CURRENT DECISIONS

CONSTITUTIONAL LAW—ALIEN JUROR GROUND FOR NEW TRIAL.—After conviction in a trial for murder in the first degree, the defendant moved for a new trial after learning that one of the jurors was an alien. N. Y. Const. (1917) Art. 1, sec. 1, guarantees a defendant a trial by "judgment of his peers." *Held,* that the defendant was entitled to a new trial as the constitutional guarantee could not be waived by a failure to object upon examination. *People v. Bott* (1923, Sup. Ct.) 201 N. Y. Supp. 47.

The instant decision is opposed to the general rule that alienage, though cause for disqualification upon preliminary examination, is no ground for objection after verdict. *Oskershauser v. State* (1908) 136 Wis. 111, 116 N. W. 769; *Kohl v. Lehlback* (1895) 160 U. S. 293, 16 Sup. Ct. 384; *Fulcher v. State* (1903) 82 Miss. 630, 35 So. 170. However, a few decisions in capital cases support it. *Richards v. Moore* (1888) 60 Vt. 449, 15 Atl. 119; *Hill v. People* (1868) 16 Mich. 351.

CONSTITUTIONAL LAW—POLICE POWER—STATUTE PROHIBITING TEACHING FOREIGN LANGUAGES IN SCHOOL.—A state statute made it a misdemeanor to teach a foreign language in public, private, or parochial schools below the eighth grade. Neb. Laws, 1919, ch. 249. The defendant appealed from a conviction for a violation of the law. *Held,* that the statute was unconstitutional as an infringement of liberty under the fourteenth amendment. *Meyer v. Nebraska* (1923, U. S.) 43 Sup. Ct. 625.

The purpose of the legislature to foster patriotism is held not to justify so great a restraint on liberty as the present statute involves. See *Lawton v. Steele* (1894) 152 U. S. 133, 14 Sup. Ct. 499; *Cummings v. Missouri* (1867, U. S.) 4 Wall. 277 (oath of past loyalty for teachers unconstitutional); *People v. American Socialist Society* (1922) 202 App. Div. 640, 195 N. Y. Supp. 801 (statute forbidding license to schools advocating overthrow of government held valid); *Herbert v. School Board* (1916) 197 Ala. 617, 73 So. 321 (compulsory vaccination of pupils held valid); (1919) 28 YALE LAW JOURNAL, 833.

CONTEMPT—STRIKE INJUNCTION—VIOLATION BY USE OF SCAB PLACARD.—During a strike, an injunction was issued enjoining certain named defendants and "all persons conspiring or associated with them" from "abusing, intimidating, molesting, annoying, insulting, or interfering with" the men still at work. The defendant's barber shop was so situated that the workmen passed by on the way to work. He posted in the window a placard saying, "NO SCABS WANTED IN HERE." Express service of the injunction was made on him and upon his refusal to remove the placard, he was adjudged guilty of contempt. *Held,* that the judgment be affirmed. *United States v. Taliaferro* (1922, W. D. Va.) 290 Fed. 214.

The use of the word "scab," without hint of violence or threat, even when spoken on the street, has been held not such a disorder as to call for an injunction. *Wood Mowing Co. v. Toohey* (1921, Sup. Ct.) 114 Misc. 185, 186 N. Y. Supp. 95. The court takes the extreme view that the word "scab" is an insult *per se* and not merely a term of classification, even though not applied to any specific individuals. This opinion does not seem warranted. For a discussion as to the right of jury trial in these cases, see *In re Atchison* (1922, S. D. Fla.) 284 Fed. 604; (1923) 32 YALE LAW JOURNAL, 843.

EVIDENCE—ADMISSIBILITY OF TRAIL OF BLOODHOUNDS.—In a prosecution for homicide, the trial court admitted evidence that bloodhounds followed a trail leading to the defendant. The defendant was convicted and appealed. *Held,* (one judge *dissenting*) that the judgment should be reversed. *State v. Grba* (1923, Iowa) 194 N. W. 250.

Most of the decided cases in the United States have admitted evidence of this character, where a proper foundation is laid with respect to purity of breeding and efficiency of the training of the dogs. *McDonald v. State* (1910) 165 Ala. 85, 51 So. 629; *State v. Adams* (1911) 85 Kan. 435, 116 Pac. 608; *State v. Rasso* (1912) 239 Mo. 535, 144 S. W. 449; 1 Wigmore, *Evidence* (2d ed. 1923) sec. 177; 3 Chamberlayne, *Evidence* (1912) sec. 1760; *contra: Ruse v. State* (1917) 186 Ind. 237, 115 N. E. 778. The hestitation shown in some courts to the use of this evidence is due to the risks of its misuse by the jury. 1 Wigmore, *op. cit. supra,* sec. 177; see (1915) 9 ILL. L. REV. 190. It is really a question of whether such evidence has any probative value and does not involve the constitutional right of an accused to be confronted by the witnesses against him, as was suggested in a recent case. *State v. Davis* (1923, La.) 97 So. 449. The accused does have an opportunity to confront and cross-examine those witnesses who give the evidence. See (1921) 5 MINN. L. REV. 228; McWhorter, *The Bloodhound as a Witness* (1920) 54 AM. L. REV. 109.

MUNICIPAL CORPORATIONS—NEGLIGENCE OF POLICE OFFICER—TORT IMMUNITY OF MUNICIPALITY.—The plaintiff was injured by a police patrol wagon owned by the defendant city and negligently driven by a police officer. He brought suit for damages. *Held,* that as the city was engaged in a governmental function, it could not be held liable. *Aldrich v. City of Youngstown* (1922, Ohio) 140 N. E. 164.

The great weight of authority exempts municipalities from liability for all acts classed as governmental. 12 L. R. A. (N. S.) 537. In the instant case the Ohio court unfortunately overrules *Fowler v. City of Cleveland* (1919) 100 Ohio St. 158, 126 N. E. 72, where it attempted to break away from the unsatisfactory results of the rule. See COMMENTS (1920) 29 YALE LAW JOURNAL, 911; (1923) 32 YALE LAW JOURNAL, 410. See also *Board of Education v. McHenry* (1922, Ohio) 140 N. E. 169 (no liability for negligence in pulling a child's tooth); 21 A. L. R. 1328, note.

PARTNERSHIP—LIQUIDATION BY SURVIVING PARTNER—RIGHT TO COMPENSATION.—In 1916, the plaintiff's testatrix and the defendant became partners in the rooming house business. In 1918, the testatrix died, but the defendant continued the business for more than two years thereafter. Meanwhile, the plaintiff filed a bill for an accounting. The auditor disallowed the defendant's claim for remuneration. The defendant appealed. *Held,* that the auditor's finding should be sustained. *Leary v. Kelly* (1923, Pa.) 120 Atl. 817.

The Uniform Partnership Act, which, although law in Pennsylvania, was overlooked by the court in the instant case, expressly allows remuneration. Sec. 18 (f); Pa. Sts. 1920, sec. 16,613 (f). The rule was otherwise at common law, in the absence of an express understanding or of the surviving partner having to continue the business for some time to effect a settlement. Gilmore, *Partnership* (1911) 356, 386; *Magullion v. Magee* (1922) 241 Mass. 360, 135 N. E. 560; *contra: Royster v. Johnson* (1875) 73 N. C. 474. Or of "extraordinary circumstances." *Maynard v. Richards* (1897) 166 Ill. 466, 46 N. E. 1138 (prosecution of lawsuit by survivor, resulting in judgment favorable to partnership); *cf. Rutan v. Coolidge* (1922) 241 Mass. 584, 136 N. E. 257. For a discussion of the common law, see 17 L. R. A. (N. S.) 399, note; L. R. A. 1917 F, 577, note.

SALES—IMPLIED WARRANTY—SALE BY SAMPLE.—The plaintiff offered to sell "sweepings" to the defendant, and sent a sample, stating, however, that he would not sell "by sample." The defendant accepted the offer. After receiving part of the quantity ordered, he refused to receive the rest, on the ground that the shipments did not conform to the sample. The lower court refused the plaintiff a recovery for the contract price, and the plaintiff appealed. *Held,* that the plaintiff could recover, since the sale was not by "sample." *Lockwood, Jr., Inc. v. Gross & Co., Inc.* (1923, Conn.) 122 Atl. 59.

Warranty of correspondence to sample is said by some courts, including the instant one, to be conditioned on a manifest intention to contract that the bulk shall correspond. *Browning v. McNear* (1904) 145 Calif. 272, 78 Pac. 722; *Imperial Portrait Co. v. Bryan* (1900) 111 Ga. 99, 36 S. E. 291. By the better view and under the clear import of sec. 12 of the Sales Act, a representation reasonably relied on by the buyer is sufficient. *Rittenhouse Auto Co. v. Kissner* (1916) 129 Md. 102, 98 Atl. 361; *Sharlette v. Lake Placid Co.* (1921) 194 App. Div. 844, 185 N. Y. Supp. 543; *Spencer Heater Co. v. Abbott* (1918) 91 N. J. L. 594, 104 Atl. 91; *Drummond & Sons v. Van Ingen & Co.* (1887, H. L.) 12 A. C. 284; Williston, *Sales* (1909) sec. 252. But where such reliance is considered evidence of a promise, the two views almost coincide. See *Browning v. McNear, supra.* The result reached is, however, sound, as the sample was not given as a representation of the quality of the sweepings to be delivered, but merely as a loose indication of their probable character. *Wood v. Michaud* (1896) 63 Minn. 478, 65 N. W. 963; *Cox v. Andersen* (1907) 194 Mass. 136, 80 N. E. 236; *Smith v. Coe* (1902) 170 N. Y. 162; 63 N. E. 57.

TORTS—INJURY TO CHATTEL BY DOMESTIC ANIMAL.—The plaintiff put a horse into a field and later the defendant put a mare in the same field. The mare broke the horse's leg. No *scienter* in the defendant was proved. The lower court applied the doctrine of *Rylands v. Fletcher* and found for the plaintiff. *Held,* reversing the judgment, that the defendant was not liable. *Manton v. Brocklebank* [1923, C. A.] 2 K. B. 212.

The court properly refused to apply the doctrine of *Rylands v. Fletcher.* In the absence of *scienter* an owner of a domestic animal is liable for injuries only if the animal is trespassing. *Mason v. Keeling* (1699, K. B.) 12 Mod. 332; *Ellis v. Loftus* (1874) L. R. 10 C. P. 10; (1919) 29 YALE LAW JOURNAL, 466. For limitations of the doctrine of *Rylands v. Fletcher,* see Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. PA. L. REV. 373; Smith, *Tort and Absolute Liability* (1917) 30 HARV. L. REV. 409; (1920) 30 YALE LAW JOURNAL, 200.

WILLS—INTERPRETATION—GIFT OF REMAINDER TO LIFE TENANT.—The testatrix bequeathed a fund in trust for the benefit of her two daughters for their lives, or while they remained unmarried, with a gift of the remainder to the children of the testatrix. A bill was filed for the construction of the will. *Held,* that on the death of the testatrix the children, including the two daughters, immediately took a vested interest in the remainder. *Redmond v. Gummere* (1922, N. J.) 119 Atl. 631.

Unless the testator has otherwise indicated an heir is not excluded from taking a remainder because he is named as life tenant. *In re Miller's Estate* (1922, Pa.) 118 Atl. 549; (1920) 29 YALE LAW JOURNAL, 575; (1922) 35 HARV. L. REV. 890; 20 A. L. R. 356, note. In the instant case a gift to either daughter of an absolute share would interfere with the testatrix's design to limit the enjoyment of the trust to the period of spinsterhood.