

CURRENT DECISIONS

CITIZENSHIP—NATURALIZATION—ALIEN WIFE OF ALIEN.—The plaintiff and her husband were born in Hungary. They ceased living together in 1912, and the husband was believed to have returned to his native land. In 1920 the wife presented a petition for naturalization which the clerk refused to file on the ground that she was the wife of an alien. She procured an order of the federal District Court requiring the clerk to file the petition. The Department of Labor objected. *Held*, that the petition should be denied because the wife of an alien could not become a naturalized citizen of the United States. *In re Guary* (1921, S. D. N. Y.) 271 Fed. 968.

The court observed that it would be an anomaly if the wife of an alien husband could become a citizen of the United States, when by section 3 of the Act of March 2, 1907 (34 Stat. at L. 1228) any American woman who marries a foreigner takes the nationality of her husband. See also *United States v. Cohen* (1910, C. C. A. 2d) 179 Fed. 834. It is an interesting example of how reasoning by analogy may result in judicial legislation. See Van Dyne, *Law of Naturalization* (1907) 51; Borchard, *Diplomatic Protection of Citizens Abroad* (1916) secs. 263-268.

CONSTITUTIONAL LAW—LICENSES—MOTOR TRUCKS OF MAIL-CARRYING CONTRACTOR NOT EXEMPT.—The defendant contracted to carry mail for the Federal Government, and to use certain motor trucks exclusively for that purpose. A state statute (Wash. Laws, 1915, ch. 142, sec. 15, as amended by Laws, 1919, ch. 46, sec. 1) made it unlawful to operate motor trucks on the public highways without first having obtained a license. *Held*, that the contractor was not relieved from complying with the statute. *State v. Wiles* (1921, Wash.) 199 Pac. 749.

It is clear that a state government may not tax federal agencies. *Dodd, Implied Powers and Implied Limitations in Constitutional Law* (1919) 29 YALE LAW JOURNAL, 140. Nor may it materially interfere with the orderly exercise of a federal power. See *Johnson v. Maryland* (1920) 254 U. S. 51, 41 Sup. Ct. 16, commented on, (1921) 30 YALE LAW JOURNAL, 426, (1921) 34 HARV. L. REV. 434. The court is seemingly correct in considering the contractor as neither a direct representative of the government, nor its agent in any sense. The license was not a direct tax on the property of the federal government or on the exercise of a federal power, but was directly on the individual, affecting the government only indirectly.

COURTS—CONTEMPT OF COURT—PUBLICATION CRITICIZING A TERMINATED CASE.—The District Court denied the application of the City of New York to have the petitioner, a member of the City Board of Estimate and Apportionment, appointed co-receiver of a street railroad company. The petitioner then wrote a letter criticizing the decision on the ground that it denied the petitioner and other members of the board any access to the books and records of the company, a privilege necessary for the protection of public interests. *Held*, that the publication of the letter was not criminal contempt. *Ex Parte Craig* (1921, C. C. A. 2d) 274 Fed. 177.

The decision was based on two grounds: (1) that the letter, being merely a criticism made in good faith, was not contemptuous; and (2) that it was written when there was no proceeding pending before the court. It could thus not be construed as misbehavior "so near the presence of the court as to obstruct the administration of justice." The case accords with the general rule in the United States in holding that a publication criticizing a court concerning proceedings

already terminated is not criminal contempt. *Cheadle v. State* (1887) 110 Ind. 301, 11 N. E. 426; *Ex Parte Green* (1904) 46 Tex. Cr. App. 576, 81 S. W. 723.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT—VOID MEANING VOIDABLE.—A contract for the sale of land provided that if the vendor could not convey good title, "this agreement shall be null and void." The vendor's title proving defective, the vendee sued for specific performance, electing to take such title as the vendor had and pay the full purchase price. The vendor claimed that the contract became entirely void as to both parties on a defect appearing in the title. *Held*, that "void" should be interpreted to mean "voidable," giving the vendee the option of specific performance. *Frazer, J., dissenting. Medoff v. Vandersaal* (1921, Pa.) 114 Atl. 618.

Although one may disagree with the instant interpretation, a court need not give the word "void" its technical meaning. *Central Oil Co. v. Southern Refining Co.* (1908) 154 Calif. 165, 97 Pac. 177; *Stewart v. Griffith* (1910) 217 U. S. 323, 30 Sup. Ct. 528. It is generally held that the expression is so loosely used that, when found in a statute, judicial decision, or contract, its real meaning must be determined from the context and nature of the subject matter involved. *Capps v. Hensley* (1909) 23 Okla. 311, 100 Pac. 515. The settled rule is that if the term "voidable" more accurately shows the intent of the parties, it will be substituted. *Anson, Contracts* (Corbin's ed. 1919) sec. 20.

EVIDENCE—UNAUTHORIZED VIEW BY THE JURY.—After a refusal of the court to permit the jury to examine his automobile, the defendant, in a negligence suit, parked his car in front of the court house so that the jurors could see it as they passed in and out. *Held*, that the defendant's conduct was not ground for reversal in the absence of evidence of actual misconduct. *Leopold v. Livermore* (1921, Wash.) 197 Pac. 778.

In an action to recover damages for personal injuries received while unloading a car on the defendants' track, the deputy sheriff in charge of the jury took them for a walk and passed within plain sight of the scene of the accident. The only question still left for decision was the amount of the damages to be awarded. There was no evidence of misconduct on the part of the jury. *Held*, that this was in effect introducing new testimony and the judgment should be reversed. *Texas Midland Ry. v. Brown* (1921, Tex. Com. App.) 228 S. W. 915.

These decisions seem squarely opposed. The general rule seems to be that when there has been merely a casual and unintentional inspection of an object or of premises, there is no ground for a new trial unless prejudice is shown. *People v. Strause* (1919, Ill.) 125 N. E. 339; 3 Wharton, *Criminal Procedure* (10th ed. 1918) sec. 1774.

INSURANCE—ACCIDENT POLICY—PARTICIPATION IN AERONAUTICS.—The plaintiff was insured by the defendant against loss resulting from bodily injuries through external, violent, and accidental means, with the following exception: "The insurance hereunder shall not cover injuries . . . sustained by the insured while participating in, or in consequence of having participated in, aeronautics." The plaintiff flew as a passenger in an airplane at a state fair and was injured when it crashed to the earth. *Held*, that the plaintiff could not recover. *Travelers Ins. Co. v. Peake* (1921, Fla.) 89 So. 418.

Forfeiture clauses in policies of insurance are not usually favored, and the courts seek a construction which will sustain the policy if possible. As often expressed, ambiguities in policies are construed against the insurer. *Wilson v. Travelers Ins. Co.* (1920, Calif.) 190 Pac. 366; *Hampton v. Hartford Fire Ins. Co.* (1900) 65 N. J. L. 265, 47 Atl. 433. But where a risk is specifically and clearly excepted and there is no doubt or ambiguity, the courts will not adopt a

strained construction in order to defeat a forfeiture. *Kreiss v. Aetna Life Ins. Co.* (1920) 229 N. Y. 54, 127 N. E. 481; *Walther v. Southern Surety Co.* (1920) 187 Ky. 466, 219 S. W. 183. The New Jersey Court of Appeals, in construing a clause similar to the one in the instant case, has just decided that "participation in aeronautics" covers a passenger in an airplane and that the parties did not intend that it should include only those physically active in the control and management of the machine. *Bew v. Travelers Ins. Co.* (1921, N. J.) 112 Atl. 859.

INTOXICATING LIQUORS—NATIONAL PROHIBITION ACT—TRANSHIPMENT OF INTOXICATING LIQUORS THROUGH THE UNITED STATES.—The plaintiff, a British corporation, transported from Scotland to New York cases of intoxicating liquors which were to be trans-shipped in the Port of New York to a vessel of another corporation, running from New York to Bermuda, the destination of the liquor. The defendant, the Collector of Customs for the Port of New York, threatened to seize the cases, and the plaintiff sought an injunction. *Held*, that the transportation through the United States of liquors which originate and are destined to foreign countries is prohibited by the National Prohibition Act. Act of Oct. 28, 1919 (41 Stat. at L. 305). *The Anchor Line v. Aldridge, Collector of Customs for the Port of New York* (1921, U. S. D. C. S. N. Y.) 66 N. Y. L. JOUR. 321 (Oct. 27, 1921).

The case is the first decision on the facts. The Act of May 21, 1900 (31 Stat. at L. 181) permitting the trans-shipment of merchandise through the territory of the United States is apparently repealed by the National Prohibition Act. The first sentence of sec. 35 of this Act repeals all prior acts to the extent of their inconsistency. *United States v. Yuginovich* (June 1, 1921) U. S. Sup. Ct., Oct. Term, 1920, No. 523. But this section has been variously construed by the Federal Courts. See *United States v. Stafoff* (1920, E. D. Mo.) 268 Fed. 417; *United States v. Turner* (1920, W. D. Va.) 266 Fed. 248.

NEGLIGENCE—PRIVITY OF CONTRACT—TICKER-SERVICE SUPPLIED TO THIRD PARTIES.—The defendant association, engaged in supplying subscribers with current news by ticker service, erroneously reported a Supreme Court decision on the taxability of stock dividends. The plaintiff, relying on the information, sold stocks at a loss and brought an action for damages, alleging negligence. The defendant demurred. *Held*, that the demurrer should be sustained since there was no privity between the plaintiff and defendant. *Jaillet v. Cashman* (1921, N. Y. Sup. Ct.) 115 Misc. 383.

Those engaged in supplying information are traditionally immune from liability in a suit by those not in privity of contract. It is an interesting relic of a once rigid principle that negligence in the performance of a duty was not actionable by those not in privity to an express or implied contract. See 1 Beven, *Negligence* (3d ed. 1908) 103; COMMENTS (1921) 30 YALE LAW JOURNAL, 607.

TAXATION—STOCK DIVIDEND NOT INCOME.—The defendants were shareholders in companies which had declared a bonus out of profits and had distributed fully paid-up shares to the shareholders in satisfaction of the bonus. No option of cash payment was given. The question arose whether the shares were income liable to the supertax within the meaning of the Finance Act. (1910) 10 Edw. VII., c. 8, sec. 66. *Held*, that the shares were not income. *Commissioners of Inland Revenue v. Blott & Greenwood* (1921, H. L.) 37 T. L. R. 762.

The instant case is interesting in that the House of Lords reached the same conclusion in defining income as the Supreme Court of the United States. *Eisner v. Macomber* (1920) 252 U. S. 189, 40 Sup. Ct. 189. For discussion, see Clark, *Eisner v. Macomber and some Income Tax Problems* (1920) 29 YALE LAW JOURNAL, 734.

TORTS—CONTRIBUTORY NEGLIGENCE—FAILURE TO VIOLATE STATUTE.—A South Carolina statute (Civ. Code, 1912, sec. 2157; Cr. Code, 1912, sec. 617) required travelers on roads to keep to the right of the center. The plaintiff, driving on the right-hand side of the road, was injured by the defendant proceeding on the same side in the opposite direction. The defence was the plaintiff's contributory negligence in failing to drive to the left to avoid the defendant. *Held*, that the plaintiff was guilty of contributory negligence despite his conformance to the law of the road. Fraser, J., *dissenting*. *Walker v. Lee* (1921, S. C.) 106 S. E. 682.

The decision apparently reaches the unusual result that failure to violate a statute is negligence. As far as can be determined, such a ruling has been applied only to statutes involving road rules. The general tendency is to consider what due care required under the peculiar circumstances. *Parker v. Adams* (1847, Mass.) 12 Metc. 415; *Herdman v. Zwart* (1914) 167 Iowa, 500, 149 N. W. 631.

TRIAL PRACTICE—NEW TRIAL—WHERE EXPERT WITNESS CHANGES MIND.—In an action for malpractice, the plaintiff had proved sufficient negligence to obtain a verdict, but the testimony of an expert witness had been essential. The defendant then moved for a new trial on the grounds of newly discovered evidence and mistake. He offered an affidavit of the plaintiff's expert witness to the effect that the latter had changed his mind and that more mature deliberation convinced him the defendant was not negligent. The plaintiff then offered an affidavit by "one assuredly an expert" to the effect that the evidence given at the trial was correct. *Held*, that a new trial should be granted. *Van Epps v. McKenny* (1921, Sup. Ct.) 189 N. Y. Supp. 910.

It is well settled that the granting of a new trial usually rests in the discretion of the trial court. *Rodan v. St. Louis Transit Co.* (1907) 207 Mo. 392, 105 S. W. 1061. It will not be granted, however, on the grounds of newly discovered evidence unless a different result is probable at the re-trial. *Swan v. Duncan* (1920) 78 Okla. 305, 190 Pac. 678; 29 Cyc. 901, note 59. Newly discovered evidence which is merely impeaching should not be the basis of a new trial. *Blake v. Rhode Island Co.* (1911) 32 R. I. 213, 78 Atl. 834. While in the instant case it is extremely doubtful whether a different result will be reached at the new trial, still the court can not be said to have abused its discretion.

UNFAIR COMPETITION—UNFAIR PRACTICE BY RETAILER.—The defendant was a purchaser from the complainant of a well-known syrup which, when diluted with carbonated water, retailed as a beverage. He weakened the original syrup by additions of water, sugar, and caramel, thereby doubling its volume and causing the drink sold to the public to contain about one-half of the usual amount of the complainant's product. The complainant sought an injunction to prohibit this practice. *Held*, that an injunction should be ordered against mixing the syrup in other than the usual manner unless requested otherwise by the customer. *Coca-Cola Co. v. Brown & Allen* (1921, N. D. Ga.) 274 Fed. 481.

The facts present a new form of unfair trade practice, and lack the requisite of business rivalry to be a clear case of unfair competition. *Sartor v. Schaden* (1904) 125 Iowa, 696, 101 N. W. 511. The law is well settled that one article cannot be delivered by the retailer in substitution of another ordered, without the customer's knowledge. *N. K. Fairbanks Co. v. Dunn* (1903, C. C. N. D. N. Y.) 126 Fed. 227; Nims, *Unfair Competition* (2d ed. 1917) sec. 131. Such a representation would be fraud. *Van Hoboken v. Mohns* (1901, C. C. N. D. Calif.) 112 Fed. 528. The instant case seems correctly decided because the fraud of the defendant threatened injury to the good will of the complainant's business. A threatened invasion of the complainant's property rights is the basis for relief. *Borden's Condensed Milk Co. v. Horlick's Malted Milk Co.* (1913, E. D. Wis.) 206 Fed. 949; Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE LAW JOURNAL, 8, 9, 10.