CURRENT DECISIONS

ADMIRALTY—AFFREIGHTMENT CONTRACTS—PREPAID FREIGHT—UNRECOVERABLE WHEN SAILING PREVENTED BY EMBARGO.—A sailing vessel with cargo for France was compelled by stress of weather to put back to New York, the port of departure; after completion of repairs she was prevented from sailing again by a Government embargo on voyages of sailing vessels to the war zone. She thereupon discharged her cargo. The bill of lading embodied the clause: "Freight earned, retained and irrevocable, vessel lost or not lost." The cargo owners libelled the vessel for the return of the prepaid freight. *Held*, that they were not entitled to recover. *Allanwilde Transport Corporation v. Vacuum Oil Co.* (1918) 39 Sup. Ct. 147.

The shippers had contracted away their claim that earnings depended on actual carriage of the goods, although there had in fact been a breaking of ground and involuntary return to port. The decision is interesting, in that the privilege of retaining the freight was recognized nothwithstanding the absence of any "restraint of princes" clause in the bill of lading. A similar conclusion was reached under a bill of lading containing an analogous prepaid freight clause and in addition a "restraint of princes" clause, but where the sailing was embargoed after loading merely and before the ship had broken ground. *The Gracie D. Chambers* (1918) 39 Sup. Ct. 149, *The Bris, ibid.* 150. For a discussion of the relation between the carriage of goods and the earning of freight and of the effect of "prepaid freight" clauses, see (1919) 28 YALE LAW JOURNAL, 279.

ADMIRALTY—"RESTRAINT OF PRINCES"—LEGALITY OF REQUISITION OF VESSEL BY FOREIGN GOVERNMENT NOT OPEN TO QUESTION IN UNITED STATES COURT.—In defense against a libel for breach of a charter party for the hire of a vessel containing a "Restraint of Princes" exception, the claimant [defendant] showed that the British Government had requisitioned the vessel. *Held*, that the libel should be dismissed. *The Adriatic* (1918, E. D. Penn.) 253 Fed. 489.

The statement of the British Government, appearing by *amici curiae*, to the effect that it had requisitioned the vessel, was held to preclude inquiry by a United States Court into the legality of the requisitioning. When the act of a public officer of a foreign government is alleged to be unauthorized by foreign municipal law, it must, said the court, first be repudiated by that government, before an American court would pronounce it illegal. See the *dictum* of Judge L. Hand in *The Florence H.* (1918, S. D. N. Y.) 248 Fed. 1012, 1017. This ascribes too conclusive a character to the legality of the acts of foreign officers. There may be no reason or desire on the part of the foreign government to repudiate the act. Only when the foreign government *asserts* the legality of the act is a municipal court precluded from denying it.

ARMY AND NAVY—INTERNED CIVILIAN ALIEN ENEMY—PAROLE NOT TO SERVE AGAINST INTERNING GOVERNMENT OPERATES AS EXEMPTION FROM SERVICE.—On the outbreak of the war between Great Britain and Germany, the appellant, a British subject, was in Hamburg, Germany. He was allowed freedom of movement in the city, but was forbidden to leave, except upon taking an oath and parole not to take up arms against Germany, on the breaking of which, he would, if caught, be shot. Failure to give the parole would have resulted in detention until the end of the war. The appellant gave his parole and returned to England.

Being called for British military service, he claimed exemption under section 8 of the Military Service Act, 1916 as a person who had been "a prisoner of war, captured or interned by the enemy, and [had] been released." *Held,* that he was exempt from service. *King v. Burnham* (1918, K. B.) 119 L. T. Rep. 308.

It required a liberal construction, believed, however, to be correct, to hold that notwithstanding the freedom of movement allowed the appellant, the prohibition to leave Hamburg constituted an "internment" of a civilian prisoner. In a previous case, temporary detention pending inquiry as to whether a British subject should be kept in Germany as a prisoner of war was held not to constitute "internment." *Robinson v. Metcalf* (1917, K. B.) 33 Times L. R. 542. The sanctity given by the court to appellant's oath to Germany speaks well for the character of Bristish justice. See also Hall, *Int. Law* (7th ed.) 432.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—VALIDITY OF SERVICE ON FORMER AGENT OF NON-RESIDENT.—An action was brought in Illinois upon a judgment for money rendered by a Kentucky court. The transactions upon which the Kentucky judgment was based took place in that state. At the time the defendants were residing in another state and carried on business in Kentucky through a resident who on their behalf entered into the transaction in question. The agency was terminated before the Kentucky suit was brought. Under the Kentucky statute process was served upon the former agent. No other service was had upon the defendants, who were still non-residents. *Held,* that the Kentucky judgment was void and so not entitled to recognition by the Illinois court. *Flexner v. Farson, Jr. et al.* (1919) 39 Sup. Ct. 97.

Under prevailing notions as to state jurisdiction the result is sound. The court argued that as the state had no power to exclude the defendants from doing business in the state, it could not require as a condition of letting them in that they assent to service on the former agent, as it might have done in the case of a corporation chartered by another state. *New York Life Ins Co. v. Dunlevy* (1915) 241 U. S. 518, 36 Sup. Ct. 613; *Mutual Reserve Fund Life Ass'n v. Phelps* (1903) 190 U. S. 147, 23 Sup. Ct. 707. The law as to the state's power to exclude the foreign corporation seems, however, to be in a transition period. Henderson, *The Position of Foreign Corporations in American Constitutional Law,* reviewed *infra.* The principal case, however, calls attention to a serious evil, viz., that the courts of the state in which the transaction took place have no power at present to compel the non-resident who acts through an agent to submit to their adjudication of controversies arising out of transactions carried on in the state. Such a result suggests the desirability of a law permitting the service throughout the country of such process in appropriate cases. See the article by Professor Cook, *The Powers of Congress under the Full Faith and Credit Clause, supra,* p. 421.

CONSTITUTIONAL LAW—POLICE POWER—STATUTE REGULATING INGREDIENTS OF CONDENSED MILK.—An Ohio statute prohibited under penalty the sale of condensed milk unless made from milk "from which the cream had not been removed and in which the proportion of milk solids" equalled a prescribed percentage. The plaintiff manufactured and sold "Hebe," a pure product of "skimmed milk condensed by evaporation" to which cocoanut oil to the extent of six per cent was added. The label plainly indicated the ingredients. The plaintiff brought a bill to restrain threatened prosecutions. *Held,* that the plaintiff was not entitled to relief, as the statute was valid and the plaintiff's product fell within it. Day, Van Devanter, and Brandeis, JJ., *dissenting. Hebe Co. and Carnation Milk Products Co. v. Shaw* (1919) 39 Sup. Ct. 125.

Such legislation is justified under the police power as a protection of the public from either or both of two things: injurious food, and fraud. See (1918) 27 YALE LAW JOURNAL, 1079. The situation in the principal case is similar to that in the oleomargarine cases: a product admittedly healthful and good, needing in reason only to be fairly labelled to prevent fraud, falls under the ban of a statute which by prohibiting its sale treats it like a product deleterious to health. *Cf. Hammond Packing Co. v. Montana* (1914) 233 U. S. 331, 34 Sup. Ct. 596. There is authority for the position of the majority that although the statute may be open to criticism, its classification was not so wholly arbitrary and unadapted to the end sought as to warrant interference by the court. But the dissent argued strongly that no interference was necessary; that "Hebe" was not and did not purport to be condensed milk, and so fell outside the statute. It is difficult to see why this construction, which would both effectuate the legitimate purpose of the statute and further individual justice, should not have prevailed.

CONSTITUTIONAL LAW—WAR POWERS—TAKING OVER OF MARINE CABLES AFTER ARMISTICE.—By statute, Congress authorized the President to take over and operate for the duration of the war any marine cable or cables, if he should deem such action necessary to the national security and defense. A few days before the armistice was signed, the President issued a proclamation, authorizing the defendant, Postmaster-General Burleson, to take over the cables of the plaintiff and other companies. This proclamation was put into effect by the defendant after the armistice was signed. The plaintiff sued for an injunction, contending that the authority of the President ceased with the termination of hostilities; for then the national emergency which alone could justify the action was ended, and a subsequent taking over of the cables was not warranted. *Held,* that the armistice did not terminate the power vested in the President. *Commercial Cable Co. v. Burleson* (1919, U. S. D. C., S. D. N. Y.) 60 N. Y. L. J. 1271 (Jan. 20, 1919).

Granted that the Act is constitutional in that it enables the taking over of a public utility necessary to the successful conduct of the war, it is submitted that the principal case is correct in holding that the armistice does not terminate the power vested in the President. As the opinion points out, a mere cessation of hostilities is not the end of a war, nor is an armistice a treaty of peace; for hostilities may be resumed at any time. The power is vested in the President "during the continuation of the war." Consequently until the war is ended by a treaty or proclamation, the power can be exercised even if the cessation of actual hostilities has made its exercise of doubtful expediency. For a discussion of the constitutionality of similar legislation see Blewett Lee, *Constitutional Objections to the Railway Control Act* (1918) 28 YALE LAW JOURNAL, 158.

COURTS—APPELLATE JURISDICTION OF SUPREME COURT—SUIT AGAINST UNITED STATES.—The plaintiff brought suit in a federal district court to collect from the United States hire of a ship for two charter periods. A judgment for one period only was affirmed by the Circuit Court of Appeals, and the plaintiff took a writ of error to the Supreme Court. *Held,* that the Circuit Court of Appeals was without jurisdiction, since the judgment of the district court, acting as a court of claims, was reviewable only directly by the Supreme Court. *J. Homer Fritch, Inc. v. United States* (1919) 39 Sup. Ct. 158.

This case settles a point of appellate jurisdiction about which there had been a diversity of opinion among the lower federal courts. As Chief Justice White

points out, the Supreme Court itself had inadvertently taken jurisdiction in previous cases of the same sort which had come to it through the Circuit Court of Appeals. The case turns, of course, upon the construction of the Tucker Act, which gave district and circuit courts concurrent jurisdiction with the Court of Claims, and the effect of the subsequent enactment of the Judiciary Act of 1891 and the Judicial Code. It is well to have the point definitely settled.

CRIMINAL LAW—COLLECTION OF MONEY IN CONNECTION WITH INTERSTATE TRANSPORTATION OF INTOXICATING LIQUOR.—Section 239 of the Criminal Code of the United States provides as follows: "Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any . . . intoxicating liquor . . . from one State . . . into another State, . . . shall collect the purchase price or any part thereof, before, on, or after delivery from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined," etc. The defendant as agent for the plaintiffs, who were carrying on a mail order liquor business from Kansas City, Mo., collected in Kansas the purchase price of liquors sold by the plaintiffs in interstate commerce. Upon receiving payment he surrendered the bills of lading which, according to the bargain with the buyer, he was to hold until payment. He now refused to pay over the money so collected and the plaintiffs sued in the Kansas courts to recover them. Recovery was denied and on writ of error the case went to the Supreme Court of the United States. *Held,* that plaintiffs were not entitled to recover. *Danciger et al. v. Cooley* (1919) 39 Sup. Ct. 119.

The decision, which involves a construction of the section of the Federal Criminal Code printed above, is placed on the ground that the collection of the money by the defendant although not a "part of the transportation" was connected with it within the meaning of the statute, for he surrendered the bill of lading only upon payment of the purchase price. As what the defendant did would clearly have been within terms of the statute if it had been done by the carrier, this construction seems entirely sound. As the ruling of the Kansas courts on the right of a principal to recover from his agent money received while doing for the principal acts in violation of the criminal law involved only a question of state law, the Supreme Court did not pass upon it. For a discussion of the rule involved—a rule upon which there is a great conflict of authority—see Woodward, *Quasi-Contracts,* sec. 148.

DESCENT AND DISTRIBUTION—EFFECT OF CONVICTION OF HEIR OF KILLING ANCESTOR.—The defendant killed her husband and was convicted of manslaughter in the third degree. She was his prospective heir. A statute provided that "Any person who shall hereafter be convicted of killing . . . any other person from whom such person so killing . . . would inherit . . . shall be denied all right, interest and estate," etc. In a suit to quiet title the defendant contended that the statute did not apply to persons convicted of manslaughter in the third degree, and also that it was unconstitutional as providing for a forfeiture. *Held,* that the wife took no interest in her husband's land. *Hamblin v. Marchant* (1918, Kan.) 175 Pac. 678.

Even without legislation some courts exclude a murderer from taking by inheritance the property of his victim. See (1918) *27* YALE LAW JOURNAL, 964. Kansas, however, had reached the opposite result. *McAllister v. Fair* (1906) *72* Kan. 533, 84 Pac. 112. In consequence, the above quoted statute was passed.

Similar legislation exists in certain other states. It may be so drawn as to deprive only murderers of the privilege of inheritance. See *Estate of Kirby* (1912) 162 Cal. 91, 121 Pac. 370. But the Kansas statute obviously included manslaughter. The defendant's constitutional objection was equally ill-founded. Under the statute there is no forfeiture; the criminal heir never takes title, even though proof of that fact can not be made until after conviction of the crime.

JURY—QUALIFICATIONS OF GRAND JURORS—WOMEN ELIGIBLE.—The petitioner, who had been indicted by a grand jury composed partly of women, sought by a writ of prohibition to establish the invalidity of the indictment. One section of the Nevada constitution prohibited trial for certain crimes "except on presentment or indictment of the grand jury"; another section provided that "Laws shall be made to exclude from serving on juries all persons not qualified electors of this state"; and a third section limited the election franchise to male citizens of a certain age and residence. By a later amendment the word "male" was omitted from this section and a provision was added that there shall be no denial of the elective franchise on account of sex. *Held*, that women, being qualified electors, were eligible to serve on the jury, and that the indictment was valid. Coleman, J., *dissenting*. *Parus v. District Court* (1918, Nev.) 174 Pac. 706.

At the time of the adoption of the Nevada constitution the term "grand jury" read in the light of the common law, was limited to men. See 3 Blackstone, *Com.* *362; *State v. Hartley* (1895) 22 Nev. 342, 40 Pac. 372. Jurors had also to be qualified electors, under the second constitutional section above quoted. This was a clause of exclusion rather than inclusion, and the mere fact that women were later made electors would not necessarily make them eligible for jury duty. The real issue between the majority and the minority was whether "grand jury" should still be read in the light of the common law or in the light of modern changes which gave women the franchise. The usual canons of construction seem to support the minority. Such was the holding in *People v. Jensen* (1917, Cal. App.) 167 Pac. 406.

MARRIAGE AND DIVORCE—COMMON LAW MARRIAGE—EFFECT OF REMOVAL OF PRE-EXISTING IMPEDIMENT.—In 1902 the petitioner went through a marriage ceremony with the defendant, who had deserted her husband at the petitioner's solicitation. The court assumed both parties to have known that the cohabitation then begun was illicit. In 1905, when the death of the defendant's first husband became known to the couple, the petitioner declared to the defendant that "she was his wife"; and thereafter the two by habit, conduct and declarations continued to hold themselves out as husband and wife, until in 1916 the petitioner began suit for the annulment of the marriage of 1902. *Held*, that the petitioner was not entitled to relief, as the parties had since the removal of the impediment contracted a valid common law marriage. *Schaffer v. Krestovnikow* (1918, N. J. Ct. Err.) 105 Atl. 239.

The court approves *Collins v. Voorhees* (1890, Ct. Err.) 47 N. J. Eq. 555, 22 Atl. 1054, so far as that case holds that cohabitation known to the parties to have been illicit at the outset will be presumed *prima facie* to continue illicit. But the fruitlessly narrow rule of that case, that all subsequent cohabitation must be referred to the original invalid marriage *ceremony* unless a subsequent *marrying* is shown, may now be considered as definitely overruled. The position of the principal case that a common law marriage can under such circumstances be shown by a declaration of the man that the woman "was his wife," together

with subsequent conduct of the parties (and without evidence of any specific agreement to *become* man and wife) is sound sense and sound law. See (1918) 27 YALE LAW JOURNAL, 702, commenting on *Schaffer v. Krestovnikow* (1917, N. J. Ch.) 102 Atl. 246, which the principal case affirms. A strong technical argument can be made on the other side. See (1916) 26 YALE LAW JOURNAL, 145. But the whole strength of the position that a second ceremony, though informal, must be shown, depends on a supposed necessity, to constitute common law marriage, of a conscious contract at some definite time to *enter upon* the relation. Though no language expressly so stating has been found, it is believed that the cases—the more modern cases particularly, cited in the comments indicated—can be interpreted to mean only that simple agreement to *be* husband and wife, such as continues practically throughout a normal marriage, is all that is necessary to constitute a common law marriage, and all that need be shown to prove one. *Cf.* note below.

MARRIAGE AND DIVORCE—FRAUD AND ANNULMENT—WIFE PREGNANT BY ANOTHER.—The plaintiff married the defendant because she represented that he had caused her to become pregnant. On discovery that another was the father of her child, he repudiated her and the child, and brought suit for annulment, although the woman had informed him before marriage that she had had intercourse with another. *Held,* that the decree annulling the marriage was correct. *Gard v. Gard* (1918, Mich.) 169 N. W. 908.

The conflicting authorities on the precise question—on which the Michigan court had twice divided evenly without being able to render a decision—are well reviewed in the opinion. The principal case seems to present the sounder view, particularly where, as here, the plaintiff entered on the marriage with the single aim of in some measure straightening out what he was led to believe were the consequences of his own wrong. Fraud "in an essential" is settled to be ground for annulment. See (1916) 26 YALE LAW JOURNAL, 159. It seems to be admitted that such facts as those in the instant case involve an "essential." And neither the objection based on unclean hands, nor that based on notice enough to put the husband on inquiry, seems overly in point. For discussion of other aspects of annulment see E. W. Spencer, *Some Phases of Marriage Law* (1915) 25 YALE LAW JOURNAL, 58; and (1916) 25 *ibid.* 258, 326; (1917) 26 *ibid.* 506, 622; (1919) 28 *ibid.* 272.

MARRIAGE AND DIVORCE—SLAVE MARRIAGE—EFFECT OF EMANCIPATION.—In 1862 the decedent, a slave, "married" the plaintiff's mother, also a slave, with the consent of their masters, by a public joining of hands followed by a ball. The couple lived together as husband and wife before and after emancipation. Subsequently the decedent left his wife and married the defendant. The plaintiff brought suit *inter alia* to be recognized as the sole heir of the decedent. The defendant denied his legitimacy. *Held,* that the plaintiff was the heir of the decedent. *Wiley v. Bowman* (1918, La.) 80 So. 243.

Even to-day the status of slavery is coming before our courts, chiefly in questions involving inheritance and marriage. See (1914) 24 YALE LAW JOURNAL, 75, discussing *Jones v. Jones* (1914) 234 U. S. 615, 34 Sup. Ct. 937. A slave "marriage" did not in itself produce any of the civil consequences of marriage. But when entered on by the consent of the master and the moral assent of the slave, it did from the moment of freedom produce all those consequences, operating retroactively at least as regards the legitimation of children; but the "marriage" must have existed at the moment of freedom. It thus appears

that for those at least whose original marrying was ineffective because of the impediment of slavery, Louisiana recognizes something very like the form of common law marriage presented in the note above.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—MINISTERIAL AND GOVERNMENTAL ACTS.—The plaintiff's intestate was killed when the automobile which she was driving was struck by the city's police automobile which was being operated negligently while conveying policemen to their beats. *Held,* that the city was liable, as such use was "ministerial and corporate," and not governmental. *Jones v. Sioux City et al.* (1919, Iowa) 170 N. W. 445.

This decision is an interesting illustration of the tendency to extend the principle that a municipality is liable for the negligence of its police officers when engaged in matters connected with the corporate affairs but bearing no true relationship to the enforcement of law. (1899, N. Y.) 37 App. Div. 307, 55 N. Y. Supp. 850. Cases determined under this rule are not numerous. Ordinarily, where it is sought to hold the municipality liable for the negligence of its police officers the decision goes on the ground either that the policeman was in the performance of a governmental duty or that he was acting in wilful violation of the law; in both of which cases the city is exempt from liability. *Calwell v. City of Boone* (1879) 51 Iowa, 687, 2 N. W. 614; *Maximilian v. Mayor* (1875) 62 N. Y. 17; *Odell v. Schroeder* (1871) 58 Ill. 353. But though the city is exempt, the officer or his superior may be liable personally. Where a fire commissioner permitted a fireman driver to operate an automobile at excessive speed while driving the commissioner to inspect some new fire houses, the commissioner was held personally responsible, the city ordinance not exempting officers and men from the speed regulations unless proceeding to a fire or responding to an emergency call. *Dowler v. Johnson* (1918, N. Y.) 121 N. E. 487.

NUISANCES—NEGRO RESIDENTIAL COLONY.—The defendant was a corporation chartered for the purpose of furnishing instruction in the higher branches of learning to members of the negro race. It acquired seventy acres of land adjoining the plaintiff's premises; and not needing the whole tract for the college proper, proposed to establish a residence colony of negroes upon part of it. The plaintiff sued for an injunction, claiming that this use of the College's property was *ultra vires. Held,* that the plaintiff was not entitled to relief, as no individual has power to attack the act of a corporation as *ultra vires;* and as the proposed colony was not a public nuisance which the plaintiff, as suffering special damage, might enjoin. *Diggs v. Morgan College* (1918, Md.) 105 Atl. 157.

The case presents an interesting corollary to the unconstitutionality of the segregation ordinances as pronounced by the Supreme Court in *Buchanan v. Warley* (1917) 245 U. S. 60, 38 Sup. Ct. 16, L. R. A. 1918C 210, Ann. Cas. 1918A 1201, discussed (1918) 27 YALE LAW JOURNAL, 393. "Whatever view may have been entertained formerly, since the decision in" that case "it is clear that the improvement of land as a colored residential neighborhood is not of itself a public nuisance. It may or may not become such, according to the way in which . . . it is conducted." An illustration of the way in which the conducting might become a nuisance may be found in *Giles v. Rawlings* (1918, Ga.) 97 S. E. 521.

TAXATION—INHERITANCE TAXES—DEDUCTION OF FEDERAL ESTATE TAX BEFORE COMPUTING STATE INHERITANCE TAX.—The estate of a Pennsylvania testator

was subject to the federal estate tax imposed by the Act of Congress approved September 8, 1916. It was also subject to the collateral inheritance tax of Pennsylvania. *Held,* that tax paid under the federal act was properly deducted before computing the state inheritance tax. *In re Knight's Estate* (1918, Pa.) 104 Atl. 765.

This decision adds another state to those which permit the deduction of the federal estate tax. The subject was discussed in (1918) 27 YALE LAW JOURNAL, 1055, and 28 *ibid.* 194, where the authorities pro and con are collected.

WORKMEN'S COMPENSATION — DEPENDENTS — DESERTED WIFE — ILLEGITIMATE CHILDREN.—Harry Scott deserted his wife and thereafter had four illegitimate children who were living with him as a family when he met his death by accident. After the desertion, his wife committed adultery. The Compensation Act provided that the following should be *"conclusively presumed"* to be dependents: "(a) A wife upon a husband . . . from whom she was living apart for a justifiable cause or because he had deserted her"; "(b) A child . . . under the age of eighteen years . . . upon the parent with whom he is living." A separate paragraph provided that "Dependents shall mean members of the employee's family . . . who are wholly or partly dependent upon the earnings of the employee for support." *Held,* that the illegitimate children of Harry Scott were dependents under the act and that his deserted wife who had also lived in adultery was not. *Scott's Case* (1918, Me.) 104 Atl. 794.

The desertion as a "wilful and unjustifiable abandonment" ended with the wife's adultery, and she no longer comes within the conclusive presumption of the act. The illegitimate children were not within the "conclusive presumption" either, but by a liberal construction they are included in the term "members of the employee's family." In accord is *Roberts v. Whaley* (1916) 192 Mich. 133, 158 N. W. 209.