama under the wrongful death statute of that state. Thereafter the plaintiff brought the present action in Illinois, basing his claim on the Alabama judgment. An Illinois statute provided that "no action shall be brought or prosecuted in this state to recover for damages for a death occurring outside of this state." *Held,* that the Illinois court had no jurisdiction over the plaintiff's action, and that the statute so construed did not violate the "full faith and credit" clause of the U. S. Constitution. *Kenney v. Supreme Lodge, etc., Loyal Order of Moose* (1918, Ill.) 120 N. E. 631.

See COMMENTS, p. 264.

CONSTITUTIONAL LAW—PUBLIC LANDS—POWER OF UNITED STATES TO EXEMPT HOMESTEADS FROM ATTACHMENT FOR PRIOR DEBTS.—In August 1912 the United States under the provisions of the federal statute as to granting homesteads conveyed land in Idaho to the plaintiff in fee simple. Under the terms of this statute land so acquired was not to "become liable to the satisfaction of any debt" of the grantee "contracted prior to the issuing of the patent therefor." U. S. Rev. St. sec. 2296. A creditor whose claim against the plaintiff accrued before the conveyance brought suits attaching the land and, after judgment, levied executions on the same. The plaintiff then brought the present proceeding to have the liens declared invalid. *Held,* that the limitations of the Act of Congress were valid and the land therefore was exempt from the creditor's claims. Holmes, J., *dubitans. Ruddy v. Rossi* (Dec. 9, 1918) U. S. Sup. Ct. Oct. Term, No. 17.

This case decides for the first time, so far as the Supreme Court is concerned, the validity of the federal statute concerned. The decision follows the current of authority in the state courts and the lower federal courts. See annotations in U. S. Comp. St., 1916, p. 5370, note 2. It settles a constitutional question of great theoretical interest as well as of practical importance. Has the federal government the power to determine that land in a state, after it

has ceased to be government property, shall not be subject to the state laws regulating ownership, at least as far as the effects of the original grant by the United States are concerned? Is the federal statute, as Mr. Justice Holmes describes it, "a pure attempt [by the United States] to regulate the alienability of land in Idaho by [federal] law, without regard to the will of Idaho?" Note that the federal government retains no interest in the land—"there is no condition, no reserved right of entry, no reversion in the United States." "Ownership" of property is of course a complex legal interest, *i. e.* a complex aggregate of jural relations—rights, privileges, powers and immunities. When one private person "transfers" real property to another what happens, from a legal point of view, is that the complex legal interest of the grantor is divested and the grantee is invested with a more or less similar aggregate of jural relations. How similar depends partly upon the words used in the deed, but also partly upon the legal effects attached to those words by the law of the jurisdiction in which the land is situated. In final analysis, therefore, it is the law which determines just what rights, etc., the new "owner" acquires. In the case in hand, the land in question was, before the patent was issued, under the jurisdiction of the federal government; after it became private property it passed under the jurisdiction of the State of Idaho, so that the legal effects of all subsequent transfers of ownership would be determined by the law of that state. The real question, therefore, seems to be this: may the United States in exercising its constitutional power to dispose of lands belonging to it—a power expressly granted by the Constitution—determine the legal effects of its own instrument of transfer and so the exact scope of the rights, privileges, powers and immunities which vest in the person to whom the patent is issued—all without reserving to the United States any interest in the property? In spite of the doubts of Mr. Justice Holmes, the majority of the court say that it may, on the ground that such a power is "necessary and proper" for the effective exercise of its undoubted power to dispose of the property in question. The result is that those who acquire homesteads from the United States have as a part of their complex legal interests—their "ownership" in fee simple—immunities which other owners in fee do not have from the claims of a certain class of creditors.

COPYRIGHTS—ROYALTIES—LIABILITY OF SUB-ASSIGNEE TO ORIGINAL LICENSOR.—The plaintiff, owner of a copyright, assigned it to P, who undertook to pay a royalty. P later became insolvent, and his receiver sold all the assets to the defendant, the latter taking an assignment of the copyright and agreeing to pay the royalty. The plaintiff sued this second assignee for royalties, claiming as beneficiary of the latter's contract with the receiver and also by virtue of a vendor's lien on the copyright. *Held,* that he could not under English law maintain suit as beneficiary of the contract, and that there was no lien in the absence of any words in the original assignment to P indicating any such intention. *Barker v. Stickney* (1918, K. B.) 119 L. T. Rep. 73.

See COMMENTS, p. 259.

CRIMINAL LAW — ROBBERY — ADMINISTRATION OF DRUG AS "FORCE." — The defendant administered a drug to the person in charge of a saloon in order to produce unconsciousness, and while the victim was in that state took money from the cash register. The state statute defining robbery required the unlawful taking of the property to be "by means of force or violence or fear" but added that "the degree of force is immaterial." *Held,* that the defendant was guilty of robbery. *State v. Snyder* (1918, Nev.) 172 Pac. 364.

The decision of the court is based upon the analogy of the cases which hold that if drugs are used to make a woman unconscious and her person is then violated, the crime of rape is committed. *Regina v. Camplin* (1845, C. C. R.) 1 Den. C. C. 89, s. c., 1 Cox C. C. 220. It must be noted, however, that to constitute rape there need be no other force used than is necessary to accomplish the intercourse. If the woman is ravished while unconscious because of drugs not administered by the accused; or if she is to the knowledge of the accused insane and so makes no resistance, rape is nevertheless committed. *Regina v. Fletcher* (1859, C. C. R.) 8 Cox C. C. 131; *contra, People v. Quin* (1865, N. Y. Sup. Ct.) 5 Barb. 128 (statutory). On the other hand, robbery is usually under our law distinguished by the presence of "force and violence" or at least "putting in fear." Picking a person's pocket is therefore not robbery, but merely larceny from the person. *Harman's Case* (1701, K. B.) 2 East P. C. 736. If, however, the article stolen is attached to the person and enough force is used to sever the attachment, robbery is committed. *Rex v. Mason* (1820, C. C. R.) R. & R. 419; *contra, Bowlin v. State* (1904) 72 Ark. 530, 81 S. W. 838. Similarly, if the force used injures the prosecutor's person, as where the woman's ear from which a ring was snatched was thereby torn. *Rex v. Lapier* (1784) 1 Leach, 360. Threats to use force which result in a "putting in fear" are also sufficient. *Hughes Case* (1825) 1 Lewin, 301. Was there, then, in the principal case sufficient force, over and above that necessary merely to take and carry away the money, to remove the offense from the field of larceny from the person into that of robbery? More in point than the authorities upon rape are the American cases holding that to induce another to take a drug in the belief that it is a harmless article of food or drink is to commit a criminal battery. *Johnson v. State* (1893) 92 Ga. 36, 17 S. E. 974. An English case takes the same view. *Reg. v. Button* (1838) 8 C. & P. 660. Later cases, however, disagree. *Reg. v. Hanson* (1849) 2 C. & K. 912. The American decisions are based upon the proposition that the chemical force thus set in motion is "force" within the meaning of that term as used in the definition of a battery. *Commonwealth v. Stratton* (1873) 114 Mass. 303. If so, it would seem that the administration of the poison to the prosecutor—the bringing of chemical force to bear upon his person—as a step in obtaining the property may very properly be held to be the use of "force" within the meaning of that word as used in the definition of robbery.

EVIDENCE—CORONER'S VERDICTS—ADMISSIBILITY IN PROCEEDING UNDER WORKMEN'S COMPENSATION LAW.—In a proceeding before the Industrial Board of Illinois for compensation under the Workmen's Compensation Law, the Board admitted in evidence a coroner's verdict that the deceased died from injuries which "resulted from a fall down a flight of stairs at Morris & Co.'s plant . . . as he was leaving his work." *Held,* that the evidence was admissible to show the circumstances under which the injury was received. Cartright, Dunn and Cook, JJ., *dissenting. Morris & Co. v. Industrial Board* (1918, Ill.) 119 N. E. 944.

In a similar proceeding the same Board admitted a coroner's verdict to the effect that the deceased "came to his death from septicæmia, due to a cut on his finger from fiber cane, accidentally received while in the discharge of his duties for the Peoria Cordage Co." *Held,* that the verdict was not admissible to show the circumstances under which the injury was received. Fanner, Carter and Craig, JJ., *dissenting. Peoria Cordage Co. v. Industrial Board* (1918, Ill.) 119 N. E. 996.

These two cases decided on the same day reveal a struggle within the court over the extent to which coroner's inquisitions are admissible in civil cases.

Note that the writer of the dissenting opinion in the first case is the author of the prevailing opinion in the second. Early common law cases seem to have admitted coroner's inquisitions as evidence in civil cases. *Toomes v. Etherington* (1660) 1 Wm. Saund. 361. They may be regarded as falling under the general exception to the hearsay rule which renders duly authorized official statements admissible. Wigmore, *Evidence,* sec. 1671. The tendency on the part of courts to-day is to exclude them as hearsay. *Hollister v. Cordero* (1888) 76 Cal. 849, 18 Pac. 855; Wigmore, *loc. cit.* Illinois has a long line of cases admitting them. *U. S. Life Ins. Co. v. Vocke* (1889) 129 Ill. 557, 22 N. E. 467 collects the authorities and has excellent opinions by Craig and Baker, JJ. The facts found, however, must not be "extraneous to the province of the inquest." *Chicago, M. & St. P. Ry. Co. v. Taylor* (1892) 46 Ill. App. 506 (verdict admitted to show how deceased came to his death, but not a finding that "the switchstand was negligently placed"). The finding in the second of the cases in hand, that the deceased came to his death "while in the discharge of his duties," seems to fall without the province of the coroner's inquest and therefore was rightly held inadmissible under prior Illinois cases. The first case may be distinguished on the ground that there is no similar finding, but merely a statement of the facts. It should be noted that the Illinois Industrial Board are bound by the common law rules of evidence. *Victor Chemical Works v. Industrial Board* (1916) 274 Ill. 11, 113 N. E. 173. Whether this is desirable or not depends in part upon the spirit of liberality or narrowness in which the rules of evidence are administered. In some states the Compensation Law frees the compensation boards or commissioners from following these rules. See Conn. Pub. Acts, 1913, ch. 138, part B, sec. 25; N. Y. Laws, 1914, ch. 41, sec. 68.

LEGACIES AND DEVISES—RELEASE OF LEGACY CHARGED UPON LAND DEVISED—VENDOR'S LIEN.—A testator bequeathed and devised all his estate to his son "subject to" certain specific legacies. A portion of the estate was real property. The legatees, in consideration of the son's promise to pay them the amounts of their legacies, executed in 1910 quitclaim deeds of the lands so devised. The son did not pay the legacies; and in 1916, after the promises to pay the amounts of the legacies were barred by the statute of limitations, one of the legatees, to whom the other legatees had meanwhile assigned their claims against the son, brought a bill in equity for the foreclosure of an alleged vendor's lien on the real property in question. *Held,* that the plaintiff was entitled to a foreclosure decree. Ostrander, C. J., *dissenting. Lavin v. Lynch* (1918, Mich.) 168 N. W. 1024.

The decision is placed by the majority of the court on the following grounds: (1) that the specific legatees each originally had an equitable charge or lien on the lands in question to secure the payment of his legacy; (2) that when each legatee quitclaimed to J., he acquired a "vendor's lien" in equity to secure the payment of the "purchase price" of his interest; (3) that this vendor's lien was assignable; (4) that the running of the statute of limitations against the promise to pay the price did not affect the validity of the lien. Ostrander, C. J., took the view that by a fair construction of the will, which apparently carried personalty as well as realty, the legacies never were a charge on the real estate and that therefore the quitclaim deeds conveyed nothing and had no effect except to clear up doubts upon that matter. So far as the construction of the will is concerned, the view taken by the dissenting judge seems the better. Assuming, however, the correctness of the views of the majority upon this point, their second point seems open to serious question. Previous

cases in Michigan had accepted the doctrine of "vendor's liens" and had applied it to the purchase and sale of equitable interests. *Ortmann v. Plummer* (1885) 52 Mich. 76, 17 N. W. 703. In the principal case, however, we are confronted by the fact that the interests sought to be "conveyed," *i. e.*, released or extinguished, by the quitclaim deeds were equitable liens on land owned by the one to whom they were "conveyed." If, as the majority opinion holds, the legatees after executing these deeds still had equitable liens on the land for the same amounts as before, it is difficult to see that the deeds had any effect whatever. Indeed the object of the whole transaction between the son and the legatees seems to have been to extinguish at the time the deeds were given any claims the latter had against the property and to take in exchange the son's personal legal duty to pay the amounts of the legacies. By holding that the legatees still had equitable liens this purpose is entirely defeated. The result reached by the majority seems therefore to be incorrect, even if we assume their construction of the will. It may be noted that by accepting the property given by the will the son had already placed himself under a personal duty to each of the legatees to pay him the amount of his legacy. *Burch v. Burch* (1875) 52 Ind. 36; Ames, *Cases on Trusts* (2d ed.) 3, n. 2.

MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—FRAUDULENT CONCEALMENT OF NATIONALITY IN TIME OF WAR.—A French woman married on August 24, 1914, in Paris, a person who claimed to be an Alsatian by birth and a Frenchman by nationality. He was in fact a German who was born in Darmstadt, Germany. The wife petitioned for an annulment of the marriage. *Held,* that she was entitled to a decree of annulment. *Re Schoenberg* (1918, Tribunal Civil de la Seine) 45 CLUNET 666.

See COMMENTS, p. 272.

QUASI-CONTRACTS — EFFECT OF EXPRESS CONTRACT INDUCED BY FRAUD — MEASURE OF RECOVERY.—The plaintiff sued for the reasonable value of work and labor done for the defendant, and to a plea that the work was done under an express contract replied that the contract was induced by the defendant's fraud. The value of the work done was more than the contract price. *Held,* that the plaintiff was not entitled to recover in indebitatus assumpsit except upon the express contract, and that damages were limited to the agreed price. *Prest v. Farmington* (1918, Me.) 104 Atl. 521.

See COMMENTS, p. 255.

RES JUDICATA—IDENTITY OF PARTIES AND CAUSES OF ACTION—JUDGMENT FOR WIFE NOT CONCLUSIVE IN HUSBAND'S ACTION FOR LOSS OF SERVICE.—In a former suit, the plaintiff's wife obtained judgment against the defendant for personal injuries caused by negligence. The plaintiff brought the present action for loss of his wife's service, and the court charged the jury that the wife's judgment was conclusive as to the defendant's negligence and as to her freedom from contributory negligence. *Held,* that the charge was erroneous. *Laskowski v. People's Ice Co.* (1918 Mich.) 168 N. W. 940.

A judgment to be available as *res judicata* must be between the same parties, or their privies, and for the same cause of action. 23 *Cyc.* 1237. The wife and husband, since the enabling statutes of married women, can no longer be considered one party. A suit to which only one was a party is generally held not to be *res judicata* in a suit brought by the other party, even when the husband

must be joined as a nominal plaintiff or defendant. *Solte v. Karren* (1917, Tex. Civ. App.) 191 S. W. 600; *Thompson v. Southern Lumber Co.* (1914) 113 Ark. 380, 168 S. W. 1068; *contra, Lindsey v. Danville* (1873) 46 Vt. 144. The principal case could be supported on this ground alone. It is believed, however, that as the wife's action was for injuries and the husband's for loss of service, the causes of action cannot be considered identical, although both are based on the same facts. See *Fish v. Vanderlip* (1915, N. Y.) 170 App. Div. 780, 156 N. Y. Supp. 38; *Bradshaw v. Lancashire etc. Ry. Co.* (1875, C. P.) L. R. 10 C. P. 189. If the act of the defendant injures two primary rights of the plaintiff, it is usually held that the latter may maintain two different actions. *Brunsden v. Humphrey* (1884, C. A.) 14 Q. B. D. 141; *Reilly v. Sicilian Asphalt Co.* (1902) 170 N. Y. 40, 62 N. E. 772; *contra, King v. Chicago, M. & St. P. Ry. Co.* (1900) 80 Minn. 83, 82 N. W. 1113. *A fortiori,* when the rights violated belong to different parties. See *Mahoning Valley Ry. Co. v. Van Alstine* (1908) 77 Oh. St. 395, 83 N. E. 601. The doctrine of *res judicata* was established to protect a wrongdoer against vexatious suits, *"nemo bis vexari debet pro una et eadem causa";* applied for that purpose it is very beneficial, but it should not be used to relieve the plaintiff from proving his case.

TORTS—RIGHT OF PRIVACY—EXHIBITING MOVING PICTURE OF PLAINTIFF WITHOUT HER CONSENT.—While the plaintiff was in the defendants' store purchasing goods, the defendants without her knowledge caused moving picture films of her face and figure to be taken, and later procured the films to be enlarged and exhibited in a moving picture theatre to advertise their wares. The plaintiff alleged that all this was done without her consent and that it caused people to believe that she had for hire permitted her picture to be taken and used as a public advertisement. The answer was a general denial. No proof of special damages was offered and the trial court sustained a demurrer to the evidence. *Held,* that the defendants' acts were a violation of the plaintiff's right of privacy and entitled her to recovery without proof of special damage. *Kunz v. Allen* (1918, Kan.) 172 Pac. 532.

See COMMENTS, p. 269.

UNFAIR COMPETITION—SIMILARITY IN APPEARANCE OF PRODUCT—"SHREDDED WHEAT" CASE.—The plaintiff corporation manufactured a shredded wheat biscuit of a peculiar size, form, color and appearance, which had become well-known to the public as coming from a single source. It owned patents covering the same. On the expiration of the patents, the defendants began to manufacture and sell wheat biscuits of exactly the same size, shape and appearance, but put up in a distinctive package. Restaurants sold the biscuits to patrons who did not see the original package. *Held,* that the plaintiff was entitled to have the defendant mark each biscuit intended for ultimate sale outside the package with some mark which would enable the purchaser readily to distinguish it from the plaintiff's product, unless after a probationary period of six months the defendant could show that such marking was not commercially practicable. Ward, J., *dissenting. Shredded Wheat Co. v. Humphrey Cornell Co.* (1918, C. C. A. 2d.) 250 Fed. 960.

The law relating to "unfair competition" is quite modern. No reference to it will be found, for example, in the early editions of such works as Pollock's *Law of Torts.* The harm sought to be prevented is not competition, but inducing persons to buy the defendant's goods by representations that they are the plaintiff's. Accordingly all that a plaintiff can ask is that, so far as is con-

sistent with the defendant's fundamental privilege to make and sell what he chooses, precautions shall be taken to prevent confusion as to the source of the product. *Elgin National Watch Co. v. Illinois Watch Case Co.* (1900) 179 U. S. 665, 21 Sup. Ct. 270 ("Elgin" watches); *Samson Cordage Works v. Puriton Co.* (1915, C. C. A. 6th) 211 Fed. 608 (window cords). If there is evidence of positive confusion as to source, caused by the imitation of the plaintiff's product either as to name, shape, color or appearance, equity will compel a defendant to take such precautions as will afford the maximum amount of protection to the plaintiff and the minimum amount of limitation on defendant's freedom of trade. *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.* (1911) 220 U. S. 446, 31 Sup. Ct. 456 ("Rubbero" goods); *Garret & Co. v. Sweet Valley Wine Co.* (1918, N. D. Oh.) 251 Fed. 371 ("Virginia Dare" wines). Where the confusion is due to imitation of the product itself great difficulty often arises in the application of this doctrine, for a change in appearance of the article may be impossible without a destruction of its function. In such case the courts, ever jealous of creating a perpetual monopoly, refuse to grant the plaintiff any relief. *Marvel Co. v. Pearl* (1914, C. C. A. 2d) 133 Fed. 160 ("Whirling" spray syringe); *Diamond Expansion Bolt Co. v. U. S. Expansion Bolt Co.* (1911, N. Y.) 177 App. Div. 554, 164 N. Y. Supp. 443 (bolts and shields). *A fortiori* is this true where the connotation as to source has been built up under the protection of a patent and the patent has expired. *Daniels v. Electric Hose Co.* (1916, C. C. A. 3d) 231 Fed. 827. However, where the appearance of the article may be changed without destroying its usefulness for the purpose intended, the courts will not hesitate to compel the defendant so to distinguish his product as to cause the least possible confusion. *Yale & Towne Mfg. Co. v. Adler* (1907, C. C. A. 2d) 154 Fed. 37 (locks); *Ruchmore v. Manhatten Screw Co.* (1908, C. C. A. 2d) 163 Fed. 939 (auto-lamps); *Coca Cola Co. v. Gayola Co.* (1912, C. C. A. 6th) 200 Fed. 720 (beverage). It is submitted that the principal case properly placed upon the defendant the burden of showing that the placing of a distinguishing mark upon the product was not commercially feasible and would result in destroying his ability to compete with the plaintiff. It should be noted that Hough, J., who concurred in the result, expressed the view that the plaintiff would be entitled to have distinguishing marks placed upon the defendant's product even though that would make it commercially impossible for him to compete.

VENDOR'S LIENS—UNLIQUIDATED CLAIMS—BREACH OF CONTRACT TO SUPPORT GRANTOR.—A father conveyed to his daughter a farm, taking in exchange her promise to care for and support him until death and to pay his funeral expenses. The daughter did none of these things. In a suit against the daughter the administrator of the father asked not only for a personal judgment but also for the enforcement of an equitable lien on the land in question to secure the payment of the amount to be found due for breach of the contract. *Held*, that the administrator was entitled to the relief asked. *Zoeller v. Loi* (1918, Ind.) 120 N. E. 623.

As the daughter never performed any part of her agreement, the father would in many states have been entitled in equity to have the land restored to him and to an accounting of rents and profits. *McClelland v. McClelland* (1898) 176 Ill. 83, 51 N. E. 559; *Lowman v. Crawford* (1901) 99 Va. 688, 40 S. E. 17. This is on the ground that where a defendant has wholly repudiated or violated his contractual duty to the plaintiff, equity deems it only fair that restitution *in specie* should be decreed. Other jurisdictions deny relief, on the ground that the remedy for breach of contract is adequate. *Gardner v. Knight* (1899) 124 Ala. 273, 27 So. 298; *Anderson v. Gaines* (1900) 156 Mo.

664, 57 S. W. 726. Apparently courts of law have not developed a quasi-contractual remedy for restitution in the form of a judgment for the value of the land in an action of *indebitatus assumpsit*. Woodward, *Quasi-Contracts*, 416. In states which deny specific restitution in equity, this is entirely logical. In those granting equitable restitution, however, this result is probably due in part to the superiority of the equitable remedy, but also in part to the fact that *indebitatus* counts for "land sold and conveyed" were relatively rare at common law, especially as used to enforce quasi-contractual obligations. They were, however, not unknown. *Nugent v. Teachout* (1887) 67 Mich. 571, 35 N. W. 254. The grantor may of course sue the grantee for damages for breach of contract; and, if the agreement is to pay money for land conveyed, he may claim in England and many of our states a vendor's lien for the purchase price. In other jurisdictions no such lien is recognized unless provided for by agreement of the parties. Story, *Equity Jurisprudence* (14th ed.) sec. 1624. Whether such a lien exists where the agreement is not to pay money but to furnish support, etc., is a question upon which the authorities are in conflict. The fact that the claim of the vendor is for an unliquidated amount and will extend over so long a period of time has led many courts to reject the doctrine as inapplicable to such a situation. *Arlin v. Brown* (1862) 44 N. H. 102; 39 *Cyc.* 1792. Other states, however—of which Indiana is one—allow the lien even in such cases. *Hamilton v. Barricklow* (1884) 96 Ind. 398. Under the Indiana law, therefore, the result reached in the principal case is correct.