CURRENT DECISIONS

ADMINISTRATIVE LAW—FINDINGS OF FACT—CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATION.—The Secretary of Agriculture, under authority of the "Meat Inspection" Act of June 30, 1906, promulgated a regulation prohibiting in interstate commerce the use of cereal in excess of two per cent. in "sausage," and requiring the presence of cereal to be stated on the label. The purpose was to prevent deception of the public, a purpose within the purview of the Act of Congress. The appellee, a sausage manufacturer, sought to enjoin the enforcement of the regulation on the ground that sausage containing more than two per cent. cereal, as did that manufactured by him, was wholesome and healthful, and that the use of the word "sausage" in his products was not deceptive. *Held,* that the injunction would not be granted. *Houston et al. v. St. Louis Independent Packing Co.* (Apr. 14, 1919) U. S. Sup. Ct. Oct. Term, 1918.

Admitting the wholesome nature of appellee's product, it was still apparent that the inclusion of unnamed ingredients, such as cereals, might make the term "sausage" deceptive to the uninstructed consumer. Whether it was thus deceptive was a question of fact, the determination of which, in the absence of bad faith or excess of delegated authority, was within the exclusive discretion of the Secretary of Agriculture, an adminstrative officer, and was not reviewable by the courts, provided there was substantial evidence to sustain the finding of fact. That there was such evidence was apparent in this case. For a similar legal doctrine applied to the findings of other executive officers, see *Decatur v. Paulding* (1840, U. S.) 14 Pet. 497 (Secretary of the Navy); *Gaines v. Thompson* (1868, U. S.) 7 Wall. 347 (Secretary of the Interior); *Bates & Guild Co. v. Payne* (1904) 194 U. S. 106, 24 Sup. Ct. 595 (Postmaster General); *Zakonaite v. Wolf* (1912) 226 U. S. 272, 33 Sup. Ct. 31 (Secretary of Commerce).

BILLS AND NOTES—PAYEE AS HOLDER IN DUE COURSE—EFFECT OF N. I. L.— By the fraud of the maker the defendant was induced to endorse a note for accommodation. The plaintiff took the note for value and without notice of any irregularity. He was compelled to take up the note at maturity, sued the defendant endorser and obtained judgment. *Held,* that the judgment was correct. *Johnston v. Knipe* (1918, Pa.) 105 Atl. 705.

This same decision, as reported in 103 Atl. 957, has already been noted in these pages. See (1918) 28 YALE LAW JOURNAL, 197, where a fuller statement of facts and authorities will be found. In its earlier form, the opinion went on the ground that the N. I. L. had not in any way changed the conceded common-law rule that a payee might be a holder in due course. The provisions of sec. 30, enumerating ways of negotiation, were held not to exclude by omission a negotiation to the payee. This is sense. But the new opinion is decidedly buttressed by a reference to sec. 64, which provides for liability *to the payee* of an endorser before delivery. While this does not expressly cover the case of a maker who negotiates a note to the payee through an agent, it is sufficiently at variance with the *expressio unius* interpretation of sec. 30 to strongly indicate, at least, what the weight of what little authority there is, has decided: that the codifiers did not intentionally draw that section in violation of common law, sense and custom.

CORPORATIONS—DISTRIBUTION OF DIVIDENDS—ARBITRARY WITHHOLDING ON THE PART OF DIRECTORS.—The defendant corporation had a capital of 2 million; its

yearly profits amounted to 60 million; the extensions proposed to 24 million; and the cash in hand and municipal bonds to 54 million. Action was brought to compel the declaration of an extra dividend. *Held,* that a decree ordering the defendant to distribute 19 million was proper. *Dodge et al. v. The Ford Motor Co. et al.* (1919, Mich.) 170 N. W. 668.

Although it is for the board of directors, and not for the stockholders, to decide whether dividends shall be declared, the directors may not arbitrarily refuse to divide profits. Whether there has been such an arbitrary refusal as calls for interference by equity is a question of fact, in the determination of which the amount of profits, of capital stock, and the nature of the business should be primarily considered. *Stevens v. United States Steel Corp.* (1905, Ch.) 68 N. J. Eq. 373, 59 Atl. 905 (profits 66 million, capital stock 1 billion; withholding not arbitrary); *Raynolds v. Diamond Paper Mills Co.* (1905, Ch.) 69 N. J. Eq. 290, 60 Atl. 941 (assets of corporation doubled; but the business required constant expansion). Under the facts of the principal case, the decision reached seems clearly right. It is to be commended as a protection of minority holders against the arbitrary acts of a numerically small majority.

EVIDENCE — DYING DECLARATIONS — "SHOT WITHOUT PROVOCATION" NOT AN OPINION.—In a prosecution for homicide, the state offered in evidence a dying declaration in writing signed by the deceased, that he was "shot without provocation." *Held,* that the declaration was admissible as a statement of fact. *State v. McNair* (1918, Utah) 178 Pac. 48.

Dying declarations, if admitted at all, should be admitted irrespective of the form in which they are made. The "opinion" rule should not be applied to exclude such a declaration when it is impossible to have the declarant present the facts in any other form. 2 Wigmore, *Evidence,* 1447. The principal case is believed sound as the declaration is predominantly a concise statement of facts—what the deceased did not do. To exclude it as an opinion would render valuable evidence inadmissible merely because of the words in which it came, by pure chance, to be expressed; a dying layman does not and cannot pick his phrases with reference to rules over which even lawyers fight. See (1918) 27 YALE LAW JOURNAL, 700; *cf.* (1917) 26 *ibid.* 505.

EVIDENCE—PEDIGREE—RELATIONSHIP—COMMUNITY-REPUTATION.—In an action to recover land, the sole question was whether the plaintiff was the brother of a decedent. The defendant, in refutation of this relationship, offered in evidence the general reputation in the community thereon. *Held,* that such reputation was inadmissible. *Ashe v. Pettiford* (1919, N. C.) 98 S. E. 304.

Community-reputation, though admissible to establish marriage, is not admitted to establish blood relationship. *Elder v. The State* (1899) 123 Ala. 35, 26 So. 213; *Lamar v. Allen* (1899) 108 Ga. 158, 33 S. E. 958; *Vowles v. Young* (1806, Eng. Ch.) 13 Ves. Jr. 140. The rule has been criticized, in cases where more direct methods of proof are unavailable. 2 Wigmore, *Evidence,* 1953. And a few states admit the evidence, either by statute or at common law. *State v. McDonald* (1910) 55 Ore. 419, 106 Pac. 444; *Carter v. Montgomery* (1875) 2 Tenn. Ch. 227; *Ewell v. The State* (1834, Tenn.) 6 Yerg. 364.

INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—WORKMEN'S COMPENSATION.—The decedent was employed by the railroad company as a laborer. While shoveling snow from the tracks, which were used for both interstate and intrastate transportation, he was struck by a passing train and later died from the injuries. His widow received an award under the New York Workmen's Compensation Act. *Held,* that the award must be set aside, as the employer was engaged in interstate commerce and the case was governed

by the Federal Employers' Liability Act. *New York Central R. R. v. Porter* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 134.

The decision is another illustration of the difficulty of determining whether an act of an employee falls within interstate commerce. See *Flynn v. New York, S. & W. R. Co.* (1917, N. J. Sup. Ct.) 101 Atl. 1034. The test sought to be applied to each case is whether the employee at the time of the injury was engaged in interstate transportation or work so closely related to it as to be practically part of it. *Shanks v. Delaware, L. & W. R. R.* (1916) 239 U. S. 556, 36 Sup. Ct. 188. If the court decides he was, there can be no recovery under the state Workmen's Compensation Acts. *New York Central R. R. v. Winfield* (1917) 244 U. S. 147, 37 Sup. Ct. 546. See (1917) 27 YALE LAW JOURNAL, 135; (1916) 25 *ibid.* 497.

INDICTMENT—GRAND JURY—PUBLIC EXAMINATION OF WITNESSES.—The defendant filed a plea in abatement to an indictment charging him with receiving a stolen automobile, but was tried and convicted. The facts, stated in the plea and admitted by the commonwealth, were that while the cause was being heard by the grand jury one or more persons, witnesses in the case, were in the grand jury room while other witnesses were testifying. *Held,* that the plea in abatement was sufficient. *Comonwealth v. Harris* (1919, Mass.) 121 N. E. 409.

The court decided that the wrong complained of was the violation of a substantial right guaranteed by the Bill of Rights which made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecution for felonies; that an "indictment" must be found in pursuance of methods of grand juries established in England and Massachusetts, the oath of which is still to keep secret "the commonwealth's counsel, your fellow's, and your own." For a criticism of the grand jury system, see (1906) 15 YALE LAW JOURNAL, 178.

INSURANCE—FORM OF POLICY—NONCOMPLIANCE WITH STATUTE—EFFECT OF APPROVAL BY COMMISSIONER.—A statute providing for a standard accident and health insurance policy, required that any portion of a policy which purported "by reason of circumstances under which a loss is incurred, to reduce the indemnity . . . shall be printed in bold faced type and with greater prominence than any other portion of the text of the policy." The defendant issued to the plaintiff such a policy with the clause not printed in bold faced type. The insurance commissioner approved the form of the policy in question but warned the defendant of the above statute. The plaintiff was injured under circumstances covered by this clause which the defendant set up as a defense against payment of the whole amount of the policy. *Held,* that under the act the clause was no defense. *Williams v. Travelers' Ins. Co.* (1918, Wis.) 169 N. W. 609.

This decision seems sound, in view of the fact that the statute is unambiguous. The court applied the general doctrine that contemporaneous or executive construction of a statute is of no weight with the court when the terms and meaning of the statute are clear. See 36 *Cyc.* 1139, note 57; and 1142, note 73. This statute is an example of the ever growing legislation relative to insurance and the standardization of policies other than those covering death and fire. *Cf.* (1918) 28 YALE LAW JOURNAL, 193.

LIFE INSURANCE—ASSIGNMENT—CHANGE OF BENEFICIARY.—One Anderson took out two policies of life insurance with his wife as beneficiary. Both contained clauses setting out the formalities for changing the beneficiary and assigning the policies. Anderson assigned the said policies to the defendant as security for a loan. After his death the plaintiff, who was still named as

beneficiary of the policies, sued the defendant for the proceeds. *Held,* that she could recover, as the assignment did not of itself change the beneficiary. *Anderson v. Broad Street National Bank* (1918, N. J. Eq.) 105 Atl. 599.

It seems clear that an assignment of a policy transfers the powers and rights thereunder and vests them in the assignee. See (1918) 27 YALE LAW JOURNAL, 1083. But the principal case is sound in holding an assignment not to be of itself an exercise of the power to change the beneficiary. For a distinction between the various powers of the holder of a policy, see (1919) 28 *ibid.*, 603.

STATE LIABILITY TO SUIT—INJUNCTION AGAINST TORT—STATE WILL NOT BE ENJOINED FROM BOMBING PRACTICE IN AVIATION SCHOOL.—The owner of a farm in Germany sought to enjoin the Government from practicing bomb dropping in a neighboring aviation school, which practice he claimed endangered his workmen and interfered seriously with his use of the farm. *Held,* that the injunction could not be granted. *Oberlandesgericht Koenigsberg,* Sept. 20, 1917, printed in (1918) 45 Clunet, 1294.

The court concluded that bombing was an exercise of the sovereign military power and that the farm might be considered as requisitioned for military purposes during the bombing practice. If the farmer was injured the court said he might bring an action against the state for damages. In the United States, neither an injunction nor damages could probably be obtained in a similar case, because the injury, if any, arises out of tort. The line of division between the appropriation of private property for the public use and the uncompensated injury by the state to which all private property is subject, is not clear and will doubtless continue to be worked out empirically. See *Langford v. United States* (1879) 101 U. S. 341; *United States v. Great Falls Mfg. Co.* (1884) 112 U. S. 645, 5 Sup. Ct. 306; *United States v. Lynah* (1903) 188 U. S. 445, 23 Sup. Ct. 349.

TORTS—MENTAL SUFFERING—DELAY IN TRANSPORTING DEAD BODY.—Owing to the negligence of the defendant, the body of the plaintiff's deceased father was not placed on a certain train. As a result, it was necessary to postpone the funeral four hours, which postponement caused the plaintiff to suffer a severe mental and nervous shock from which she did not recover for several days. *Held,* that there could be no recovery, as there was no physical tort resulting in injury to person or purse. *McNeal v. Seaboard Air Line Ry.* (1919, Ga.) 98 S. E. 409.

For a discussion of the right to recover for mental suffering where there is no "physical invasion" of the plaintiff's rights, see (1919) 28 YALE LAW JOURNAL, 508. On mental suffering generally, see RECENT CASE NOTES, p. 707, *supra.*

TRUSTS—EXPECTANCY—SUBJECT OF EXECUTION.—Realty was conveyed to a trustee who, upon the death of the grantor, was to convey to the heirs of the grantor. The trustee was empowered, if he so desired, to reconvey to the grantor at any time, and terminate the trust. While the grantor was alive, his daughter conveyed her interest under this trust to her husband. The plaintiffs, judgment creditors of the husband, sought to subject the interest to their lien. *Held,* that the interest of the husband was a mere expectancy and not subject to execution. *Doctor v. Hughes* (1919, N. Y.) 122 N. E. 221.

The court reasoned that the direction to convey to the settlor's heirs was equivalent to the reservation of a reversion, not to the creation of a remainder; they would take, if at all, by descent and not by purchase; and their interest was subject to be barred by deed or will. They thus had, during the settlor's life, a

mere expectancy. But the court intimates that the ancient common-law rule may have been changed from one of property to one of construction, so that unmistakable words might have created a remainder in the settlor's own heirs.

UNFAIR BUSINESS—RESTRICTION ON RESALE PRICE—REFUSING TO SELL TO CUSTOMERS WHO CUT PRICES.—To an order by the Federal Trade Commission, requiring a company to cease indicating to dealers minimum resale prices and to cease refusing to sell to dealers who refuse to maintain such prices, the company agreed. Federal Trade Commission Bulletin, April 22, 1919, *in re Auto Strop Razor Co.*

A similar order was issued to another company which apparently has not agreed. Federal Trade Commission Bulletin, April 22, 1919, *in re Clayton F. Summy Co.*

Under the interpretation put by the courts on the Sherman and Clayton Acts, refusal to sell to dealers who cut the desired or agreed retail price, gives no right of action to the dealer concerned. See (1919) 28 YALE LAW JOURNAL, 505. This raises an interesting question as to the enforceability of the Trade Commission's order. That the practice itself is, at least in some cases, recognized by the offender itself as undesirable is indicated by the very general agreement by the parties concerned to these and other orders of the Commission.

WAR POWERS—FEDERAL CONTROL OF RAILROADS—JURISDICTION OF STATE COURTS.— The plaintiff sued the principal defendant, a foreign railroad corporation, for damages to a shipment of cattle delivered to it in October, 1917, and summoned the Mobile & Ohio Railroad as garnishee. The latter set up that the process served upon it was void and the court without jurisdiction because the railroad systems of both corporations had been taken under federal control pursuant to the Presidential Proclamation of December 26, 1917, and the Act of Congress of March 21, 1918. The trial court adopting this view, discharged the garnishee. *Held,* that the State court had jurisdiction and that the dismissal of the garnishee was erroneous. *L. N. Dantzler Lumber Co. v. Texas & Pacific Ry.* (1919, Miss.) 80 So. 770.

The court construed the Act of Congress as not intended "to suspend the collection of debts" or to grant carriers "immunity from judgments." Whether an execution could issue after judgment the court expressly declined to decide. But it is to be presumed, the opinion states, that the Director-General of Railroads would permit such a judgment to be paid. The construction of the statute seems sound. A distinction may well be taken between such a suit as this and a proceeding to compel a carrier to construct connecting tracks, as in *Commercial Club of Mitchell v. Chicago, Milwaukee & St. P. Ry.* (1918, S. Dak.) 170 N. W. 149.

WATER-RIGHTS—MILL PRIVILEGES—OWNERSHIP OF SOIL—PRIVILEGE OF FISHING.—The fee of land with a millpond thereon was conveyed to the defendant, who was to hold subject to "mill privileges." The same grantor conveyed to the plaintiff the privilege to use the water for the maintenance and operation of his mill. The defendant prevented the plaintiff from fishing in the millpond. The plaintiff brought a bill to enjoin this interference. *Held,* that relief must be denied, as the grant to the defendant carried with it all privileges except the mill privileges. *Thompson v. Tennyson* (1919, Ga.) 98 S. E. 353.

By the grant of the fee simple the defendant secured all the essentials of full ownership—an almost complete aggregate of rights, privileges, powers, immunities, etc., relating to the land and the millpond. The plaintiff, on the

other hand, received only whatever privileges, etc., were reasonably required for the use, maintenance and operation of the mill. Therefore the plaintiff, like any other person, was subject to a multital duty not to *fish* in the millpond. See (1913) 23 YALE LAW JOURNAL, 16; (1917) 27 ibid. 67.

WORKMEN'S COMPENSATION—DISFIGUREMENT—DUAL COMPENSATION.—While in the course of his employment, the plaintiff's arms and fingers were burned, so that they were permanently disabled. His face and head was also burned, seriously disfiguring him. The circuit court allowed compensation for permanent partial incapacity and also for serious and permanent disfigurement. *Held,* that the award was proper. *Wells Bros. Co. v. Industrial Commission* (1918, Ill.) 121 N. E. 256.

This case involves the construction of an amendment to the Illinois Compensation Act. Laws 1915, 403. Before this amendment, there could not be recovery for both incapacity and disfigurement. *Stubbs v. Industrial Com.* (1917) 280 Ill. 208, 117 N. E. 419. The New York statute has been similarly amended so as to permit double recovery. *Erickson v. Preuss* (1918) 223 N. Y. 365, 119 N. E. 555; (1918) 27 YALE LAW JOURNAL, 1097. For a discussion of the theory underlying an award which is not based on loss of earning power, see Bohlen, *Some Problems Under Workmen's Compensation Laws* (1919) 67 PENN. L. REV. 62.

WORKMEN'S COMPENSATION—INJURY DUE TO THIRD PERSON'S FAULT—ELECTION OF REMEDY.—The plaintiff, an employee who had elected to come under the Workmen's Compensation Act, was injured in the course of his employment by the negligence of the defendant, a third party who had elected not to be bound by the Act. After receiving compensation from his employer, the plaintiff brought an action against the defendant for negligence. The defendant pleaded that the employee was not the proper party plaintiff, since the employer had paid the required compensation. *Held,* that he was a proper party plaintiff. *Jones v. Fisher* (1919, Ill.) 122 N. E. 95.

Where an employee has been injured under such circumstances as would give him a common-law right of action against a third party, the Illinois Act distinguishes between the case where all parties have accepted the Act and where the third party had not accepted the Act. In the former, the employee is limited to his claim for compensation against his employer. *Friebel v. Chicago City Ry.* (1917) 280 Ill. 76, 117 N. E. 467. In the latter, which is the principal case, the common-law right is reserved to the employee, subject to his repayment to the employer of the amount received in compensation. See *Houlihan v. Sulzberger & Sons Co.* (1917) 282 Ill. 76, 118 N. E. 429. The Connecticut Act does not make this distinction, the common-law right being reserved to the employee in either case. Gen. St. 1918, sec. 5346. For the subrogation of the employer to the rights of the employee, see (1918) 27 YALE LAW JOURNAL, 708; and (1918) 27 *ibid.* 971.