CURRENT DECISIONS

ADMINISTRATIVE LAW—SUITS AGAINST THE CROWN—JURISDICTION OF COURTS.—The plaintiff brought an action against the defendant, "his Majesty's Principal Secretary of State for War," for breach of a contract and for a declaratory judgment concerning its meaning. *Held,* that a servant of the Crown who contracts on behalf of the Crown cannot be sued on his contract and that an action will not lie against him for a declaration as to the meaning of the contract. *Hosier Brothers v. Earl of Derby, Secretary of State for War* (1918, C. A.) 119 L. T. Rep. 351.

The remedy in England for breach of contract by the government is by petition of right and not by action. An action is denied by reason of the principle of the English law that a sovereign can do no wrong and that when government officials make a contract with an individual it is the sovereign who acts through them. Following the English rule, no common law remedy existed in this country for the breach of a contract by the national or by a state government. The petition of right was deemed inapplicable because the executive is not regarded as the sovereign. The sole remedy open to the individual was a petition to the legislature for an appropriation to pay his claim. Legislation now permits such suits against the federal government to be filed in the U. S. Court of Claims. Similarly, some of the states allow suits to be brought against the state in the ordinary state courts. See Goodnow, *The Principles of Administrative Law of the United States,* 387-392.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF STATE CHARGE TO INTERSTATE RAILROAD FOR PERMISSION TO ISSUE BONDS.—The Union Pacific Railroad Company, a Utah corporation, with a line over thirty-five hundred miles long extending through several states, has only about six-tenths of a mile of main track in Missouri and the value of its property in that state is only a little over one per cent. of the value of all its property. The business it does in Missouri is purely interstate. Desiring to issue bonds secured by mortgage on the whole line, the Railroad Company applied to the Missouri Public Service Commission for a certificate authorizing the issue. A similar application was made in all states through which the road passes. The Missouri Commission granted the authority but charged a fee fixed by the letter of the state statute at a percentage of the total bond issue authorized. In order to obtain the certificate the Railroad Company paid this fee, but at the time protested in writing that it paid under duress, *i. e.,* in order to escape the statutory penalties. On a *certiorari* proceeding to set aside the Commission's judgment as an unlawful interference with interstate commerce, the Supreme Court of Missouri held that by applying for the certificate under the statute the Railroad Company was "estopped" from questioning the validity of the charge. The Railroad Company then took the case to the Supreme Court of the United States. *Held,* that the state statute was an unlawful interference with interstate commerce and that the Railroad Company was not "estopped" by its application from questioning the constitutionality of the statute. *Union Pacific R. R. Co. v. Missouri* (Dec. 9, 1918) U. S. Sup. Ct. Oct. Term, No. 65.

That the state statute imposed an unlawful burden upon interstate commerce is too clear to admit of doubt, as two very recent cases show. *Looney v. Crane Co.* (1917) 245 U. S. 178, 38 Sup. Ct. 85; *International Paper Co. v. Massachusetts* (1918) 246 U. S. 135, 38 Sup. Ct. 292. As the certificate was a com-

mercial necessity for the issue of the bonds—they would not be marketable without it—and as very severe statutory penalties were threatened if the bonds were issued without the certificate, the court very properly held that there was sufficient duress to prevent the payment from being "voluntary" in such sense that the so-called "estoppel" theory would apply. As the court points out, all acts done under duress are voluntary in the sense that the party under duress chooses the lesser of two evils. "The fact that a choice was made according to interest does not exclude duress."

CONTRACTS—MISTAKE INDUCED BY FRAUD—RETENTION OF BENEFITS.—The plaintiff orally agreed to adjust the loss under an insurance contract for $335. When reducing the oral agreement to writing the defendant's agent, taking advantage of plaintiff's illiteracy, fraudulently induced the plaintiff to sign an agreement to accept $250 in full payment. In answer to the plaintiff's action on the oral agreement, the defendant set up the written agreement and performance thereunder. *Held,* that the signed writing did not constitute a contract, and that plaintiff could recover the balance due without returning what he had received. Grace, J., *dissenting. Mathias v. State Farmer's Mutual Ins. Co.* (1918, N. D.) 168 N. W. 664.

A document signed under these circumstances has frequently been held to be wholly inoperative, not even conferring upon its fraudulent holder the power of creating rights in a *bona fide* purchaser for value. *Foster v. Mackinnon* (1869) L. R. 4 C. P. 711. The contract is said to be *void* for mistake, there being no negligence. Nevertheless, the acceptance and retention of benefits received under this "void contract" should estop the plaintiff from enforcing the previous contract, just as it would in the case of a contract voidable for fraud. It would here be an accord and satisfaction but for the fact that the defendant's performance under the "void contract" was nothing but a part performance of the defendant's duty under the previous oral agreement. *Foakes v. Beer* (1884) 9 App. Cas. 605. Even had the written document been merely *voidable* for fraud, the plaintiff's power of avoidance should not be destroyed by the retention of a payment less than that to which he has a right under the operative facts of the previous oral agreement.

CRIMINAL LAW—VOID SENTENCE—IMPOSING FINE AND IMPRISONMENT WHEN STATUTORY PENALTY IS IN THE ALTERNATIVE.—The state law authorized a court to punish for a certain crime either by fine or imprisonment. The court sentenced a convicted person to imprisonment and to pay a fine of one dollar. The prisoner paid the fine and then sought release by *habeas corpus. Held,* that as the statute did not authorize both fine and imprisonment, the sentence to imprisonment became void when the fine was paid. Carter, J., *dissenting. People ex rel. Maglori v. Siman* (1918, Ill.) 119 N. E. 940.

The majority admit that if the relator had not paid the fine the court could not have held either part of the sentence void as beyond the jurisdiction of the trial court. It is difficult to see how a sentence not void when entered can be made so *ex post facto* by acts of the prisoner. The view of Mr. Justice Carter, that the sentence was not beyond the power of the court but merely erroneous, seems preferable. The error should therefore have been corrected by writ of error. Prior Illinois cases seem to sustain that view. *People v. Graves* (1917) 276 Ill. 350, 114 N. E. 556; *People v. Whitman* (1917) 277 Ill. 408, 115 N. E. 531. On the other hand, *Ex parte Montgomery* (1885) 79 Ala. 275, supports, but without discussion, the view of the majority.

EQUITY—BILLS TO CONSTRUE WILLS—NO JURISDICTION WHEN WILL IS UNAMBIGUOUS AND ADVERSE CLAIM MERELY VERBAL.—A testator devised land "to my daughter . . . during her natural life and at her death . . . unto the heirs of the said [daughter]." The daughter's children asserted that she had only a life estate, and that they owned the remainder in fee. She thereupon filed a bill in equity to construe the will and to remove the cloud from her title. *Held,* that the court was without jurisdiction to construe the will or to remove a cloud, since the will was clear and unambiguous in devising a fee simple estate under the rule in Shelley's case, and merely verbal claims against an owner in possession did not constitute a cloud on the title. *Greenough v. Greenough* (1918, Ill.) 120 N. E. 272.

Although the court declined jurisdiction to construe this will because clear and unambiguous, they actually rendered a declaratory judgment giving the plaintiff in substance the very relief she sought. The utility of declaratory judgments and the desirability of legislation which shall bring about this needed procedural reform are discussed in an article by Prof. Borchard (1918) 28 YALE LAW JOURNAL, 1, 105.

INFANTS—RIGHT TO SUE—INFANCY AS EXCUSE FOR FAILURE TO GIVE STATUTORY NOTICE.—As a condition precedent to the recovery of damages for personal injuries from a municipal corporation, a statute required "any person" about to sue to give notice within six months of the date of the injury. The plaintiff, a child of seven at the time of the alleged injury, failed to give notice within the time specified. *Held,* that the plaintiff was nevertheless entitled to recover. *McDonald v. City of Spring Valley* (1918, Ill.) 120 N. E. 476.

The decision settles for Illinois a point upon which the authorities in other jurisdictions are divided. New York has long taken the view which prevailed here. *Murphy v. Village of Fort Edward* (1915) 213 N. Y. 397, 107 N. E. 716. Mere infancy is not enough, however; it must be such as to produce inability to give notice. *Winter v. City of Niagara Falls* (1907) 190 N. Y. 198, 82 N. E. 1101. Some jurisdictions give the language of the statute a literal interpretation which bars the infant from suit unless notice was given. *Toney v. Decatur* (1911) 175 Ind. 98, 93 N. E. 540; *Peoples v. Valparaiso* (1912) 178 Ind. 673, 100 N. E. 70. Many statutes fortunately contain provisions making exceptions for physical and mental inability to give notice. For other authorities see 32 L. R. A. (N. S.) 350; 13 Ann. Cas. 488.

MUNICIPAL CORPORATIONS—POWERS—ORDINANCE REQUIRING DISCLOSURE OF INGREDIENTS OF MEDICINES INVALID.—An ordinance of the Board of Health of New York City provided that no "patent" or "proprietary" medicines should be sold in the city unless the names of the ingredients, except those physiologically inactive, were filed with the Board of Health, the records of the same to be open only to persons specified in the ordinance. The plaintiffs, druggists, sought to restrain the enforcement of the ordinance. *Held,* that as the ordinance forbade the sale, except on the conditions specified, not only of medicines to be acquired in the future but also of medicines already on hand, it was beyond the powers of the Board of Health as granted by the city charter. *E. Fougera & Co., Inc. v. City of New York* (1918, N. Y.) 120 N. E. 642.

Inasmuch as druggists did not know and had no reasonable means of finding out the ingredients of "patent" and "proprietary" medicines already on hand, the ordinance virtually prohibited the sale of such stocks. The question whether the legislature could constitutionally make a prohibition of this kind, the court left open. The decision seems clearly correct in holding that general

provisions in a city charter could not be construed to include so sweeping a power.

REMOVAL OF CAUSES—RESIDENCE OF PARTIES—SOME OF PLAINTIFFS NON-RESIDENTS OF DISTRICT.—An action was brought in a state court of Texas by several beneficiaries joined as plaintiffs, some of them being resident citizens of Texas and others of Kentucky. The defendant, a Delaware corporation, having removed the cause to the federal district court, the plaintiffs moved to remand on the ground that the suit could not have been originally brought in the federal court because some of the plaintiffs were not residents of the district. *Held,* that the district court had jurisdiction on removal, although the suit could not have been originally brought there. *James v. Amarillo City Light & Water Co.* (1918, N. D. Tex.) 251 Fed. 337.

The opinion contains a careful review of the authorities dealing with this confused subject. It repudiates the doctrine of *Ex parte Wisner* (1906) 203 U. S. 449, 27 Sup. Ct. 150, and reaches the same conclusions that were advanced in (1918) 27 YALE LAW JOURNAL, 935.

SALES—WARRANTIES—IMPLIED WARRANTY BY RESTAURATEUR OF WHOLESOMENESS OF FOOD.—The plaintiff ordered baked beans at the defendant's restaurant. The dish of beans contained stones upon which the plaintiff "bit down hard," breaking her teeth. There was no evidence of negligence on the part of the defendant. *Held,* that the defendant was liable for breach of its implied warranty of fitness of the food for consumption. Crosby, J., *dissenting. Friend v. Childs Dining Hall Co.* (1918, Mass.) 120 N. E. 407.

This is the first decision by a court of last resort which holds that the contract between the innkeeper and the guest who orders food to be eaten on the premises, is one of sale and hence carries an implied warranty of wholesomeness. See also, *Barrington v. Hotel Astor* (1918, App. Div.) 171 N. Y. Supp. 840. The subject is discussed in a Comment in (1918) 27 YALE LAW JOURNAL, 1068. It is interesting to note that, on facts very similar to those of the principal case, the Massachusetts court on the same day denied recovery to a plaintiff who sued in tort instead of on the implied warranty. *Ash v. Childs Dining Hall Co.* (1918, Mass.) 120 N. E. 407.

TORTS—LABOR UNIONS—LIABILITY OF UNION MEMBERS FOR INJURING PLAINTIFF'S BUSINESS BY FALSE STATEMENTS.—For the purpose of injuring the plaintiffs' business as building contractors, the members of a bricklayers union, pursuant to a vote of the union, circulated among mason contractors false statements that the plaintiffs were employing non-union masons. The members of the union also refused to work for the plaintiffs. As a result, the plaintiffs' business was destroyed. *Held,* that the plaintiffs were entitled to recover damages from members of the union. *Martineau v. Foley* (1918, Mass.) 120 N. E. 445.

The decision is placed on the ground that the sending out of the false statements for the purpose of destroying the plaintiffs' business constitutes "an unlawful conspiracy." A prior case had held that equity would enjoin the continued circulation of similar false statements even though no actual damage was shown. *M. Steinert & Sons Co. v. Tagen* (1911) 207 Mass. 394, 93 N. E. 584. Presumably an action would have lain in Massachusetts if the false statement had been made by one person acting alone, as it has been held in that jurisdiction that false statements made with the intent to cause and causing damage are, unless made on a privileged occasion, actionable even

though not technically libelous or slanderous. *Morasse v. Brochu* (1890) 157 Mass. 567, 25 N. E. 74; *Davis v. New Eng. Ry. Pub. Co.* (1909) 203 Mass. 470, 89 N. E. 565; see also *Ratcliffe v. Evans* [1892] 2 Q. B. 524.

WILLS—CONSTRUCTION—LEGACY TO BE PAID "IF AND WHEN" IS CONTINGENT.—The testator bequeathed £250 to each of three grandchildren to be paid to them "if and when they shall respectively attain twenty-one." Suit was brought to determine whether these legacies were contingent. *Held,* that the legacies were contingent upon the legatees attaining twenty-one. *Re Kirkley* (1918, Ch.) 119 L. T. Rep. 304.

It seems to be undisputed that a legacy to A to be paid *when* A attains a certain age, is a vested gift despite the direction postponing payment, so that if the legatee dies under such age his personal representative will be entitled. *Re Bartholomew* (1849) 1 Mac. & G. 359; *Smith's Estate* (1910) 226 Pa. St. 304, 75 Atl. 425. No English case determining the effect of an "if and when clause" seems to have arisen previously. The decision appears clearly sound.

WORKMEN'S COMPENSATION ACT—"ACCIDENTAL INJURIES"—ARSENICAL POISONING OF FIREMAN IN ZINC SMELTER.—An employee who had worked at a zinc smelting furnace for thirty-eight years died of arsenical poisoning. Medical witnesses testified that probably his system became surcharged with arsenic which finally became acute arsenical poisoning. No case of arsenical poisoning had appeared in the employer's plant in fifty years. *Held,* that the employee died from an "accidental injury," not from an occupational disease, and that his administrator was entitled to compensation. *Matthiessen v. Hegeler Zinc Co.* (1918, Ill.) 120 N. E. 249.

Occupational diseases not resulting from a definite injury are usually held not to be "accidents" within the meaning of compensation acts. See (1917) 27 YALE LAW JOURNAL, 144. The principal case does not purport to depart from this rule, but it is difficult on the evidence to understand the finding that the employee's "death was due to acute arsenical poisoning not of a chronic nature, or a culmination of a gradual development of a long course of poisoning."

WORKMEN'S COMPENSATION ACT—COMPENSATION AWARDED—PRICE OF ARTIFICIAL LEG AS "SURGICAL AID."—The claimant received injuries which necessitated the amputation of his leg. Under the Connecticut Workmen's Compensation Act, which requires the employer to furnish the injured employee a physician and "such medical and surgical aid as such physician shall deem reasonable or necessary," an award of compensation was made and the price of an artificial leg included therein. *Held,* that the award was correct. Prentice, C.J., *dissenting. Olmstead v. Lamphier* (1918, Com.) 104 Atl. 488.

The allowance of compensation for splints and crutches is common. The principal case goes a step farther in construing "surgical aid" as including also the furnishing of artificial limbs. Under the New York Compensation Law, the language of which is different, the cost of an artificial arm cannot be included in the award of compensation. The principal case settles a point upon which the rulings of the Compensation Commissioners had been conflicting. *Pedroni v. Blakeslee & Sons* (1916) 1 Conn. Comp. Dec. 670 (disallowed); *Saddlemire v. American Bridge Co.* (1918) 2 *ibid.* 665 (allowed). No other authorities have been found.

WORKMEN'S COMPENSATION ACT—INJURIES "ARISING OUT OF" THE EMPLOYMENT—ASSAULT BY FELLOW EMPLOYEE.—The claimant and another employee were culling barrel staves. The other man took some staves from the claimant's rack. He objected and a fight ensued in which he was injured. *Held,* that he was entitled to compensation. *Pekin Cooperage Co. v. Industrial Commission* (1918, Ill.) 120 N. E. 530.

Injuries inflicted by a fellow employee by a willfully tortious act or in "horse-play" are generally held not to arise out of the employment. *Jacquemin v. Turner & Seymour Mfg. Co.* (1918, Conn.) 103 Atl. 115, discussed in (1918) 27 YALE LAW JOURNAL, 965. The principal case lays down the rule that "where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment." The distinction would help to harmonize some of the cases, which are in great confusion. It was not adopted in the *Jacquemin* case.