RECENT CASE NOTES

AGENCY—WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—INJURY NOT CAUSING DISABILITY.—The plaintiff was slightly injured in the course of his employment and received a small sum, without formal proceedings, as compensation. At the same time, however, a nerve was destroyed, resulting in permanent impotency. Since the compensation act made no provision for injuries not affecting earning power, this action was brought at common law for damages. *Held*, that the plaintiff could not recover, since the remedies given by the statute were exclusive of all others. *Hyett v. Northwestern Hospital* (1920, Minn.) 180 N. W. 552.

The legislative intent, in enacting compensation acts, was undoubtedly to abolish all existing causes of action for personal injuries suffered in the course of employment, and to substitute therefor definite compensation commensurate with the loss of earning power. *Peet v. Mills* (1913) 76 Wash. 437, 136 Pac. 685. Where the act does not provide compensation, there is no remedy. Next of kin to whom the act gives no death benefits may be deprived of their former statutory right of action. *Shanahan v. Engineering Co.* (1916) 219 N. Y. 469, 114 N. E. 795. Pain and suffering are no longer elements of actionable damage, but are risks of the employment. See *Sweeting v. Knife Co.* (1919) 226 N. Y. 199, 201, 123 N. E. 82, 83. The lost remedies are a part of the price that the employee has paid for his right to compensation. Both employer and employee gained benefits and made concessions. Bohlen, *Some Problems under Workmen's Compensation Laws* (1919) 67 U. P. L. REV. 62, 64. Injuries that do not result in lost earning power and are not included in the compensation schedules give no right to compensation under the act. *Shinnick v. Clover Farms Co.* (1915) 169 App. Div. 236, 154 N. Y. Supp. 423. Disfigurement, which is usually of this class, may, however, be so severe as to materially impair the ability to secure employment, and is then properly compensable. *Ball v. Hunt* [1912, H. L.] A. C. 496. The act gives the compensation, not for the injury, but for the actual disability. *Jones v. Anderson* (1914, H. L.) 8 B. W. C. C. 2. In a few jurisdictions the acts specifically provide compensation for severe disfigurement. See (1919) 28 YALE LAW JOURNAL, 715. When the disfigurement could not be compensated for under the act, it has been held that the injury did not come within the purview of the act, and that a common law recovery, therefore, was allowable. *Shinnick v. Clover Farms Co., supra.* But this doctrine is restricted to those cases where no disability whatsoever is involved. *Morris v. Muldoon* (1920) 190 App. Div. 689, 180 N. Y. Supp. 319. This point of view seems unjustifiable under the New York act, which provides that the employer's liability, as prescribed by the act, shall be exclusive and in place of any other liability whatsoever. Oklahoma also apparently recognizes this distinction. See *Adams v. Biscuit Co.* (1917, Okla.) 162 Pac. 938, 946. The Louisiana statute, which declares that the remedies therein granted for injuries for which compensation is provided are exclusive, has been construed to permit a common-law recovery for disfigurement, since the statute does not provide compensation for such an injury. *Boyer v. Box Co.* (1918) 143 La. 368, 78 So. 596. But this reasoning could hardly be applied to the Minnesota act, which completely abolishes the right to any other method, form, or amount of compensation than that provided. The decision in the principal case seems clearly sound. In the few cases *contra*, the desire to aid the injured employee appears to have prevailed over sound policy and the evident intention of the compensation acts. As to the constitutionality of disfigurement provisions in workmen's compensation acts see (1920) 33 HARV. L. REV. 473.

ADMIRALTY—COLLISIONS—DEFENSE OF COMPULSORY PILOTAGE.—The steamers Gothland and Alexander Shukoff collided in the Thames on Dec. 4, 1916. Both vessels were in charge of compulsory pilots. It appeared that the Gothland was at fault, but her owners put in the defense of compulsory pilotage. Evidence was offered to show that the captain and crew of the Gothland had not rendered the pilot the proper assistance by keeping a sharp lookout and giving the pilot warning of the proximity of the Shukoff. *Held,* that the defence of compulsory pilotage was not available, since the master and crew of the vessel had not rendered proper assistance to the pilot, and this neglect contributed to the collision. *The Alexander Shukoff v. The Gothland* [1921, H. L.] A. C. 216.

Most seaports require the taking of a licensed pilot on entering and leaving port. N. Y. Laws 1882, ch. 410, sec. 2119; The Pilotage Act, 1913, sec. 11. If the only penalty for failure to take a pilot is the payment of the fee, the pilotage is not considered compulsory. *Homer Ramsdell Trans. Co. v Cie. Gén. Transatlantique* (1901) 182 U. S. 406, 21 Sup. Ct. 831; *The Dallington* [1903, Adm.] P. 77. When in charge of a vessel the pilot exercises most of the functions of the master of the vessel. Abbott, *Merchant Ships and Seamen* (14th ed. 1901) 301; Hughes, *Admiralty* (2d ed. 1920) 36. A pilot is not an insurer of the safety of the vessel, but is under a duty to the owners to exercise the reasonable skill and diligence of an expert and may be held liable for any damages the owner may have to pay. *Guy v. Donald* (1907, C. C. A. 4th) 157 Fed. 527, 14 L. R. A. (N. S.) 1114, note. Pilot associations have been held liable for the negligence of a pilot furnished by them. *The Thielbek* (1917, C. C. A. 9th) 241 Fed. 209; but see Marsden, *Collisions at Sea* (7th ed. 1919) 108 (English rule). According to the rule long followed in England it was a good defense to an action for damages for a collision that the vessel was in the charge of a compulsory pilot, the theory being that no man should be held liable for the acts of a servant whom he has no choice in employing. *The Maria* (1839, Adm.) 1 W. Rob. 95; *The Halley* (1867, P. C.) L. R. 2 A. C. 193, 201. This exemption from liability has been recognized by statute in England. 52 Geo. III., c. 39, sec. 30 (1812); Merchant Shipping Act, 1894, sec. 633. When a pilot takes charge of a vessel the master is not relieved from all liability. He must see that the pilot's orders are obeyed and that a good lookout is kept. Abbott, *op. cit.,* 302. And if the master and the crew are to blame for any act or omission that contributes to the accident the owners are liable. *The Velasquez* (1867, P. C.) L. R. 1 A. C. 494; *The Tactician* [1907, Adm.] p. 244. The master is placed in the peculiar position that he must not offer too much assistance or interfere under penalty of forfeiting the defense. Abbott, *op. cit.,* 303, 304. The defense of compulsory pilotage has not been allowed in the United States. *The China* (1868, U. S.) 7 Wall. 53; *Indra-Line v. Palmetto Phosphate Co.* (1916, C. C. A. 4th) 239 Fed. 94; cf. *Homer-Ramsdell Transportation Co. v. Cie. Gén. Transatlantique, supra.* The theory of the American cases is that the vessel herself is liable to a lien according to the maritime law and that the doctrines of common-law agency do not apply. The English rule has been recently changed by statute. The Pilotage Act, 1913, sec. 15. The statute did not apply in the instant case as it did not take effect until January 1, 1918. The rule adopted by the statute, which corresponds to the American rule, would seem to work out the most uniform and satisfactory results.

BILLS AND NOTES—INDORSEMENT BY MISTAKEN HOLDER OF THE SAME NAME.—S. & Co. drew a check payable to H. E. Richards, intending to mail the same to its client by that name in Oklahoma. By mistake the check was sent to a former client of the same name in Texas, who cashed it at a Texas bank, which, in turn, discounted it with the defendant bank. The defendant bank collected payment from the drawee bank. The plaintiff drawer now sues as assignee of the

true payee for conversion. *Held,* that the plaintiff cannot recover. *Slattery & Co. v. National City Bank* (1920, N. Y. Mun. Ct.) 64 N. Y. L. J., Dec. 22, 1920, No. 68.

It is a general rule that no title to a negotiable instrument passes by a forged indorsement and that the bank or person making the payment does so at its peril. N. I. L. sec. 23; *Munroe v. Stanley* (1915) 220 Mass. 438, 107 N. E. 1012. The cases in which the indorsement has been made by a person of the same name as the true payee, into whose hands the check has fallen, must be distinguished from the impostor cases, since in the latter type the mistake as to identity is on the part of the drawer, while in the former the mistake as to identity originates with the party who purchases or pays the instrument on the spurious indorsement. See *Harmon v. Old Detroit National Bank* (1908) 153 Mich. 73, 116 N. W. 617; 17 L. R. A. (N. S.) 514, note. The indorsement of a check or draft by one who is not the payee or indorsee but who bears the same name is clearly a forgery if he knows that he is not the person intended. *Russell v. First National Bank* (1911) 2 Ala. App. 342, 56 So. 868; *Beattie v. National Bank* (1898) 174 Ill. 571, 51 N. E. 602. A drawer nevertheless cannot recover from the drawee who has paid a check sent by the drawer to a payee of the same name as the true payee, because as between two innocent parties the one causing the injury must suffer. *Weisberger v. Barberton Savings Bank* (1911) 84 Ohio St. 21, 95 N. E. 379. Nor will a recovery be allowed against a savings bank where its depositor requested that a draft payable in Germany be sent to him there for the amount of his deposits, and where such draft was received and indorsed by and paid to a party of the same name by the drawee, the bank having a rule that deposits will be paid only over its counter. *Jung v. Second Ward Bank* (1882) 55 Wis. 364, 13 N. W. 235. But it has been held that the drawee bank may recover against the indorsee of the false payee immediately upon discovering that there has been a forgery. *Third National Bank v. Merchants Bank* (1894, Sup. Ct.) 76 Hun, 475, 27 N. Y. Supp. 1070; *Beattie v. National Bank, supra.* And where the true payee sued an indorsee of a person having the same name as the payee, the court allowed a recovery by the plaintiff, and likewise where the assignee of the true payee brought suit against the drawee bank which had paid a draft to a bona fide purchaser from a person having the same name as the payee. *Indiana National Bank v. Hottsclaw* (1884) 98 Ind. 85; *Graves v. American Exchange Bank* (1858) 17 N. Y. 205. Where the owner of a bond delivered it merely for safekeeping to a bailee of identically the same name, an indorsement and delivery of the bond by the bailee to the plaintiff for value was inoperative against the owner. *People's Trust Co. v. Smith* (1915) 215 N. Y. 488, 109 N. E. 561. Where the payee of a draft sued the indorsee of a person having the same name as the payee, a state of facts similar to the instant case in all respects except that the true payee was suing instead of his assignee, the court permitted the plaintiff to recover. *Thomas v. First National Bank* (1912) 101 Miss. 500, 58 So. 478. In view of what has been said above it would seem that upon authority the principal case is not sound.

CARRIERS—BILLS OF LADING—DELIVERY OF GOODS WITHOUT SURRENDER OF BILL OF LADING.—The plaintiff shipped a carload of potatoes to Louisville, Ky., by the defendant railroad on an "order notify" bill of lading. The bill of lading, endorsed in bank by the plaintiff consignor, was attached to a draft, discounted at the plaintiff's bank, and forwarded to the vendee's bank, which wrongfully delivered it to the vendee without receiving payment of the draft. An agent of the vendee, having the bill in his possession, telephoned the defendant's agent at Louisville to deliver the car to the Southern Railroad to be taken to Dumesnil, Ky., which it did without demanding surrender of the bill. The potatoes, being unsatisfactory, were rejected at the latter place and the bill of lading was

returned to the bank. The plaintiff accepted a return of the bill of lading and the draft, sold the potatoes at a loss, and sought to hold the defendant liable for the difference between the contract and the selling price. *Held,* that the defendant was not liable. *Pere Marquette Ry. v. French* (1921) 41 Sup. Ct. 195.

Prior to the enactment of the Federal Uniform Bills of Lading Act, 39 U. S. Stat. at L. 538, ch. 415, it was the general view that the requirement that the bill of lading be surrendered upon delivery of the goods was primarily for the protection of the carrier. *Famous Mfg. Co. v. Chicago & Northwestern Ry.* (1914) 166 Iowa, 361, 147 N. W. 754; *Nelson Grain Co. v. Railroad Co.* (1913) 174 Mich. 80, 140 N. W. 486. Congress, however, in this Act, had in view the protection of holders who may have made advances upon the bill of lading as security. See *Matter of Bills of Lading* (1908) 14 I. C. C. Rep. 346. The evident result of this legislation has been to deprive the carrier of the power, which it formerly had, to terminate its duty to the consignor by merely making delivery to the consignee, whether he was in possession of the bill or not. The decision by the Michigan court, construing the federal Act in the instant case, seems to go the length of making the carrier liable to the consignor for the mere failure to take up the bill of lading, though the person to whom delivery is made has it in his possession at the time. *French v. Pere Marquette Ry.* (1918) 204 Mich. 578, 171 N. W. 491. The protection intended to be extended by the Act does not require this holding. Furthermore the carrier is justified in making delivery to a person in possession of a bill properly indorsed, as in the instant case. 39 U. S. Stat. at L. 540, sec. 9. Of course, if the carrier makes delivery to a consignee who has not possession of the bill of lading, it is liable, because under the Act it has not performed its contract. *Babbitt v. Grand Trunk Western Ry.* (1918) 285 Ill. 267, 120 N. E. 803; *Turnbull v. Michigan Central Ry.* (1914) 183 Mich. 213, 150 N. W. 132. The right of action against the carrier, however, will exist only in favor of a bona fide purchaser. 39 U. S. Stat. at L. 540, sec. 11. As was pointed out in the instant case the plaintiff, when it took back the bill of lading, knew all the facts. The decision is clearly correct and distinctly defines the duties of the carrier under the sections of the Act involved.

CONTRACTS—LEGALITY OF AGREEMENTS BY BUYERS NOT TO BID AGAINST EACH OTHER AT A PUBLIC AUCTION.—The plaintiff and defendant agreed that they would not bid against each other at a public auction of government stores, in order to keep down the price and to share the profits to be realized by a resale of the goods. The defendant accordingly purchased the articles but repudiated the agreement and the plaintiff brought a bill for an account with damages. The lower court found that as a result of this combination the goods were sold for much less than they would have been had competition been free. *Held,* that the plaintiff was entitled to an account, since the contract was not illegal or against public policy. Scrutton, L. J., *dissenting. Rawlings v. General Trading Co.* (1920, C. A.) 37 T. L. R. 252.

The instant case shows the divergence of judicial opinion between the United States and England regarding public bidding. In the United States the general rule is that any agreement whereby bidding is checked or stifled at an auction sale of either private or public property, is illegal. *Doolin v. Ward* (1810, N. Y. Sup. Ct.) 6 Johns. 194; *Fletcher v. Johnson* (1905) 139 Mich. 51, 102 N. W. 278. Similarly, where contracts for the construction of public or private works are let upon bids, agreements which in their necessary operation tend to restrain natural rivalry and competition among prospective contractors, are held to be against public policy and void. *McMullen v. Hoffman* (1899) 174 U. S. 639, 19 Sup. Ct. 839; *Pitts. Dredging Co. v. Monongahela Co.* (1905, C. C. W. D. Pa.) 139 Fed. 780. Especially is this rule applied to agreements affecting judicial sales and government sales and lettings. *Jones v. Caswell* (1802, N. Y. Sup. Ct.) 3 Johns.

29; *Kuhn v. Buhl* (1916) 251 Pa. 348, 96 Atl. 977; 42 L. R. A. (N. S.) 1198, note. These principles have generally not been applied to private sales not at public auction. *Morrison v. Darling* (1874) 47 Vt. 67; *White v. McMath* (1913) 127 Tenn. 713, 156 S. W. 470. Yet there are a few decisions which have so extended them. *Kincheloe v. Taylor* (1918) 123 Va. 178, 96 S. E. 167; *Boyle v. Adams* (1892) 50 Minn. 255, 52 N. W. 860. The latter case is perhaps justifiable on the ground that public property was involved. The growing tendency, however, has been to inquire into the intent and purpose of the parties and to uphold the agreement or combination whenever its object is not to stifle or paralyze competition. The agreement, therefore, will be upheld where it is entered into solely to make the purchase possible, or to protect an interest or effect a bona fide partnership. *Smith v. Ullmann* (1881) 58 Md. 183 (to make the purchase possible); *Hopkins v. Ensign* (1890) 122 N. Y. 144, 25 N. E. 306 (to protect an interest); *Hegness v. Chilberg* (1915, C. C. A. 9th) 224 Fed 28 (to effect a bona fide partnership). The principal case is doubtless in accord with the English authorities. *Heffer v. Martyn* (1867) 36 L. J. Ch. 372; *Leopard v. Litoun* (1897, Q. B.) 41 Sol. Jo. 545. But considering the nature of the sale, the purpose of the agreement and its effect, the dissenting opinion would seem to be sounder, and certainly it is in accord with the American decisions.

CONFLICT OF LAWS—DOMICIL OF A MARRIED WOMAN.—A Scotswoman married a Scotsman while both were domiciled in Scotland. In 1893 the husband emigrated to Australia at the instance of his wife, and ceased to communicate with her. In 1902 he went through the form of marriage with another woman and lived with her until his death in Queensland in 1918. The wife commenced divorce proceedings in Scotland, but died in 1915 before a decree was secured. The Commissioners of Internal Revenue brought this action to subject her estate to legacy duties, on the theory that her domicil was in Scotland. The Lord Ordinary held that the husband had a domicil in Queensland but that the wife's domicil remained in Scotland. The Court of Session, by a majority, held that the wife's domicil was in Queensland, *Held*, that the wife's domicil was in Queensland. *Lord Advocate v. Jaffrey* [1921, H. L.] A. C. 146.

The American courts have followed a far more liberal rule than the English doctrine. Where the husband has given cause for divorce, all courts of the United States allow the wife to establish a domicil for the purpose of divorce, wherever she wishes. *Ditson v. Ditson* (1856) 4 R. I. 87; *Beale, Domicile of a Married Woman* (1917) 2 So. L. Q. 93, 101; but see *Burtis v. Burtis* (1894) 161 Mass. 508, 37 N. E. 740. There has been a growing tendency to allow a wife who has grounds for divorce to obtain a domicil for other purposes. *Buchholz v. Buchholz* (1911) 63 Wash. 213, 115 Pac. 88 (letters of administration); *Watertown v. Greaves* (1901, C. C. A. 1st) 112 Fed. 183 (purposes of jurisdiction); *Shute v. Sargent* (1893) 67 N. H. 305, 36 Atl. 282 (probate); *contra, Estate of Wickes* (1900) 128 Calif. 270, 60 Pac. 867. These cases have been criticised on the ground that the family is still the fundamental unit of our legal civilization and it must have one definite domicil. Beale, *Domicile of a Married Woman, supra.* The husband's privilege of fixing the family domicil rests upon his duty to support his family. *In re Bushby* (1908, Surro.) 59 Misc. 317, 112 N. Y. Supp. 262. When he fails to fulfil his matrimonial duties, the reason for his privilege fails. And under the present emancipation of woman, since she is *sui juris,* and can have dealings with others, she should be directly amenable to the law and hence should have a legal home of her own. Levitt, *Domicile of a Married Woman* (1920) 91 CENT. L. J. 24, 28. The interests of the state are not served by depriving a wronged wife of the privilege of establishing a legal domicil. As a practical matter, knowledge that she cannot have a separate legal domicil will not in the least deter her from leaving her husband

and breaking up the family entity if she wishes to. Some cases in the United States have allowed a married woman to obtain separate domicil even where the husband has given no ground for divorce. *Chapman v. Chapman* (1889) 129 Ill. 386, 21 N. E. 806; *Buchholz v. Buchholz, supra; Saperstone v. Saperstone* (1911, Sup. Ct.) 73 Misc. 631, 131 N. Y. Supp. 241; *contra, In re Bushby, supra; Cheely v. Clayton* (1884) 110 U. S. 701, 4 Sup. Ct. 328. It is submitted that the wife should not be allowed to benefit by her own wrong and that the grounds of policy for allowing a separate domicil do not apply where the husband has not given cause for divorce or legal separation. England does not, in general, allow a separate domicil to a married woman even for divorce proceedings. *Dolphin v. Robins* (1859) 7 H. L. Cas. 390. The instant case is in accord with the less liberal English rule.

CONTRACTS—RESTRAINT OF TRADE—RESTRAINT ON ALIENATION OF PROPERTY MANUFACTURED UNDER SECRET PROCESS.—This suit was brought to restrain the Coca-Cola Co. and the Coca-Cola Bottling Co. from executing contracts alleged to be within the anti-trust laws of the state. By the contracts the Coca-Cola Co. granted the privilege of bottling to the Bottling Co., the latter agreeing to buy all their syrups from the Coca-Cola Co. and not to resell the syrup thus bought. *Held,* that the contract, by restraining the resale of the syrups, merely restricted the grantee in the exercise of a privilege, and was therefore valid. *Coca-Cola Co. v. State* (1920, Tex.) 225 S. W. 791.

In general, restraints on alienation are considered void. *Park & Sons Co. v. Hartman* (1907, C. C. A. 6th) 153 Fed. 24. But where the restraint is found to be reasonable, with respect both to the public and to the contracting parties, and is limited to what is fairly necessary to the protection of the covenantee, it will be sustained. *Ford Motor Co. v. Boone* (1917, C. C. A. 9th) 244 Fed. 335; cf. *Continental Candy Corp v. Calif. Sugar Co.* (Dec. 28, 1920) U. S. D. C. S. D. Calif. No. 579. It cannot, however, be upheld solely because the article sold is manufactured under a patent or secret process. *Straus v. Victor Talking Machine Co.* (1916) 243 U. S. 490, 37 Sup. Ct. 412. A patent does not confer upon the patentee the right to sell or use the patented article; he has these rights without a patent. He only gets a right to exclude others from using his invention or discovery. See Munson, *Control of Patented and Copyrighted Articles after Sale* (1917) 26 YALE LAW JOURNAL, 270, 272. When title to the chattels is passed by the patentee, they are no longer subject to the patent monopoly. *Motion Picture Patents Co. v. Universal Film Mfg. Co.* (1916) 243 U. S. 502, 37 Sup. Ct. 416. Most of the cases holding restraints on alienation to be invalid do so on the theory that they have for their purpose the destruction of competition. *Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 127 N. W. 803. Other cases go on the theory that a free right of alienation is an incident to the general right of property in articles which pass from hand to hand in commerce. See *Dr. Miles Medical Co. v. Park & Sons Co.* (1908, C. C. A. 6th) 164 Fed. 803, 806. The latter rule is based upon public policy and if a transaction does not infringe the policy which the rule carries out, then it is not illegal. See Kales, *Contracts and Combinations in Restraint of Trade* (1918) sec. 35. The principal case, not being one where competition was restricted, comes within the last class of cases. As there was no public demand for the syrup, as such, and as no one but the licensee of the defendant could bottle the beverage, it was a contract protecting the rights retained by the covenantee and the restraint seems reasonable and not against public policy. The reasoning of the court, that the restraint on the resale of the article was a restriction on the exercise of a privilege that was granted, seems faulty. Though the restriction as to the resale was imposed before the syrup was sold by the defendant and at the time when the privilege was granted, it attached to the article and was in effect a restraint on the alienation of the article itself.

CORPORATIONS—POWER OF MAJORITY STOCKHOLDERS TO SELL ENTIRE PROPERTY FOR STOCK.—The Alice Company, being without reasonable prospects of making a profit, agreed to convey its property to the Anaconda Company, receiving stock of the latter in return, and after ratification by a majority of the stockholders, carried out the agreement. A majority of the stockholders having voted to dissolve, the minority stockholders brought this action to set aside the sale to the Anaconda Company and to enjoin the dissolution. *Held,* that the majority stockholders had the power to sell the property for stock, but the sale should be set aside because of the inadequacy of the price. *Geddes v. Anaconda Mining Co.* (1921) 41 Sup. Ct. 209.

The instant case raises two questions: (1) can the majority stockholders sell all the property of a corporation for stock, and (2) can they force this stock on the dissenting stockholders? To answer the first question we must decide whether the corporation has the power to take stock and whether the majority can exercise such power. Without statutory authority, or charter authority, a corporation can not hold stock in another corporation. *Riker v. United Drug Co.* (1911) 79 N. J. Eq. 580, 82 Atl. 930. An exception has been suggested where the corporation is about to dissolve and distribute this stock. *Treadwell v. Salisbury Co.* (1856, Mass.) 7 Gray, 393; see *Byrne v. Schuyler Co.* (1895) 65 Conn. 336, 342, 31 Atl. 833, 836. But even where a corporation has the power, as is generally the case, can it be exercised by the majority? The cases which deny this authority are generally cases where the majority could not sell all the property for cash, because the concern was prosperous. *Elyton Land Co. v. Dowdell* (1896) 113 Ala. 177, 20 So. 981; *People v. Ballard* (1892) 134 N. Y. 269, 32 N. E. 54. It would seem that where the corporation can take stock, the majority can sell for stock in the same circumstances that they can sell for cash: namely, when the company is not prospering. *Bowditch v. Jackson Co.* (1912) 76 N. H. 351, 82 Atl. 1014; *Metcalf v. Am. School Furniture Co.* (1903, C. C. W. D. N. Y.) 122 Fed. 115. After the corporation has this stock, the second question is whether the majority stockholders can force it on the dissenting minority? The practically universal answer is that they can not. *Winfree v. Riverside Cotton Mills* (1912) 113 Va. 717, 75 S. E. 309; *contra, Mayfield v. Alton Ry.* (1902) 198 Ill. 528, 65 N. E. 100. To allow such action would be to change a stockholder's investment without his consent. But the denial of this power should not affect our answer above to the first question, for the corporation's acquisition of stock and the distribution of this stock are totally separate. *Butler v. New Keystone Copper Co.* (1915) 10 Del. Ch. 371, 93 Atl. 380; *Logie v. Copper Mines* (1910) 106 Wash. 208, 179 Pac. 835. It is merely necessary to arrange to give cash to the dissenters. *Slattery v. New Orleans Co.* (1911) 128 La. 871, 55 So. 558; *Jackson v. Gardiner Co.* (1914, C. C. A. 1st) 217 Fed. 350. Some courts have gone farther and granted a decree setting aside the sale of the property unless cash is paid to the minority holders within a stated time. *Koehler v. Brewing Co.* (1910) 228 Pa. 648, 77 Atl. 1016; cf. *Mason v. Mining Co.* (1889) 133 U. S. 50, 10 Sup. Ct. 224. Statutes may provide for the appraisal of the stock of dissenters. Cf. *In re Rowe* (1919, Sup. Ct.) 107 Misc. 549, 176 N. Y. Supp. 753. A suggestion has been made that where the stock is the equivalent of cash, the dissenters can not refuse it. See *Koehler v. Brewing Co., supra.* In the instant case the court adopted this suggestion. The decision might also be justified on the ground that the right of the dissenting stockholders to cash does not affect the power of the corporation to sell its property for stock. Inevitably, as in the instant case, this question is bound up with the question as to whether a fair price has been secured; its answer does not determine the existence of the power, but only shows whether it has been exercised properly.

PRACTICE—EQUITABLE COUNTERCLAIM TO LEGAL ACTION—SEPARATE AND PRIOR TRIAL OF ISSUES RAISED.—The plaintiff sued the defendant for wrongful discharge before the expiration of a contract to employ him for three years. The defendant pleaded, in addition to a general denial, an equitable counterclaim asking for specific performance of a contract which obligated the plaintiff to sell his stock in the defendant corporation to it in severing relations with it. The defendant moved for the separate trial at Special Term of the issues raised by his counterclaim and for a stay of the trial of the other issues in the meantime. *Held,* that the motion for a separate trial on the equitable counterclaim should be granted, and the latter should be stayed until the trial of the legal issues. *Reilly v. Guttman Silks Corporation* (1920, N. Y. Sup. Ct.) 113 Misc. 502.

There seems to be quite a conflict as to the order of trial of the issues raised by an equitable counterclaim to a legal action. The courts in some of the states hold that the issues raised in the equitable counterclaim should be tried first. *Cotton v. Butterfield and Demaris* (1905) 14 N. D. 465, 105 N. W. 236; *Penninger Co. Ltd. v. Clark* (1912) 22 Idaho 397, 126 Pac. 524. The rule in the federal courts is to the same effect. *Union Pacific Ry. v. Syas* (1917, C. C. A. 8th) 246 Fed. 561; *Fay v. Hill* (1918, C. C. A. 8th) 249 Fed. 415. The only reason given by these courts is that the determination of the equitable issues in favor of the defendant would put an end to the litigation and obviate the necessity of trying the legal issues involved. *Swasey v. Adair* (1891) 88 Calif. 179, 23 Pac. 284; 7 Encyc. of Pl. & Pr. 810. But it is conceivable that the determination of the equitable issues may not in some cases put an end to the litigation; and then this reason would fail. Other courts leave it to the discretion of the trial court as to whether the issues on the equitable counterclaim should be tried first. *Cacavallo v. D'Elia* (1918) 93 Conn. 116, 105 Atl. 348; *Crosby v. Scott-Graff Lumber Co.* (1904) 93 Minn. 475, 101 N. W. 610. It has recently been held that the court abused its discretion in deciding the legal issues as to the plaintiff's title before disposing of the equitable defense of bona fide purchase. *Oliver v. McWhirter* (1918) 112 S. C. 555, 96 S. E. 140. In the lower New York courts there is a conflict on this point. In one case it was held that since the equitable counterclaim would be heard first anyway, it was not necessary to stay the legal proceedings. *Thomas v. The Bronx Realty Co.* (1901) 60 App. Div. 365, 70 N. Y. Supp. 206. Other courts hold that the defendant must make a motion to have such a counterclaim tried first before attempting to place the case on the calendar. *Brody, Adler, & Koch Co. v. Hochstadter* (1912) 150 App. Div. 527, 135 N. Y. Supp. 549; *New York v. Matthews* (1913) 156 App. Div. 490, 141 N. Y. Supp. 432. The New York Court of Appeals has held with the instant case and other cases in lower New York courts, that where the facts constituting the equitable counterclaim are also a defense to the legal action, the issues on the counterclaim do not have to be tried first. *Bennett v. Edison Electric Illuminating Co.* (1900) 164 N. Y. 131, 58 N. E. 7; *Loewenthal v. Haines* (1914) 160 App. Div. 503, 145 N. Y. Supp. 579; *contra, Goss v. Goss & Co.* (1908) 126 App. Div. 748, 111 N. Y. Supp. 115. The best rule seems to be the one that makes it discretionary with the court. This discretion should be based upon the facts and circumstances of each case as well as upon the condition of the calendar.

PRACTICE—LEGAL COUNTERCLAIM IN AN EQUITABLE ACTION—JURY TRIAL A MATTER OF RIGHT.—The plaintiff sued in equity for the recovery of capital stock in the defendant corporation, to which the plaintiff claimed to be entitled by virtue of an agreement whereby the plaintiff agreed to make certain payments and deliver to the defendants certain machinery and to assign to them exclusive patent rights. The plaintiff alleged complete performance on his part, which entitled him to receive 600 shares, of which only 510 were delivered; and this suit was brought to compel the delivery of the balance and to restrain the

defendant from transferring it to anybody else during the pendency of the action. The defendant put in a general denial and also a legal counterclaim for $25,000 damages for non-delivery of certain of the machines. The defendant moved for a jury trial on his counterclaim as a matter of right. *Held* (Smith, J., *dissenting*) that the defendant is entitled as a matter of right to have the legal issues raised by the counterclaim settled by a jury. *Maag v. Maag Gear Co.* (1920) 193 App. Div. 759, 184 N. Y. Supp. 630.

The law seems settled that a defendant by setting up a legal counterclaim to an action in equity cannot change the whole action into a legal one and obtain thereby a trial by jury on all the issues. *Lord Kinnaird v. Field* [1905] 2 Ch. 361; *Angus v. Craven* (1901) 132 Calif. 691, 64 Pac. 1091. The courts of some states hold that where the defendant pleads a legal counterclaim to an equitable cause of action he is not entitled to a jury trial on the counterclaim as a matter of right. *Johnson Service Co. v. Kruse* (1913) 121 Minn. 28, 140 N. W. 118; *Larkin v. Wilson* (1882) 28 Kan. 513. And the constitutional provision that the right of trial by jury shall remain inviolate does not prevent this result. *Johnson v. Peterson* (1903) 90 Minn. 503, 97 N. W. 384; *Peters v. Duluth* (1912) 119 Minn. 96, 137 N. W. 390. The instant case in holding that the defendant is entitled to a jury trial as a matter of right is in conflict with an earlier New York decision by the Court of Appeals, which held that in such a case the right was waived. *Mackellar v. Rogers* (1888) 109 N. Y. 468, 17 N. E. 350; 19 Encyc. of Pl. and Pr. 799, note. For a brief discussion of the scope of counterclaims see (1921) 21 COL. L. REV. 196; (1921) 5 MINN. L. REV. 307.

PROPERTY—RIGHTS WITH RESPECT TO DEAD BODIES.—The plaintiff, who was the next of kin of the defendant's deceased husband, had buried the body in a family plot. There was evidence that the defendant, although ill at the time, had consented to the manner and place of burial. Thereafter the defendant was about to disinter and remove her husband's body to a place chosen by her. The plaintiff filed a bill for an injunction. *Held*, that an injunction should issue, since the defendant had waived her right to the control of her husband's body for purposes of burial. *Stiles v. Stiles* (1920, Sup. Ct.) 113 Misc. 576, 185 N. Y. Supp. 53.

The early common law recognized no rights with respect to dead bodies; they were exclusively within the jurisdiction of the church and ecclesiastical courts. See *Reg. v. Sharpe* (1857, Cr. App.) Dearsly & B. 160; 3 Coke, Inst. 203. There is no property in dead bodies; they are not subject to a lien; nor will replevin lie for them. *Amer. Express Co. v. Epply* (1876) 5 Ohio Dec. 337; *Keyes v. Konkel* (1899) 119 Mich. 550, 78 N. W. 649. However, the law has always recognized a duty to bury the dead. This duty is usually cast successively upon the executor, surviving spouse, next of kin, and the person under whose roof the deceased died. See *Pierce v. Proprietors* (1872) 10 R. I. 227, 235; *Williams v. Williams* (1882) L. R. 20 Ch. Div. 659, 664. Although there is no property in dead bodies, it is recognized that the relatives of a deceased person have a right that third persons shall not mutilate or otherwise maltreat the body. *Larson v. Chase* (1891) 47 Minn. 307, 50 N. W. 238; *Floyd v. A. C. L. Ry.* (1914) 167 N. C. 55, 83 S. E. 12. Relatives also have a right under certain circumstances that the body shall not be disinterred. *Gardner v. Swan Cemetery* (1898) 20 R. I. 646, 40 Atl. 871; *Litteral v. Litteral* (1908) 131 Mo. App. 306, 111 S. W. 872. The exercise of the so-called right of control over a dead body, in preference to others, is subject to the supervision of courts of equity. See *Larson v. Chase, supra; Pettigrew v. Pettigrew* (1904) 207 Pa. 313, 319, 56 Atl. 878, 880. Under certain circumstances the surviving spouse, who is usually preferred, will not be permitted to control the body as against the next of kin. *Wood v. Butterworth* (1911) 65 Wash. 344, 118 Pac. 212. Under other circumstances, the privilege will be refused the relatives and granted to a stranger in blood. *Scott v. Riley*

(1883, Pa. C. P.) 16 Phila. 106; see *O'Donnell v. Slach* (1899) 123 Calif. 285, 55 Pac. 906. In at least one case the court has denied it altogether and ordered the body to be buried under the decree and direction of the court. *De Festetics v. De Festetics* (1911) 79 N. J. Eq. 488, 81 Atl. 741. In some states custody and control of the dead body is granted and regulated by statute. See Conn. Gen. St. 1902, sec. 363; *Swits v. Swits* (1909) 81 Conn. 598, 71 Atl. 782. Since the defendant in the instant case had waived the right which the court recognizes she had to control the disposition of her husband's body, the intervention of equity to prevent disinterment seems proper. Cf. *Snyder v. Snyder* (1880, N. Y. Sup. Ct.) 60 How. Pr. 368.

TAXATION—FEDERAL CORPORATION TAX—DEDUCTION OF INTEREST LIMITED TO PAR VALUE OF PAID-UP CAPITAL.—Section 38 of the Federal Corporation Excise Tax Law of 1909 permitted a deduction from the corporation's gross income of "interest actually paid within the year on its bonded or other indebtedness not exceeding the paid up capital stock of such corporation." The defendant corporation had sold a considerable number of shares at prices above par. In making up its tax returns the corporation deducted interest upon the entire amount paid for the shares. The United States claimed the deductions should be limited to interest upon the par value of the stock, and sued for the balance of the tax assessed on this basis. *Held,* that the plaintiff should recover. *New York, N. H. & H. Ry. v. United States* (Nov. 11, 1920) U. S. C. C. A. 2d, Oct. Term, 1920, No. 30.

The defendant claimed that Congress intended by "paid up capital stock" the sum actually paid in by the stockholders, and that any other interpretation of the act would make it void as denying equal protection of the laws. But the court rejected this interpretation and laid stress upon the words "not exceeding the paid-up capital stock" as showing the congressional intent to limit "capital stock" to the par value of the shares. The excess over par paid for shares is regarded as a premium by business men generally. It was first entered in the defendant's books in its profits and loss account, and the sums were used as if surplus. In the construction of tax laws, words are usually to be interpreted in their popular sense. See *American Pig-Iron Storage Co. v. State Board of Assessors.* (1894, Sup. Ct.) 56 N. J. L. 389, 394, 29 Atl. 160, 161. It seems clear that in the principal case the legislative intent has been properly interpreted. Cf. *B. & M. Ry. v. United States* (1920, C. C. A. 1st) 265 Fed. 578. A resulting apparent inequality, however, is that while the defendant may not make the deduction, another corporation might do so even though similarly circumstanced in every respect except that its shares were of no par value. But assuming that Congress intended to impose the tax in this manner, the Act should not be held unconstitutional. Cf. *Union Tanning Co. v. Commonwealth* (1918) 123 Va. 610, 96 S. E. 780; *Greene v. Louisville & Interurban Ry.* (1917) 244 U. S. 499, 37 Sup. Ct. 673. It is in the result but not in the method of imposition that the tax is unequal and possibly unjust. As the tax involved was laid under the 1909 law, the case is of interest chiefly as showing an additional advantage of stock without par value. The advantage does not exist under the present law, however. Under the 1918 Federal Income Tax Law, sec. 214, all interest paid on indebtedness is deductible. Montgomery, *Income Tax Procedure* (1920) 585; Holmes, *Federal Taxes* (1920) 855.

TAXATION—FEDERAL CORPORATION TAX—UNREASONABLE SALARY DEDUCTIBLE IN DETERMINING TAXABLE INCOME.—The United States brought suit to recover from the defendant corporation an additional income tax, on the theory that the salary paid to its president, which it had used as a deductible item in determining its taxable income, was unreasonably disproportionate to the value of his services and hence an improper deduction. *Held,* that the plaintiff should suffer a non-

suit, since the corporation's privilege of deducting an officer's salary depends not on the reasonableness but on the bona fides of the salary. *United States v. Phila. Knitting Mills Co.* (1920, E. D. Pa.) 268 Fed. 270.

The opinion does not indicate what years' taxes were in dispute, but it appears from a newspaper comment on the decision that the taxes in question were for the years 1909-1912. The Corporation Tax Act of 1909 permitted deduction from gross income of "all the ordinary and necessary expenses actually paid within the year" in the operation of the corporation's business. 36 Stat. at L. 113. Substantially the same phraseology was continued in the Income Tax Act of 1913 and of 1916; no express reference being made to salaries. 38 *id.* 172; 39 *id.* 759, 767. Under these Acts the problem is whether the employer may determine for himself the necessity of the expense with respect to a given salary, or whether the question of what was an ordinary and necessary expenditure for services shall be submitted to a jury. The principal case is believed to be sound within the limits of good faith. A mere error of judgment or undue liberality to an employee ought not to deprive the employer of the privilege of deducting. When the name of compensation for services is used really as a cloak to cover a distribution of profits or income, the deduction cannot stand. *Jacob & Davies, Inc. v. Anderson* (1915, C. C. A. 2d) 228 Fed. 505. The Revenue Act of 1918 expressly includes among deductible expenses "a reasonable allowance for salaries." Secs. 214 (a), 234 (a). Possibly this phrase gives the taxing officials power to review excessive salaries paid by a tax payer even though no mala fides is involved. Of course Congress may, if it chooses, limit deductions in respect to salaries to fair compensation for services rendered. The Treasury Regulations assume that it has done so. U. S. Int. Rev. Reg. 45, art. 105, 106; see Holmes, *Federal Income and Profits Taxes* (1920) 347, and *1921 Suppplement*, 220. No known judicial determination of the question has yet been rendered.

WILLS—CONSTRUCTION OF "LAPSE."—The testator's will provided that the residuum should go to four relatives in equal shares, and that in case any of them should die before the testator, his portion should "lapse." A statute declared that upon the death of any relative legatee before the testator, his share should go to his lineal descendants. One of the legatees having predeceased the testator, this bill was brought by the administrator for a construction of the will and an order determining the devolution of the share of the deceased relative. *Held*, that the will created a tenancy-in-common and hence no right of survivorship, with a *dictum* that the use of the word "lapse" prevented the application of the above statute to the disputed legacy and made it intestate property. *Hay v. Dole* (1920, Me.) 111 Atl. 713.

At common law, if a residuary legatee dies before the testator, his legacy is said to lapse, going to the heirs of the testator. *Stetson v. Eastman* (1892) 84 Me. 366, 24 Atl. 868; see *Farnsworth v. Whiting* (1906) 102 Me. 296, 300, 66 Atl. 831, 832. It would seem then that the testator in the instant case has merely expressed what the law would imply anyway. But the statute involved in the case has changed the common-law rule, so that when a legacy to a relative lapses, it goes to the lineal descendants of the relative and not to the heirs of the testator. Rev. St. Me. 1903, ch. 76, sec. 10. Hence in the absence of a clear intention to the contrary, the lineal descendants of the deceased legatee in the instant case, if any, should take such an interest as would have been taken by the deceased legatee. See *Keniston v. Adams* (1888) 80 Me. 290, 294, 14 Atl. 203, 204. The express declaration by the testator of the common-law rule would scarcely seem under the circumstances to afford evidence of such an intention. But even assuming that there is a clear intention to the contrary, it would seem very doubtful whether it should be given effect in view of the fact that the statute is based on public policy. See *Winter v. Winter* (1846, Ch.) 5 Hare, 306, 312;

see *Nutter v. Vickery* (1874) 64 Me. 490, 498. Although the dictum in the instant case is questionable, the decision that the surviving legatees take as tenants-in-common and that as far as they are concerned the heirs of the testator prevail, is undoubtedly sound. *Magnuson v. Magnuson* (1902) 197 Ill. 496, 64 N. E. 371; see *Herzog v. Title Guarantee & Trust Co.* (1903) 177 N. Y. 86, 93, 69 N. E. 283, 285.

WILLS—SOLDIERS' WILLS—REVOCATION OF FORMAL WILL BY UNATTESTED WRITING.—The testator, a soldier in the English army, made a formal will leaving property to his fiancée. He then was sent into active service. Later, because of certain information received by him, he broke off the engagement, and wrote to his sister, who had the will, instructing her to burn it, which she did. The testator died in service. After his death an unattested copy of the destroyed will was found. *Held,* that the will had been effectually revoked by the letter. *Wood v. Gossage* (1921, C. A.) 37 T. L. R. 302.

The English Wills Act provides that a will may be revoked "by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed." Wills Act, 1837 (1 Vict. c. 26) sec. 20. A writing, therefore, is usually inoperative as a revocation, unless signed by the testator, and attested by two witnesses, as required for the validity of a will. Wills Act, *supra,* sec. 9; *Toomer v. Sobinska* [1907] P. 106. But a soldier in actual military service is exempt from these requirements in the execution of a will disposing of personalty. Wills Act. *supra,* sec. 11; see COMMENTS (1918) 27 YALE LAW JOURNAL, 806. So an informal soldier's will may be probated with a prior formal will. *Winter v. Pawle* (1918, P.) 34 T. L. R. 437. And an *informal* soldier's will revokes a prior inconsistent formal will, except as to real estate. *Nixon v. Prince* (1918) 34 T. L. R. 444. Similarly, in Virginia, a holographic will revokes a prior inconsistent formal will. *Gordon v. Whitlock* (1896) 92 Va. 723, 24 S. E. 342. The court in the instant case construes secs. 11 and 20 of the Wills Act to mean that, since no formalities are required for the execution of a soldier's will, none are required for its revocation. That a soldier should have the same privilege in revoking as in executing a will seems a just exception to the usual modern requirements for revocation. The decision obviously carries out the intention of the testator.