CURRENT DECISIONS

ALIENS—ANTI-ALIEN LAND LEGISLATION—DISCRIMINATION AGAINST HEIRS OF CITIZENS.—The intestate, a citizen owning farm land, left as next of kin two nieces, who were citizens, and three nephews, non-resident aliens, who were English subjects residing in England. A statute precluded non-resident aliens from acquiring land in the state, with the exception that land acquired by an *alien* before the passage of the statute might descend to his heirs, who could sell within ten years or acquire absolute title by becoming a citizen. Neb. Rev. Sts. 1913, sec. 6273. The state brought an action to forfeit the shares of land claimed by the alien nephews. *Held,* that the land did not escheat, but passed to the nieces, and that the exception in the statutes had no application as the deceased was a *citizen. State v. Toop* (1922, Neb.) 186 N. W. 371.

Legislation preventing aliens from acquiring an interest in realty is now quite general. See COMMENTS (1922) 31 YALE LAW JOURNAL, 299. But the exception in the instant statute penalizes a *citizen* by depriving his heirs or devises of rights permitted to the heirs or devisees of an *alien.* A similar statute has been given the same interpretation in Illinois. *Wunderle v. Wunderle* (1893) 144 Ill. 40, 33 N. E. 195. It is to be hoped that the case will be a stimulant to legislative action.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—STATE SEDITION ACT.—The defendant was convicted of violating a state statute making it unlawful to advocate the performance of any acts in opposition to organized government. N. M. Laws, 1919, ch. 140. On appeal, the statute's constitutionality was questioned. *Held,* that the statute was unconstitutional because violating the privilege of free speech guaranteed by the state constitution. *State v. Diamond* (1921, N. M.) 202 Pac. 988.

The court construed the statute as applying to everyone advocating a change in government regardless of whether the proposed change was to be accomplished by constitutional methods or not. Under this construction the decision is obviously sound. *Ex parte Meckel* (1920) 87 Tex. Cr. App. 120, 220 S. W. 81. Similar statutes in other states have been construed as punishing only those who advocated an overthrow of organized government by the exercise of force and violence; the statutes were, therefore, held to be constitutional. *State v. Tachin* (1919) 92 N. J. L. 270, 106 Atl. 145. The instant case is of more than ordinary interest because perhaps indicating "a return to normalcy" on the part of the courts after a somewhat prolonged period of wartime hysteria. For a discussion of the principles involved see Corwin, *Freedom of Speech and Press Under The First Amendment: A Résumé* (1920) 30 YALE LAW JOURNAL, 48; Hart, *Power of Government Over Speech and Press* (1920) 29 *ibid.* 410; COMMENTS (1920) 29 *ibid.* 337, 677; (1920) 30 *ibid.* 68; (1922) 31 *ibid.* 422.

CONTRACTS—EFFECT OF CLAUSE GIVING EXCLUSIVE SALE TO REAL ESTATE BROKER.—The defendant signed an agreement giving the plaintiff "the exclusive sale" of her property. About one month later the defendant sold the property to a purchaser whom she herself procured. The plaintiff sued for the stipulated commission. *Held,* (two judges *dissenting*) that the plaintiff could recover. *Harris v. McPherson* (1922, Conn.) 115 Atl. 723.

Where the owner gives the "exclusive agency" to sell, he does not impliedly promise to pay a commission if he sells the property himself. *Smith v. Preis* (1912) 117 Minn. 392, 136 N. W. 7; *Roth v. Thomson* (1919) 40 Calif. App. 208, 180 Pac. 656. There is a conflict, however, when the term "exclusive sale" is used. *Murphy v. Sawyer & Warford* (1913) 152 Ky. 645, 153 S. W. 991 (commission allowed); *Roberts v. Harrington* (1918) 168 Wis. 217, 169 N. W. 603 (commission not allowed). The consideration for the owner's promise in such

cases is the broker's effort and money expended for advertising. *Hayes v. Clark* (1920) 95 Conn. 510, 111 Atl. 781. The minority of the court in the instant case argued that the defendant merely made an offer which could be accepted by the procuring of a customer by the plaintiff and which was revocable at any time before acceptance. The fact that the writing was on a standard form furnished by the plaintiff also had some weight since the terms should have been construed most strictly against the broker. See COMMENTS (1919) 28 YALE LAW JOURNAL, 575.

CONTRACTS—LANDLORD AND TENANT—PRE-EXISTING DUTY AS CONSIDERATION.—The defendant was the tenant of the plaintiff's land at a fixed rental per acre. During a flood, the defendant threatened to abandon the premises, and was induced to remain by the plaintiff's promise that rent for the flooded portion (almost one half) would not be asked. The plaintiff sued for rent for the entire premises. The defendant pleaded the later agreement. *Held,* that plaintiff could recover rent for the entire premises. *Hunter Land & Development Co. v. Watson,* (1922, Mo.) 236 S. W. 670.

There are still a discouragingly large number of cases which reiterate the mechanical formula that a pre-existing duty cannot be a consideration for a new promise. The leaven of such a decision as that of Justice Cardozo's seems to need more than time to produce a desirable result. *DeCicco v. Schweizer* (1917) 221 N. Y. 431, 117 N. E. 807; Corbin, *Does a Pre-existing Duty Defeat Consideration?* (1918) 27 YALE LAW JOURNAL, 362.

ELECTIONS—NAMES OF PERSONS NOT ENTITLED TO HOLD OFFICE MAY NOT BE PRINTED ON OFFICIAL BALLOT.—The petitioners applied for a writ of mandamus to compel the Board of Elections to place on the official ballot as candidates for mayor of the City of New York and President of the Board of Alderman the names of two persons who were incarcerated in the state prison for felonies and whose terms of imprisonment extended beyond election day. *Held,* that the application should be denied, because under the Public Officers Law (Cons. Laws, 1909, ch. 47, sec. 3) and the Penal Law (Cons. Laws, 1909, ch. 88, sec. 510) a person to be nominated must be one who, at the time of his election, can take and hold the office for which he has been nominated. *Matter of Lindgren* (1921) 232 N. Y. 59.

In the absence of constitutional inhibition, the legislature has the power to determine the qualifications of state officials, and candidates for state offices. *Riter v. Douglas* (1910) 32 Nev. 400, 109 Pac. 444; 20 C. J. 125. Authority to pass upon objections to nominations is frequently vested by statute in election boards. *State v. Joyce* (1912) 87 Ohio St. 126, 100 N. E. 325. In some states the decision of the board is subject to review by the courts. *Hunt v. Hoffman* (1914) 125 Minn. 249, 146 N. W. 733; *State v. Hallowell* (1906) 77 Neb. 610, 110 N. W. 717. The board acts in a purely ministerial capacity. *State v. Democratic Committee* (1908) 120 La. 620, 45 So. 526. A fair construction of the statutes involved seems to lead to the conclusion that their purpose, at least in part, was to exclude from the official ballot the names of persons who would be ineligible to hold office if elected.

INTOXICATING LIQUORS—PROTECTION OF LAWFULLY ACQUIRED LIQUORS—RECOVERY FOR LIQUOR STOLEN FROM WAREHOUSE.—In July, 1919, the plaintiff stored 17 cases of liquor in the defendant's warehouse. Shortly thereafter they were stolen from the defendant, who was consequently unable to deliver them to the plaintiff on demand. Suit was brought to recover the value of the liquor. *Held,* that the plaintiff might recover. *Murphy v. St. Joseph Transfer Co.* (1921, Mo.) 235 S. W. 138.

In 1920 the United States Supreme Court held that liquor stored in a public

warehouse might be removed to the home of the owner. *Street v. Lincoln Safe Deposit Co.* (1920) 254 U. S. 88, 41 Sup. Ct. 31. A very recent case, with almost identical facts, reached a different result without directly overruling the prior decision. *Corneli v. Moore* (1922) 42 Sup. Ct. 176. For a full discussion of property rights in intoxicants, see COMMENTS (1922) 31 YALE LAW JOURNAL, 305.

SALES—ACCEPTANCE OF A PART OF THE GOODS AS CONSTITUTING AN ACCEPTANCE OF THE WHOLE.—The defendant purchased eleven pieces of silk from the plaintiff by sample. Four pieces were tendered back to the plaintiff because they were of a quality inferior to that of the samples. The plaintiff refused the tender and later brought an action to recover the purchase price. *Held,* that the acceptance by the defendant of part of the silks implied an acceptance of the entire lot. *Madison Costume Co. Inc. v. Goldberg* (1921, Sup. Ct.) 191 N. Y. Supp. 223.

Whether an acceptance of part of a lot of goods delivered under an entire contract constitutes an acceptance of the whole is a question on which the courts are divided. *Holmes v. Gregg* (1890) 66 N. H. 621, 28 Atl. 17; *Buckeye Buggy Co. v. Montana Stables* (1906) 43 Wash. 49, 85 Pac. 1077; *Mendetz v. Wood & Co.* (1914, Sup. Ct.) 86 Misc. 52, 148 N. Y. Supp. 92. The rule followed in the instant case seems the better; the buyer is only privileged to either accept or reject the entire lot. "If the buyer can accept some and reject others, the seller must equally be at liberty to make a valid tender of some and not others." Williston, *Sales* (1909) sec. 493, n. 68. The case is also interesting in that it holds that the special provisions of the New York Personal Property Law (N. Y. Cons. Laws, 1909, ch. 41, sec. 125) corresponding to the Uniform Sales Act, sec. 44, have no application to cases where the defect is in the quality of the goods delivered. This is in accord with the previous decisions in New York and with the English decisions under the Sale of Goods Act, sec. 30, of which the American statutes are an exact copy. See *Portfolio v. Rubin* (1921, Sup. Ct.) 196 App. Div. 316, 187 N. Y. Supp. 302; *Aitken, Campbell & Co. Ltd. v. Boullen & Gatenby* [1906, Sc.] Ct. of Sess. Cas. 490.

STATUTES—CONVICTION BASED ON IMPROPER STATUTE NOT GROUND FOR REVERSAL IF NOT PREJUDICIAL.—In a prosecution for manslaughter arising out of the violation of a state statute regulating automobile headlights a conviction was obtained under the erroneous impression of the court and counsel that the 1917 statute was still in effect when in fact the 1919 statute had replaced it. *Held,* that as the 1919 statute was no more favorable to the defendant than the one under which he was convicted, there was no ground for reversal. *Clemens v. State* (1921, Wis.) 185 N. W. 209.

The instant case illustrates the growing tendency of the courts to disregard the technicalities of procedure where not to do so would result in a useless repetition of a trial. For a general discussion on the subject of overlooking statutes, see COMMENTS (1920) 30 YALE LAW JOURNAL, 855.

TRUSTS—DECLARATION OF TRUST NOT RECOGNIZED IN CIVIL LAW.—T, desiring to make a gift of certain shares of stock in a company, informed the company that she was holding the shares as trustee for the plaintiff. The company issued new certificates for the stock, which T gave to the plaintiff. The defendant claimed the shares as the beneficiary under T's will on the ground that the gift was invalid. *Held,* that the plaintiff could not recover since the shares were not transferable by delivery and a declaration of trust could not be recognized under the civil law of Quebec. *O'Meara v. Bennett* (1921, P. C.) 126 L. T. R. 201.

The trust is peculiarly a development of English law. Scott, *The Trust As An Instrument of Law Reform* (1922) 31 YALE LAW JOURNAL, 457. Trusts are unknown to civil law. They were recognized in Louisiana by statute only in 1920. Bogert, *Trusts* (1921) 7; see *Marks v. Loewenberg* (1918) 143 La. 196, 78 So. 444.