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CURRENT DECISIONS

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ALIENS—DECISION OF BOARD OF INQUIRY—JUDICIAL REVIEW OF REVERSAL BY SECRETARY OF LABOR.—The Board of Inquiry under the Immigration Act, Act of Feb. 5, 1917 (39 Stat. at L. 887) admitted the relator as a citizen. On appeal, the Assistant Secretary of Labor reversed the decision, and a writ of *habeas corpus* was brought for a review. *Held,* that as the evidence before the board of inquiry shows no ground for a reversal of their judgment, the judgment of the Secretary of Labor will be reversed. *United States, ex rel. Hom Yuen Jum, v. Dunton* (1923, S. D. N. Y.) 291 Fed. 905.

The instant case for the first time affirms the court's power to review the decision of the Secretary of Labor, in determining whether the alleged alien has enjoyed the rights given him by the statute. See *United States v. Pierce* (1923, C. C. A. 2d) 289 Fed. 233; Bouvé, *Exclusion and Expulsion of Aliens in the United States* (1912) ch. 4; see (1924) 37 HARV. L. REV. 379.

CONTRACTS—RESTRAINT OF PERSONAL LIBERTY—AGREEMENT NOT TO ENTER COUNTY OF PLAINTIFF VALID.—The plaintiff had formerly sued defendant for alienation of his wife's affections. The suit was settled, the defendant giving a bond and agreeing not to enter either the county in which the plaintiff lived or the adjoining county for a period of fifteen years, except in case of serious illness or death of a member of his family. The defendant returned to the county of the plaintiff's residence, and the plaintiff sued on the bond. The defendant demurred on the ground that the agreement was void as against public policy. *Held,* that the demurrer be overruled. *McSpadden v. Leonard* (1923, Ark.) 251 S. W. 694.

The case is in line with the few previous decisions on the point. *Upton v. Henderson* (1912, Ch.) 28 T. L. R. 398; *Wallace v. McPherson* (1917) 138 Tenn. 458, 197 S. W. 565. Similar restrictions limiting privileges of engaging in trade or employment have usually been held valid if reasonable in time or space. *Sherman v. Pfefferkorn* (1922) 241 Mass. 468, 135 N. E. 568; *Scherman v. Stern* (1922, N. J.) 117 Atl. 631. If the contract required the defendant to leave the state, it would probably be held contrary to public policy. See *Wallace v. McPherson, supra.*

CRIMINAL LAW—EVIDENCE—PROOF OF CORPUS DELICTI AFTER EXTRAJUDICIAL CONFESSION.—In a crime for the killing of an illegitimate child the only evidence in addition to the extrajudicial statements of the accused, was that the child was seen last in the care of the defendant and had disappeared. The body had never been found. Over a motion by accused for a directed verdict, the case was left to the jury. *Held,* (three judges *dissenting*) that the state had failed to prove its case beyond a reasonable doubt. *People v. Kirby* (1923, Mich.) 194 N. W. 142.

In a few jurisdictions an extra-judicial confession may be used with slight additional corroborative facts in establishing the body of the crime. *People v. Brasch* (1908) 193 N. Y. 46, 85 N. E. 809; *Bolland v. U. S.* (1916, C. C. A. 4th) 238 Fed. 529. The instant case follows the better view that the *corpus delicti* must be proved independently of the confession. 68 L. R. A. 33, note; 1 Ann. Cas. 823, note; NOTE AND COMMENT (1923) 21 MICH. L. REV. 339; (1923) 23 COL. L. REV. 189. For a discussion of an interesting case on analogous facts see *Proof of the* Corpus Delicti *in Murder Trials* (1917) 51 IR. L. T. 311.

CRIMINAL LAW—FALSE PRETENSES DISTINGUISHED FROM LARCENY BY TRICK.—One Boyer deposited a certain sum of money in the plaintiff bank. Later he presented checks at the windows of two paying tellers, and diverted the attention of

one teller, so that both were honored. Each check equaled the amount of his entire deposit. The bank sued the defendant on a policy of insurance issued to insure the bank against loss by theft to recover the money so lost. *Held,* (two judges *dissenting*) that the plaintiff had no cause of action, as the money was obtained by false pretenses and not by theft. *Cedar Rapids Nat. Bank v. American Surety Co. of New York* (1923, Iowa) 195 N. W. 253.

The instant case soundly distinguishes larceny by trick, where the accused obtains a chattel by fraud, intending at the time to convert it, while the owner intends to part with possession only, from false pretenses, where the owner intends to part with the actual property in the chattel. (1923) 32 YALE LAW JOURNAL, 619; (1920) 20 COL. L. REV. 318; (1914) 2 CALIF. L. REV. 334. See COMMENTS (1921) 30 YALE LAW JOURNAL, 613.

EMPLOYERS' LIABILITY—FEDERAL ACT—DEATH WHILE REPAIRING PROPERTY USED IN INTRASTATE AND INTERSTATE COMMERCE.—A railroad maintained ash pits for both intrastate and interstate engines. The plaintiff employee was killed while restringing electric wires leading to the cranes that lifted ashes from the pits. Suit was brought under the Federal Employers' Liability Act. *Held,* that the employee was not engaged in interstate transportation. *Wallace v. N. Y. N. H. & H. R. R.* (1923, Conn.) 121 Atl. 878.

The case soundly follows the federal rule that an employee must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it. *Shanks v. D. L. & W. R. R.* (1916) 239 U. S. 556, 36 Sup. Ct. 188 (shifting overhead power shaft in shop repairing interstate as well as intrastate engines not within Act); *Boals v. Penn. Ry.* (1920) 193 App. Div. 347, 183 N. Y. Supp. 915 (same as to dumping ashes from engine used for both intrastate and interstate trains); Ann. Cas. 1918 B, 54; (1922) 32 YALE LAW JOURNAL, 89.

MANDAMUS—RELEGATION OF TRIAL OF FACTS TO INFERIOR COURT BY COURT OF ORIGINAL JURISDICTION.—Original proceeding in *mandamus* was brought in the supreme court pursuant to Art. IV, sec. 4 of the state constitution to compel the payment of a balance due for building a section of the highway. *Held,* that the issue being one of fact, and the purpose to enforce a private right, the trial of the question of fact should be relegated to the superior court. *State, ex rel. Otteson, v. Claudsen* (1923, Wash.) 214 Pac. 635.

Original jurisdiction conferred on an appellate court is not necessarily exclusive. *People, ex rel. Kocourek, v. City of Chicago* (1901) 193 Ill. 507, 62 N. E. 179; *People, ex rel. Foley, v. Montez* (1910) 48 Colo. 436, 110 Pac. 639. The instant case soundly follows a practice which secures a jury trial and a more adequate consideration of the facts. *Hains v. Saginaw County* (1891) 87 Mich. 237, 49 N. W. 310; *State, ex rel. Hopkins, v. County Court of Cooper County* (1876) 64 Mo. 170. See also Schofield, *Jury Trial in Original Proceedings for Mandamus in the Supreme Court* (1909) 3 ILL. L. REV. 479.

PROPERTY—COVENANTS RUNNING WITH THE LAND—COVENANT NOT TO QUARRY IN RESIDENTIAL DISTRICT.—The defendant, a corporation engaged in quarrying, owned land containing an abandoned quarry in a residential district. The defendant conveyed to one von Oven some land and the quarry with the covenant that the grantee, his heirs and assigns, should never quarry on that land. The defendant sold the adjacent lots for residences, and von Oven organized the plaintiff corporation for the purpose of quarrying and conveyed the land to it without the covenant. The plaintiff alleged that the covenant formed a cloud on its title and filed a bill in equity to remove it. The bill was dismissed and the plaintiff appealed. *Held,* that the decree be affirmed. *Natural Products Co. v. Dolese & Shepard Co.* (1923) 309 Ill. 230, 140 N. E. 840.

The instant case is in line with the weight of authority in enforcing against an assignee of the covenantor a covenant, the object of which is to exclude a noxious trade from a residential district, and not to exclude a competing business contrary to public policy. See *Norcross v. James* (1885) 140 Mass. 188, 2 N. E. 946; *Hodge v. Sloan* (1887) 107 N. Y. 244, 17 N. E. 335; L. R. A. 1915 A, 679, note; Clark, *Equitable Servitudes* (1918) 16 MICH. L. REV. 90.

TAXATION—CONSTITUTIONAL LAW—TAX ON SEVERANCE OF LUMBER A PRIVILEGE TAX.—A statute levied "a privilege or license tax upon all persons, firms, corporations . . . . engaged in the business of severing natural resources from the soil or water." The tax was for seven cents a thousand feet on all timber severed, without reference to its value. The plaintiffs, individuals and corporations, attacked the constitutionality of the tax on the ground that it was a property tax, not uniform and proportional to the value. *Held,* (one judge *dissenting*) that the tax was constitutional. *Floyd v. Miller Lumber Co.* (1923, Ark.) 254 S. W. 450.

Although there is some conflict, the instant case is in accord with the majority view that severance taxes, whether applied to individuals or corporations, are not property taxes. *Producers' Oil Co. v. Stephens* (1906) 44 Tex. Civ. App. 327, 99 S. W. 157; *Oliver Iron Mining Co. v. Lord* (1922, U. S.) 43 Sup. Ct. 526; *Standard Oil Co. v. Red River Parish* (1916) 140 La. 42, 72 So. 802; *Contra: Thompson v. Kreutzer* (1916) 112 Miss. 165, 72 So. 891. See (1924) 8 MINN. L. REV. 172.

TAXATION—FEDERAL INCOME TAX—BEQUEST TO EXECUTOR IN LIEU OF COMPENSATION NOT INCOME.—The defendants were executors under a will which bequeathed to them certain sums of money, in lieu of all compensation or commissions. The federal income tax law provided that bequests should not be taxable as income. Act of Oct. 13, 1913 (38 Stat. at L. 114, 166). To an action by the United States to recover income tax on the legacies, the defendant demurred. *Held,* that the demurrer should be sustained. *United States v. Merriam* (1923, U. S.) 44 Sup. Ct. 69.

The court held that the controlling intention of the testator was to make a bequest conditional upon the assumption of the duties of executor, and not merely to fix compensation for services. See *Orton v. Orton* (1867, N. Y.) 3 Keys, 486; *Kirkland v. Narramone* (1870) 105 Mass. 31; 2 Williams, *Executors and Administrators* (11th ed. 1921) 1026. For a contrary construction, see *Renshaw v. Williams* (1892) 75 Md. 498, 23 Atl. 905; *Richardson v. Richardson* (1911, 2d Dept.) 145 App. Div. 540, 129 N. Y. Supp. 941; *cf. Gordon v. Greening* (1916) 121 Ark. 617, 182 S. W. 272.

TORTS—PRIVATE NUISANCE CAUSED BY THIRD PERSON—DUTY OF OCCUPIER OF LAND TO ABATE.—A owned waste land adjoining B's land and canal. A trespasser had dumped waste upon A's land, and a fire starting by spontaneous combustion threatened B's property. Although notice was given A of the nuisance he did nothing to abate it. B sued A for damages, and the lower court refused a recovery. *Held,* (one judge *dissenting*) that the judgment be affirmed as A owed no duty to abate the nuisance. *Edwards v. Birmingham Canal* [1923, C. A.] 40 T. L. R. 94.

An occupier of land owes no duty to abate a private nuisance unless he created or continued it. Salmond, *Torts* (5th ed. 1920) sec. 71 (4). And a mere omission to abate a nuisance created without his authority does not amount to a continuance by the occupier. *Saxby v. Manchester R. R.* (1869) L. R. 4 C. P. 198; Clerk and Lindsell, *Torts* (7th ed. 1921) 419. But contrary to the instant case failure to abate after notice has been held to create liability. *Morris Canal Co. v. Ryerson* (1859) 27 N. J. L. 457; 14 A. L. R. 1110, note.