ABSTRACTS OF RECENT DECISIONS

ACCIDENTAL INJURIES TO INFANTS—NEGLIGENT STORAGE OF EXPLOSIVES—PROXIMATE CAUSES OF INJURY—TORTS OF INFANTS.—Where a plaintiff, aged twelve, sued a quarrying company for injuries received when a dynamite cap exploded in his hand, alleging that the injury was due to the negligent storing of dynamite on the defendant's property, which was a place attractive to infants, and that the plaintiff secured the cap from a fourteen-year-old boy, who took it from the defendant's storehouse, the plaintiff could not recover if the fourteen-year-old boy was sui juris, since in that event his act, and not that of the defendant, was the proximate cause of the injury. In the absence of any allegations or proof to the contrary, an infant over fourteen is presumed to be sui juris. *Bottorff vs. South Const. Co.*, 110 N. E. 977.

APPEAL AND ERROR—TELEGRAPH—ACTION FOR DELAY.—When a person has received judgment against a telegraph company for injury due to the company's negligent delay in sending a message, the company cannot on appeal raise the point that the telegram in question was an interstate message. The point should have been raised on the original trial of the case. *Western Union Telegraph Co. v. Freeman*, 180 S. W. (Ark.) 743.

The telegraph company's contention that the case of *Western Union Tel. Co. v. Brown*, 234 U. S. 542, applied was erroneous, for in that case the telegram showed on its face that it was an interstate message.

CARRIERS—INJURY TO PASSENGER LEAVING THE CAR—DUTY OF EMPLOYEES.—The carrier owes the highest degree of care consistent with the nature of the business, but employees are not under any absolute duty to know that a passenger is attempting to alight from the car. When a street car is stopped at or near a regular stopping place after a signal by the passenger, this is an invitation to the passenger to alight the instant the car stops, and the passenger has a right to rely upon the car not being started until a reasonable time has been given to alight. If, after the passenger has signaled for the car to stop, the car is stopped near the regular stopping place for some other purpose than allowing passengers to alight, the duty is then on the car crew to prevent passengers from alighting. *Terre Haute, I. & E. Traction Co. vs. York*, 110 N. E. 999 (Ind.).

CARRIERS—LIABILITY FOR INJURIES TO PASSENGERS.—The porter and brakeman, who told a woman that the train upon which she had passage would connect with another railroad so that she would not have to wait over at the junction point, were acting outside of their actual or apparent scope of authority, and the defendant railroad is not liable for the suffering and humiliation of the plaintiff caused by her having acted on these false statements. Plaintiff had purchased her ticket only to the junction point, and defendant had no control over the connecting carrier. *Texas & Pa. Ry. Co. v. Conway*, 180 S. W. (Tex.) 666.

CHARITABLE ORGANIZATIONS—HOSPITAL—LIABILITY FOR NEGLIGENCE.—A paying patient in a hospital conducted without aim of profit in which indigent patients were treated free of cost sued for injury done him through negligence of an attending nurse. *Held*: that he might recover damages. *Tucker v. Mobile Infirmary Asso.*, 68 So. 4.

Charitable corporations liable to injury to a pedestrian caused by the negligence of its servants. *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N. S.) 1144.

Liable unless there is an express contract exempting. *Bonce v. Central Methodist Church*, 147 Mich. 230. So in *Hordorn v. Salvation Army*, 199 N. Y. 233, 32 L. R. A. (N. S.) 62.

But in *Adams v. University Hospital*, 122 Mo. Ap. 675, it was held that a charitable institution such as a hospital is not liable for the torts of its servants nor for the negligence of the managers in the selection of such servants. So in *Hearns v. Waterbury Hospital*, 66 Conn. 98.

The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution. 85 Ohio St. 90. See also *McDonald v. Mass. General Hospital*, 120 Mass. 432, and *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294.

CLAYTON ACT—MONOPOLISTIC LEASES—APPLICATION TO EXISTING CONTRACTS.—Where the maker of a very large percentage of all the shoe machinery made in the United States leases machines to shoe manufacturers with the stipulation that the lessee shall not use the machine in the manufacture of footwear which has not had certain essential operations performed on it by other machines leased from the lessor, that he shall use the leased machine exclusively for the work for which it was designed, that he shall obtain all duplicate parts and supplies for the machine exclusively from the lessor at such prices as it may establish, and other similar provisions, and where the lessor further retains the right to remove all the leased machines on the breach of any of these conditions, *held*, that such leases are illegal, as in violation of the Clayton Act (38 Stat. 731). The Clayton Act, Sec. 3, which makes it unlawful to lease or sell machinery, etc., on any condition or agreement that will tend to prevent the lessee or purchaser from dealing with competitors of the lessor or seller, is applicable to a continuing contract of lease, although the lease was made before the passage of the act. *United States vs. United Shoe Machinery Co.*, 227 Fed. 507.

CLAYTON ACT—SUIT AGAINST CORPORATION FOR VIOLATION—TRANSACTING BUSINESS IN DISTRICT.—In a suit by a Maryland corporation carrying on business in Baltimore against an Illinois corporation for damages for injury by defendant caused by acts alleged to be in violation of the anti-trust laws of the United States the defendant appeared specially for the sole purpose of moving to quash the marshal's return of service. Defendant said that it was not liable on the suit in that district, in that it neither resided, was found, transacted business, nor had agents therein. It appeared that the defendant had men soliciting orders for its products in Maryland, chiefly from jobbers, and for the purpose of promptly filling such orders, kept a supply of goods with a storage company, which delivered the same on advices from the defendant's officers in other states. *Held*, that the defendant was transacting business in Maryland within the meaning of the Clayton Anti-Trust Act (Oct. 15, 1914, C. 323, Sec. 12, 38 Stat. 736), that a suit could be maintained against it under the Act in that district, and to avoid any question of service, the defendant might be brought into court by process serve on it (subsequent to the suit here decided) in the state of its incorporation. *Frey and Son v. Cudahy Packing Co.*, 228 Fed. 209.

COMMERCE—POWERS OF INTERSTATE COMMERCE COMMISSION—ORDER REQUIRING RAILROAD TO FURNISH CARS.—Refiners on the Pennsylvania Railroad obtained an order from the Interstate Commerce Commission requiring the railway to furnish tank cars. The railway obtained an injunction on the ground that the Commission had no power to order the railway to furnish cars either under the original act of 1887 or under the amendment of 1906. *Held*, that the Commission exceeded its statutory power in making the order and that the order be suspended and annulled. See note in this issue for discussion of the duty of a railroad to furnish tank and other special cars. *Pennsylvania R. Co. v. United States*, 227 Fed. 911.

CONSTITUTIONAL LAW—DISCRIMINATION—BULK SALES ACT.—The Sales in Bulk Act (Ky. St. 1915, Sec. 2651a), enacted to prevent fraudulent sales, providing that sales by a merchant of any part of his stock other than in the ordinary course of trade, or a sale of his stock in bulk, shall be void as against the seller's creditors, unless the purchaser shall inquire of the seller as to the names and residences of the seller's creditors in the course of his business, and at least five days before the consummation of the sale notify them of the intended sale, and further declaring a purchaser not liable to any creditor not mentioned in the seller's statement, is not invalid as being an unreasonable interference with the right of property. Such an act is not discriminatory within the fourteenth amendment to the federal Constitution in that it applies only to merchants, since that classification is not an arbitrary one. *Dwiggins Wire Fence Co. vs. Patterson*, 179 S. W. 224 (Ky.).

CONSTITUTIONAL LAW—INJUNCTION RESTRAINING CRIMINAL PROCEEDINGS—EQUAL PROTECTION OF THE LAWS—DISCRIMINATION AGAINST ALIENS.—Equity has jurisdiction to restrain the criminal prosecution of an employer under the Arizona anti-alien labor law at the instance of an alien employee who alleges that the act violates the federal Constitution and that its enforcement will result in his immediate discharge. The discrimination against aliens lawfully resident in the state, which is produced by the provisions of the act of December 14, 1914, that every employer of more than five workers at any one time shall employ not less than 80 per cent qualified voters or native-born citizens of the United States or some subdivision thereof, renders the statute under the fourteenth amendment to the federal Constitution, as denying the equal protection of the law, and such a statute can not be justified under the police power. *Truax vs. Raich*, 36 U. S. Sup. 7.

Equal protection is due to aliens as well as to citizens. *People vs. Crane*, 214 N. Y. 154. Courts of equity have no right to enjoin a criminal prosecution unless the law is invalid and property rights are involved. *Dibrell vs. City of Coleman*, 172 S. W. 550 (Texas). So in *Critsinger vs. City of Atlanta*, 83 S. E. 263 (Georgia).

CONSTITUTIONAL LAW—LEGISLATIVE POWER UNDER CITY CHARTER.—Plaintiff, a real estate dealer, sought to have the Board of Election Commissioners of the City of St. Louis enjoined from holding an election on ordinances providing for Negro Segregation on the grounds of the constitutionality of the initiative phase of the city charter. The Supreme Court of Missouri held that the initative phase of the charter was in perfect accord with the State Constitution, which adopts the initiative as a state policy. That the delegation of legislative power to the municipal legislative assembly did not vest in them exclusive power to legislate; and in the absence of any such grant of exclusive power the initiative is in harmony with the state policy adopted by the State Constitution. Where the people desire certain legislation the legislative assembly may adopt it, but if it refuses to do so, the people themselves by the initiative may act to secure the desired legislation. *Pitman v. Drabell, et al*, Mo. Sup. Ct., Feb., 1916.

CORPORATIONS—RIGHT TO DIVIDENDS—NATURE OF REMEDY—LIABILITY OF NATIONAL BANK FOR MONEY RECEIVED UNDER CONTRACT ULTRA VIRES.—A pledgee of corporate shares may recover from the corporation a dividend declared thereon to the extent of his interest, and if the pledgor receives the dividend, he holds it in trust for the pledgee; if the dividend is collected by a third person having knowledge of the rights of pledgee, the latter may recover it on the common count for money had and received. A contractual relation between the parties is not necessary to support an action of assumpsit for money had and received, which is based on an equitable right from which a promise is implied. A national bank which

has received money equitably belonging to another cannot defend a suit for its recovery on the ground that it was received as an incident of a contract made by the bank, which was ultra vires and not enforceable. *National Bank of Commerce vs. Equitable Trust Co.*, 227 Fed. 526. So in *Meredith Village Savings Bank vs. Marshall*, 68 N. H. 417.

CRIMINAL LAW—CONSTITUTIONALITY OF COURT—SUBSTITUTION OF JUDGE DURING TRIAL.—The constitutional right of "trial by jury" in Federal courts means a trial by twelve men, presided over by a judge. The continuous presence of a judge and jury of twelve men is necessary, and another judge cannot lawfully be substituted for the one before whom the trial was commenced, during its progress, and while the testimony is being taken. *Freeman vs. United States*, 227 Fed. 732.

DIVORCE—JUDGMENT—SHOWING MERITORIOUS DEFENSE.—Plaintiff received a divorce from defendant on the grounds of abandonment and adultery. Defendant was not notified of the day of the trial and he attempted to have the judgment set aside on the ground that he had a good defense to the abandonment charge. But the court held that it was not enough that he stated facts sufficient to be a good ground of defence to the abandonment charge. He must state facts that would be a good defense to both grounds. *Wade v. Wade*, 180 S. W. (Tex.) 643.

EVIDENCE—INTERSTATE COMMERCE ACT—PUBLICATION OF RATES.—Where the Interstate Commerce Commission had approved a new schedule of rates of a railroad, it is presumed that the railroad had complied with the statute requiring them to give thirty days notice to the Commission and to the public before the rate should go into effect. *International & G. N. Ry. Co. v. Carter*, 180 S. W. (Tex.) 663. The publication of the rates is something to be done before the Commission approves the rate. *U. S. v. Miller*, 223 U. S. 599.

HABEAS CORPUS — IMMIGRATION CASES — CONCLUSIVENESS OF DECISIONS OF IMMIGRATION OFFICERS—DEPORTATION OF ALIENS.—An alien, detained by the Commissioner of Immigration for deportation for a cause not recognized as sufficient by the act of February 20, 1907 (34 Stat. at L. 898, Ch. 1134), as amended by the act of March 26, 1910 (36 Stat. at L. 263, Ch. 128) is entitled to demand his release by habeas corpus. The decisions of immigration officers under this act are conclusive merely as to matters of fact, not as to matters of law. Alien immigrants cannot be deported under this act as "persons likely to become a public charge" merely because the labor market in the city of their immediate destination is overstocked. *Gegiow vs. Uhl*, 36 U. S. Sup. 2.

Decisions of inspectors are conclusive only as to matters of fact. *Davies vs. Manolis*, 103 C. C. A. 310. Since immigration officials are administrative officers and their decisions are those of the executive department of the government, an order discharging an alien cannot operate as *res judicata* in a subsequent proceeding for deportation. *Sire vs. Berkshire*, 185 Fed. 967. Where a Chinese person claiming to enter the United States as a native born citizen was not given a fair trial, a writ of habeas corpus is the proper remedy. 109 C. C. A. 310. Where the alien has been in this country longer than three years, has left the country, and is now seeking to re-enter, the decision of the Secretary of Commerce and Labor is not final in proceedings to deport, but the court on habeas corpus may inquire into the whole case. *Redfern vs. Halpert*, 108 C. C. A. 262. The decision of the Secretary of Commerce and Labor is final in deportation proceedings during the three-year period of probation. *Prentis vs. Di Giacoma*, 192 Fed. 467. *Ex parte Pugliese*, 209 Fed. 720. The fact that the demand for a certain class of labor is very slight is no reason for deportation on the ground that the immigrant is likely to become a public charge. *Ex parte Gregory*, 210 Fed. 680.

INDEMNITY—NOTICE OF ACCEPTANCE.—A bond under seal, delivered by the obligors to the obligee, conditioned upon the indemnification of the latter, a surety company, for all losses under an official bond upon which the surety company "has become or is about to become surety," is a completed contract of indemnity or guaranty which binds the obligors without any notice that it has been accepted and acted upon by the obligee. *U. S. Fidelity and G. Co. vs. Riefler*, 36 U. S. Sup. 12. The rule, requiring notice by the guarantee of his acceptance of the guaranty, and his intention to act under it, applies only where the instrument being, in legal effect, merely an offer or proposal, such acceptance is necessary to that mutual assent, without which there can be no contract. If made at the request of the guarantee, the guaranty becomes the answer of the guarantor to a proposal, and its delivery to the guarantee or for his use completes the contract. *Davis vs. Wells, Fargo & Co.*, 104 U. S. 159. In *Davis Sewing Machine Co. vs. Richards*, 115 U. S. 524, the defendant signed a guaranty of the future performance of his contract by the plaintiff's agent. No notice of acceptance by the guarantee was given to the guarantor. *Held*, that this was an incomplete contract of guaranty.

INJUNCTION—CIVIL RIGHTS—EXCLUDING CRITICS FROM THEATERS.—Theater managers in New York excluded from their playhouses a newspaper dramatic critic who had severely criticized their productions. He obtained an injunction restraining the theater managers from excluding him, but on appeal the Appellate Division reversed the decision declaring his remedy under the Civil Rights Law to be adequate. *Woolcott v. Shubert*, 154 N. Y. Sup. 643. Dowling, J., dissented on the ground that the defendants own a great many theaters in New York City and the plaintiff's means of livelihood would be seriously impaired by being excluded therefrom, for his value to the newspaper employing him would be virtually destroyed, and that the statutory remedy was inadequate to protect the rights of the plaintiff conferred upon him by statute.

INTERNAL REVENUE — EXCISE ON CORPORATION — "DOING BUSINESS." —The question as to what acts of a corporation amount to "doing business" under the act of Congress approved August 5, 1909, c. 6, 36 Stat. II (Comp. St. 1913, Sec. 6300-6308), passed on in *Public Service Railway Co. and Rapid Transit Street Railway Co. v. Herold*, 219 Fed. 301, and before the Supreme Court in *McCoach v. Minehill Railway Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, has received further treatment in six cases before Circuit Judge Hunt (Dist. Ct. D. New Jersey). The actions were to recover taxes paid under the Corporation Tax Law. A corporation held to be "doing business" where, though leasing all its property and franchises, except its franchise to be a corporation, it yet exerts its corporate powers, as by issuance of bonds to increase its estate, or does acts not reasonably necessary to enable the lessee to enjoy the rights in existence at the time of the lease. *Public Service Electric Co. v. Herold*, 227 Fed. 486. *Held*, to be "doing business" by exerting its power for the acquisition of additional franchise rights (having previously leased all property and franchises). *Public Service Ry. Co. v. Herold*, 227 Fed. 490. Having leased plant, property and franchises, except franchise to be a corporation, *held*, to be "doing business" because one of the express purposes of its incorporation was to lease such plants. *Public Service Electric Co. et al. v. Herold*, 227 Fed. 491. Where the corporation leased its business but reserved the right to extend the business for the benefit of the lessee, at the lessee's request, *held*, to be "doing business" by a substantial exercise of the reserve power, though for the benefit of the lessee as well as itself. *Public Service Ry. Co. v. Moffett*, 227 Fed. 494. But where the corporation leased all property and contracts, with right to use lessor's name where necessary, the lessee agreeing to follow out the lessor's plan, the lessor, however, retaining its corporate organization, paying salary of secretary, directors' fees, interest on bonds, and expenses of distributing dividends, and even voting stock

in another corporation, *held*, not to be "doing business." *Public Gas Service Co. v. Herold*, 227 Fed. 496. And where the lessee ran business and agreed to make the necessary extensions of line, the lessor performing no acts save receiving rentals, *held*, not liable for taxes because not "doing business." *Public Service Ry. Co. et al. v. Herold*, 227 Fed. 500. The suits for recovery relate to a particular year, or to particular years.

INTERPRETATION—HARRISON ANTI-NARCOTIC LAW.—Under the Harrison Anti-Narcotic law the question has arisen as to whether a person having the drugs in his possession, though not apparently coming within any of the classifications of persons set out in the act, can be held guilty under its provisions. The cases bearing on this point are discussed in a note in this issue.

INTERPRETATION—RE-ENACTMENT OF STATUTES—CONTINUITY OF PROVISIONS.—Where an amendatory act re-enacts provisions of the original statute in the same or substantially the same language, and the original statute is repealed, such provisions will not be considered as repealed and then re-enacted, but will be regarded as having been continuous and undisturbed by the amendatory act. A statute providing that conviction for a second offense shall be followed by imprisonment in the penitentiary is not ex post facto or retroactive when applied to a case where the second offense was committed after the enactment of the provision for the punishment of the second offense although the first offense was committed prior to the enactment of such provision. Where a person who is convicted under a statute prescribing a definite term of imprisonment is given an indeterminate sentence, the question of the validity of the statute authorizing such indeterminate sentence cannot be raised in an habeas corpus proceeding. *Ex parte Allen*, 110 N. E. 535 (Ohio).

INTERSTATE COMMERCE—BILLING TO FICTITIOUS PERSON—ENTRAPMENT.—Where defendant sold an obscene book and sent it by interstate express, billed to a person of the name given him by the buyer, the character of the transaction as commerce is not affected by the name being fictitious. *Hanish vs. U. S.* 227 Fed. 584.

LICENSE—APPROPRIATION OF LICENSE BY THE UNITED STATES.—The Act of June 25, 1910, c. 423, 36 Stat. 851, which provides that the owner of a patent covering an invention which shall be used by the United States without license may recover reasonable compensation for such use by suit in the Court of Claims, in effect provides for the appropriation by the government, by right of eminent domain, of a license to make or use any patented invention; and, having such right, the government may contract for the making of all or any part of the same, and the contractor is protected against liability for the infringement, the owner of the patent being limited to the remedy provided by the statute. *Marconi Wireless Telegraph Co. vs. Simon*, 227 Fed. 906.

QUALIFICATIONS OF GRAND JURORS—MISCONDUCT OF ATTORNEYS BEFORE THE GRAND JURY.—A grand juror having been duly drawn and summoned for service in a federal court, and having the qualifications prescribed by law does not become disqualified for service because he thereafter loses a property qualification, which takes him out of the class of voters from which jurors are selected. A plea in abatement on the ground of misconduct of the government attorneys in the grand jury room must set out facts which raise a legal presumption of prejudice. *United States vs. Gradwell et al*, 227 Fed. 243.

REVIEW OF PROCEEDINGS OF THE INTERSTATE COMMERCE COMMISSION.—A conclusion of the Interstate Commerce Commission on a pure question of

fact, such as the reasonableness of a rate or the giving of a preference will not be reviewed by the court; but a conclusion which plainly involves, under the undisputed facts, an error of law, or which is shown to be supported by no substantial evidence, or to be directly contrary to the evidence, thereby also involving an error of law, will be so reviewed. *Louisville & N. R. Co. vs. United States*, 227 Fed. 258.

SABBATH BREAKING—RECOVERY FOR WORK DONE ON SUNDAY.—In a suit by a newspaper for the balance due on a contract for printing, the defendant denied liability for such part of the work as was done on Sunday under a statute (R. S. Mo. 1909, Sec. 4801) making it a misdemeanor to do unnecessary work on Sunday. *Held* (Supreme Court), that a Sunday newspaper is a necessity. *Pulitzer Pub. Co. v. McNichols*, 181 S. W. 1.

The Missouri Court of Appeals held in *Barney v. Spangler*, 131 Mo. A. 58, that one might not recover for work done on Sunday.

SALES—WARRANTIES—EFFECT OF RETAINING THE PROPERTY.—In a suit for the recovery of the purchase price of an engine furnished under a contract making the performance of certain tests by the engine conditions precedent to any liability for the engine, it appeared that though the tests had been unsatisfactory, the defendant had retained and continued to use the engine though refusing to accept or pay for it. The defendant contended that the contract was executory and no liability had arisen. *Held*, that the summons called upon the defendant either to reject the engine and demand its removal or to accept it and rely on a recovery of damages for any breach of the contract, and that his election to keep and use the engine caused the title to pass, and the conditions precedent to become collateral agreements. *Crescent Milling Co. v. H. N. Strait Mfg. Co.*, 227 Fed. 804.

TAXATION—EXEMPTION—TRANSFER OF IMMUNITY.—Any contract exemption from taxation which may have been created by a provision in the charter of a canal and banking company which limits the exemption thereby granted to such property "as is possessed, occupied, and used by the said company for the actual and necessary purposes of said canal navigation," did not pass to its grantee and lessee in favor of which the canal company exercised the right given to it by the New Jersey Act of March 14, 1871, to lease the canal or any part thereof. *Morris Canal and Banking Co. vs. Baird et al.*, 36 U. S. Sup. 28.

A subrogation by statute of one corporation to the right and privileges of a former corporation, does not include an immunity from taxation. *Gulf & Ship Island R. Co. vs. Hewes*, 183 U. S. 66. An exemption from taxation is personal and cannot be assigned except by legislative authority. *State ex rel. Wine vs. Keokuk & W. R. Co.*, 99 Mo. 30. So in *Keokuk & W. R. Co. vs. State of Missouri*, 152 U. S. 301. A railroad cannot, by sale, transfer its exemption under the state constitution, but its consolidation with another railroad will not destroy its exemption. *Rock Island A. & L. R. Co. vs. State Board of Appraisers of Louisiana*, 133 La. 674.

WILLS—DESIGNATION OF LEGATEES—WORDS OF RELATIONSHIP.—By item second of a will, testator made a bequest "to each of my relatives and kindred by blood of the first and second degree," and by item third made a different bequest to an uncle, "he to receive nothing under item second hereof." By the civil law there was but one person, a half-sister, who came within the terms of item second, and under the laws of the state, in case of intestacy, she would have inherited the entire estate, while, on the other hand, there were a number of persons, including the uncle mentioned, who were blood relatives of the first and second degrees by the canonical law. *Held*, that the testator evidently had in mind the latter law, and intended that it should govern in determining the legatees. *Wheat vs. Hill*, 227 Fed. 984.