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# ABSTRACTS

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ALIENS — ALTERNATIVES TO DEPORTATION WHERE RETURN TO COUNTRY OF ORIGIN IMPOSSIBLE — Janavaris came to the United States as a cabin boy on a Greek steamer on December 3, 1939. In accordance with the applicable statute and regulations he was permitted to land and visit this country for a period of sixty days. He overstayed his permitted leave and remained in this country. He has been guilty of no other wrongful act and in fact has registered for the Selective Service. On May 12, 1942, a warrant for his arrest was issued and on July 10, after hearing, a warrant for his deportation. The place of deportation was specified as Greece and he was alternately given permission to ship voluntarily upon another vessel of his choice. Janavaris petitioned for a writ of habeas corpus on the theory that he should be released on bond until such time as his deportation can be effectuated. Prior to the entrance of the United States into the war it was the practice of the Department of Justice to release aliens on bond in such cases.[1] *Held,* release on bond is not a statutory right but is discretionary with the Attorney General. However, this court has the power to release an alien who has been detained an unreasonably long period of time after it appears the warrant for his deportation cannot be effectuated. In peacetime this has been held to be one to four months, and while a longer time may be justified under wartime circumstances, it has now (October 20, 1942) been an unreasonable length of time, since his release constitutes no danger to the United States and his continued imprisonment can serve no useful purpose. The alternative of service on a sea-going vessel is not authorized by Congress, and Janavaris is ordered released, subject to the discretion of the Attorney General to require bond. *United States ex rel. Janavaris v. Niccolls,* (D. C. Mass. 1942) 47 F. Supp. 201.[2]

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[1] Immigration Act of 1917, 39 Stat. L. 890, § 20, 8 U. S. C. (1940), § 156.

[2] Moraitis v. Delany, (D. C. Md. 1942) 46 F. Supp. 425, noted 42 COL. L. REV. 1343 (1942), indicated that a year would not be too long to hold an alien in custody where deportation to the country of origin was impossible because of war, but held that an alternative deportation to the government in exile in England would be illegal. Accord, United States ex rel. Miskic v. Uhl, (D. C. N. Y. 1942) 47 F. Supp. 165.

ALIENS — RIGHT OF RESIDENT ENEMY ALIEN TO SUE IN FEDERAL COURTS — Petitioner, born in Japan, became a resident of the United States in 1905. On April 15, 1941, he filed a libel in admiralty in a federal district court for wages due him as a seaman. Claimants of the vessel appeared and filed an answer, but later, on January 20, 1942, moved to abate the action on the ground that petitioner had become an enemy alien by reason of the war between Japan and the United States and had no "right to prosecute any action in any court of the United States during the pendency of said war." The district judge granted the motion and petitioner sought mandamus in the circuit court to compel the district court to vacate its judgment and proceed to trial. His motion for leave to file was denied without opinion, and the Supreme Court then granted leave to file in that Court. *Held*, mandamus granted. Early English decisions denying aliens the right to sue were altered as long ago as 1698 [1] and the old rule has never been applicable here. "A lawful residence implies protection and a capacity to sue and be sued." [2] If public welfare demands that the alien shall not receive the proceeds of suit, the decision must be made by the government and a windfall should not be allowed to the present claimants. The prohibition of suits by "enemies" under the Trading With the Enemy Act [3] applies only to nonresident aliens until extended by Presidential proclamation and the President has made no declarations as to enemy aliens under this act. *Ex parte Kawato*, (U. S. 1942) 63 S. Ct. 115.[4]

BANKRUPTCY — SETOFF — APPLICABILITY OF SECTION 68 TO CHAPTER XI (ARRANGEMENTS) — The case of *In re Ulen & Co.*, (D. C. N. Y. 1941) 46 F. Supp. 437, noted 41 MICH. L. REV. 521 (1942), has been affirmed by *Tyler v. Marine Midland Trust Co. of New York*, (C. C. A. 2d, 1942) 128 F. (2d) 927.

CONSTITUTIONAL LAW — FULL FAITH AND CREDIT — DIVORCE DECREES — *A* and *B*, each married and resident in North Carolina, went to Nevada in May 1940, and on June 26, 1940, after barely six weeks, each filed a divorce action in the Nevada court. The defendants in those divorce actions entered no appearance and were not served with process in Nevada but only by publication and substituted service. Both *A* and *B* were granted divorce decrees in which the Nevada court made a specific finding that "the plaintiff has been and is now a bona fide and continuous resident of the County of Clark,

[1] Wells v. Williams, 1 Ld. Raym. 282, 91 Eng. Rep. 1086 (1698).

[2] Clarke v. Morey, 10 Johns. (N. Y.) 69 at 72 (1813).

[3] 40 Stat. L. 416 (1917), 40 Stat. L. 1020 (1918), 50 U. S. C. (1940), Appendix, § 7.

[4] For collections of cases, see 137 A. L. R. 1347 (1942); 140 A. L. R. 1519 (1942). See also Sterck and Schuck, "The Right of Resident Alien Enemies to Sue," 30 GEORGETOWN L. J. 421 (1942); Gordon, "The Right of Alien Enemies to Sue in American Courts," 36 ILL. L. REV. 809 (1942); Battle, "Enemy Litigants in our Courts," 28 VA. L. REV. 429 (1942); 30 CAL. L. REV. 358 (1942); 5 UNIV. DETROIT L. J. 106 (1942); 54 HARV. L. REV. 350 (1940); 55 HARV. L. REV. 1057 (1942); 28 VA. L. REV. 1010 (1942); 27 YALE L. J. 105 (1917).

State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law." [1] *A* and *B* were married to each other in Nevada on October 4, 1940, the day the second decree was granted, and returned to North Carolina. There they were indicted, tried and convicted of bigamous cohabitation. In an appeal to the Supreme Court of North Carolina the petitioners excepted to charges that a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina and that the petitioners had the burden of satisfying the jury, but not beyond a reasonable doubt, of the bona fides of their residence in Nevada for the required time. In affirming the judgment of conviction,[2] the North Carolina Supreme Court held that North Carolina was not required to recognize the Nevada decrees under the rule of *Haddock v. Haddock*,[3] but it also intimated that the Nevada divorce was collusive. On writ of certiorari to the United States Supreme Court, *held* that since it is impossible to tell on which ground the North Carolina decision is based, the judgment cannot be sustained if either ground is invalid under the Federal Constitution. The constitutional question of *Haddock v. Haddock* must thus be faced. In that case it was held that the matrimonial domicile of the wife need not give full faith and credit to a decree obtained by the husband in a state where he had established a separate domicile, after wrongfully leaving his wife, where service on the wife had been obtained by publication and she had not entered an appearance in the case. This case is now overruled. A divorce action, while not a proceeding in rem, is more than an action in personam. A state has an interest in the marital status of its citizens and therefore can alter the marriage status of the spouse domiciled there even though the other spouse is absent. The residence statute of Nevada must be construed to mean domicile and therefore, the constitutional requirements of due process having been met, the instant decrees were valid in Nebraska and consequently must be given full faith and credit in North Carolina. Whether one spouse has wrongfully deserted has no relevancy to state power. Full faith and credit requires that local policy in divorce be subservient to national unity just as it is in gambling contracts, etc. Justice Murphy and Jackson dissented on the ground that the Nevada statute did not require domicile and that on the facts in the instant case the parties were not domiciled in Nevada so that the Nevada court did not have jurisdiction. *Williams v. North Carolina*, (U. S. 1942) 63 S. Ct. 207.[4]

[1] Nev. Comp. Laws (1929), § 9460, as amended Laws (1931), p. 161.

[2] State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1942).

[3] 201 U. S. 562, 26 S. Ct. 525 (1906).

[4] For full discussion of Haddock v. Haddock and other cases involving full faith and credit as applied to divorce decrees, see Holt, "Any More Light on Haddock v. Haddock?" 39 MICH. L. REV. 689 (1941). See also Jacobs, "Attack on Decrees of Divorce," 34 MICH. L. REV. 749, 959 (1936); Beale, "Constitutional Protection of Decrees of Divorce," 19 HARV. L. REV. 586 (1906); Beale, "Haddock Revisited," 39 HARV. L. REV. 417 (1926); McClintock, "Fault as an Element of Divorce Jurisdiction," 37 YALE L. J. 564 (1928); Bingham, "The American Law Institute vs. the Supreme Court in the Matter of Haddock v. Haddock," 21 CORN. L. Q. 393 (1936).

CONSTITUTIONAL LAW — TRIAL BY JURY — CONDITIONS OF VALID WAIVER — The Supreme Court granted review of an order releasing relator from custody on the ground that his waiver of trial by jury, without advice of counsel, was void and made his conviction a nullity. The facts have been more fully stated in an earlier comment.[1] In setting aside the order of release, the Supreme Court, speaking through Justice Frankfurter, stated that "We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court.[2] . . . The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. . . . [But] He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. . . . And if the record before us does not show an intelligent and competent waiver of the right to the assistance of counsel by a defendant who demanded again and again that the judge try him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual." Justices Douglas, Black and Murphy dissented on the ground that while both advice of counsel and trial by jury may be waived separately, they should not be cumulated, particularly in a case where the defenses were so technical as here. *Adams v. United States ex rel. McCann*, (U. S. 1942) 63 S. Ct. 236.[3]

CRIMINAL LAW AND PROCEDURE — LIABILITY FOR DEATH OF ONE ENDANGERED BY DEFENDANT'S CRIMINAL ACT — Appellant was tried by a jury, convicted of murder in the second degree and sentenced for life under an indictment which first charged that he purposely and with premeditated malice killed E. I. B. and then described in detail how the offense was committed. The indictment recited the chain of events leading up to appellant's ravishing of the deceased, a child of twelve years, and that as a proximate result of that ravishment and of the pain and grief accompanying it the deceased had fallen into a stream of water and that appellant wilfully and feloniously failed to rescue her although it was within his power to do so and that she was drowned. Appellant assigned error on the overruling of a motion to quash the indictment for insufficiency of the facts to state a public offense. *Held*, that while criminal, like civil, liability cannot be based upon mere failure to rescue one in peril, there is a duty to assist one who has been put in danger by defendant's criminal act. The question in criminal law is not so much one of duty and breach as of cause and effect. The indictment showed a direct chain of causation from appellant's wrongful acts to the child's death and stated a public offense. Conviction affirmed. *Jones v. State*, (Ind. 1942) 42 N. E. (2d) 1017.

[1] 41 MICH. L. REV. 495 at 499 (1942).

[2] Patton v. United States, 281 U. S. 276, 50 S. Ct. 253 (1930).

[3] The habeas corpus aspects of this case will be commented upon in a later issue.

CRIMINAL LAW AND PROCEDURE — STATUTE OF LIMITATIONS — CONSTRUCTION OF EXCEPTION WHERE PERSON "ABSENT FROM THE DISTRICT" — Defendants were indicted on December 18, 1941, and charged with having on July 18, 1930, violated the revenue laws of the United States relating to the tax imposed on the importation of morphine by importing 220 lbs. of morphine and failing to pay taxes thereon, and with failing to make a monthly return of all morphine imported to the Collector of Internal Revenue as required by law. Defendants filed a special plea in bar, alleging that the indictment was not found within three or six years [1] after the alleged offenses were committed and hence was barred by the statute of limitations. The government filed a replication and on the issue raised it was stipulated that defendants were natives of Greece and had not entered this country until 1941. The government contended that the statute had not run under the proviso that "The time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. . . ."[2] *Held*, plea in bar sustained. Defendants were not absent from the district within the meaning of the statute. "Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability."[3] The court distinguished *Brouse v. United States*,[4] which found Brouse a fugitive from justice of the District of Massachusetts when he had not been within that district at the time of committing the crime, on the ground that federal districts are merely administrative divisions and not independent jurisdictions. *United States v. Eliapoulos*, (D. C. N. J. 1942) 45 F. Supp. 777.[5]

ESTATES IN FEE — VALIDITY OF FEE SIMPLE DEFEASIBLE ON DEATH OF OWNER INTESTATE — *A* died, leaving all his property to his wife, *B*, "with full power to use and dispose of the same and to make testamentary disposition thereof, in any manner she may think proper, subject only to the provision contained in Article Fourth of this instrument." The fourth article provided "that if my said wife shall survive me and if at her death she shall not have left a legally executed will dated after my decease, then the gift made in her favor shall be limited to a life estate with power of disposition." *B* executed a will after her husband's death. The executor of *B's* will brought suit for a construction of the two wills in which beneficiaries under each will intervened. Beneficiaries under *A's* will claimed *B* had only a life estate with power of appointment, while the residuary beneficiary under *B's* will claimed she had a

[1] The ordinary period of limitations on federal crimes is three years, but for offenses under the internal revenue laws "involving the defrauding or attempting to defraud the United States" the period is six years. 18 U. S. C. (1940), §§ 582, 585.

[2] Id., § 585 [now 26 U. S. C. (1940), § 3748].

[3] Principal case, 45 F. Supp. at 781.

[4] (C. C. A. 1st, 1933) 68 F. (2d) 294.

[5] Cf. annotation on construction of phrase "fleeing from justice," 124 A. L. R. 1049 (1940).

conditional fee. *Held*, *B* had a conditional fee defeasible on her failure to make a will. The argument that the particular condition is impossible cannot be sustained. While an inheritable estate is necessary for a fee simple, the same is not true of a conditional fee, which may be granted subject to defeat if the grantee does not make a will.[1] *Cragin v. Frost National Bank*, (Tex. Civ. App. 1942) 164 S. W. (2d) 24.[2]

EVIDENCE — CIRCUMSTANTIAL EVIDENCE — NECESSITY OF EXCLUDING ALL INCONSISTENT THEORIES — In an action for damages arising out of a collision between an automobile driven by plaintiff's intestate and an automobile driven by defendant, the jury found for plaintiff on circumstantial evidence and in spite of conflicting inferences from the physical facts presented by defendant. The negligence relied on was that defendant's car was in the wrong lane at the time of the collision, and it was undisputed that after the impact his car was over the center line. Defendant contended that the accident might conceivably have happened while both cars were in their proper lanes through the entanglement of some overhanging part of one with the other. *Held*, although some states follow a contrary rule, in this state in a civil case proof of a material fact by inference from circumstantial evidence alone does not require that it be so conclusive as to exclude every other hypothesis. The jury's verdict was supported by the character and location of the damage done to both vehicles, their relative positions on the highway after the impact, the superior weight of the defendant's car, the location of debris found on the highway, etc. *LeBlanc v. Grillo*, (Conn. 1942) 28 A. (2d) 127. Accord, in a suicide case, *Cox v. Metropolitan Life Ins. Co.*, (Me. 1942) 28 A. (2d) 143.[1]

FEDERAL COURTS AND PROCEDURE — SUITS UNDER TUCKER ACT — USE OF COUNTERCLAIM AGAINST UNITED STATES — The United States sued for the use of subcontractors on a bond executed under the provisions of the Miller Act.[1] This act provides that a contractor with the United States must furnish a bond for the protection of persons supplying labor or material in prosecution of work provided for in the contract, and that on failure of the contractor to pay any subcontractor the United States may sue for the use of such beneficiaries. In this suit the defendants filed a counterclaim asserting that the United States owed them over $7,000 on the contract. The defendants based their right to maintain the counterclaim upon the Tucker Act,[2] Rules 13 and 14 of the Rules of Civil Procedure, and the decision in *United States v. American Surety Co.*[3] The Tucker Act confers jurisdiction upon the federal district courts "Concurrent with the Court of Claims, of all claims not exceeding

[1] Citing Foy v. Foy, 188 N. C. 518, 125 S. E. 115 (1924), and In re Gardner, 140 N. Y. 122, 35 N. E. 439 (1893), to the same effect.

[2] See 14 TEMP. L. Q. 518 (1940).

[1] See 10 R. C. L. 1007 (1915); 23 C. J. 49 (1921); 20 AM. JUR. 1041 (1939); 32 C. J. S. 1102 (1942).

[1] 49 Stat. L. 793 (1935), 40 U. S. C. (1940), § 270a (2).

[2] 36 Stat. L. 1093 (1911), as amended, 28 U. S. C. (1940), § 41 (20).

[3] (D. C. N. Y. 1938) 25 F. Supp. 700.

$10,000, founded . . . upon any contract, express or implied, with the Government of the United States. . . ." Rule 13 provides that when a complaint is filed, all counterclaims arising out of the same transaction must be set up, and Rule 14 that third parties may be brought in. On a motion to strike the counterclaim, *held* motion granted. The court disagreed with the *American Surety* case, and said that under the Tucker Act the district court sits as a court of claims and that its authority to adjudicate claims against the United States does not extend to any action which could not be maintained in the Court of Claims. Although the Court of Claims may allow a set-off, it cannot render an affirmative judgment against the United States on a counterclaim. In the present suit the United States is merely a nominal party plaintiff for the benefit of the subcontractor, as required by the Miller Act, and that act was not intended to cover controversies between other persons. Procedural rules cannot extend jurisdiction and hence Rules 13 and 14 have no application to a suit of the present nature. Moreover, defendants have not presented their counterclaim to the General Accounting Office for examination as provided by statute.[4] *United States for use of Metal Mfg. Co. v. Biggs*, (D. C. Ill. 1942) 46 F. Supp. 8.

HABEAS CORPUS — SELECTIVE SERVICE ACT — MOMENT OF INDUCTION — The petitioner was granted a writ of habeas corpus on his complaint that he was unlawfully restrained of his liberty and held for army service by an officer of the United States Army. The petitioner's claim to be a conscientious objector had been overruled by his local draft board. Petitioner then presented himself at the reception center, where he was given a physical examination and thereafter commanded to stand and take an oath of induction. This he refused to do, informing the officers that he was a conscientious objector. On the hearing on the writ, the question was as to jurisdiction of the army, which turned upon the point at which the military authority attaches, the moment at which induction occurs. The court *held* that induction occurs by operation of law when the selected man is found acceptable by the government, and no acceptance or oath by the person affected is necessary. The court's decision was based on the rules and regulations issued under the authority of the Selective Service Act.[1] These give detailed instructions to the local draft boards for transportation of selected men to the induction center, and then provide: "At the induction center, the selected men found acceptable will be inducted into the land or naval forces." [2] A provision for administration of an oath formerly included in this rule [3] had been omitted by revision, but the court stated it would have reached the same conclusion under the former rule. *Ex parte Billings*, (D. C. Kan. 1942) 46 F. Supp. 663.[4]

[4] 42 Stat. L. 24 (1921), 28 U. S. C. (1940), § 774.

[1] 54 Stat. L. 885 (1940), 50 U. S. C. (1940), Appendix § 301 et seq.

[2] Selective Service Regulations (1942), § 633.9.

[3] Selective Service Regulations (1940), § 429.

[4] See generally on the operation of selective service, Geraghty, "Judicial Protection of Individuals under the Selective Training and Service Act of 1940," 36 ILL. L. REV. 310 (1941); Taintor and Butts, "The Protection of Individuals and of the Nation under the Selective Service Acts of 1917 and 1940," 14 MISS. L. J. 445 (1942).

LABOR LAW — INJUNCTIONS — PICKETING WITH FALSE BANNERS — Plaintiff sought an injunction against defendant labor union, which picketed its place of business with signs stating "This house on strike." Prior to the time picketing was begun, a ballot had been taken among plaintiff's employees on the question whether a strike should be called and no one voted in favor of a strike, although immediately after the establishment of the picket line some of the employees left and remained away from work. The picketing was for the purpose of obtaining a closed shop agreement. *Held*, injunction granted. Untruthful picketing is unlawful picketing. There is no statutory restraint of the powers of courts of equity and the present facts do not come within the recent Supreme Court cases [1] overruling state policy on the ground of interference with the constitutional guarantee of free speech. A dissenting judge argued that equity would not enjoin the false statements themselves, the damage remedy being adequate, and that consequently it should not enjoin them when combined with picketing which was in itself lawful. *Magill Bros. v. Building Service Employees' International Union*, 20 Cal. (2d) 506, 127 P. (2d) 542 (1942).[2]

PLEADING — TRESPASS ON THE CASE FOR NEGLIGENCE — NECESSITY OF SPECIFYING PARTICULAR ACTS OF NEGLIGENCE — In an action of trespass on the case for negligence arising out of a highway collision, plaintiff's declaration stated merely his own right in the highway in the exercise of due care and defendant's interference with that right by running into him. Defendant's demurrer was sustained by the trial court, and plaintiff brought a bill of exceptions. *Held*, exceptions sustained and case remitted for further proceedings. By the common law rule it is not necessary to plead specific acts of negligence by defendant in an action of trespass on the case arising from a highway collision. The cases in this state cited to the contrary are distinguishable. *Reichwein v. United Electric Rys. Co.*, (R. I. 1942) 27 A. (2d) 845.[1]

[1] American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568 (1941); Bakery & Pastry Drivers & Helpers v. Wohl, 315 U. S. 769, 62 S. Ct. 816 (1942).

[2] See comments, 39 MICH. L. REV. 110 (1940); 40 MICH. L. REV. 1200 (1942). The Swing case is also noted: 1 BILL RTS. REV. 231 (1941); 2 id. 59 (1941); 19 CHI-KENT L. REV. 290 (1941); 15 UNIV. CIN. L. REV. 339 (1941); 29 GEO. L. J. 796 (1941); 54 HARV. L. REV. 1066 (1941); 7 OHIO ST. L. J. 454 (1941); 90 UNIV. PA. L. REV. 201 (1941); 89 UNIV. PA. L. REV. 825 (1941); 19 TEX. L. REV. 480 (1941). The Wohl case is noted in 2 BILL RTS. REV. 226 (1941); 37 ILL. L. REV. 86 (1942); 51 YALE L. J. 1209 (1942). Cf Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807 (1942), noted 55 HARV. L. REV. 1221 (1942); 28 IOWA L. REV. 151 (1942); 20 N. C. L. REV. 434 (1942); 90 UNIV. PA. L. REV. 970 (1942). See also Stanley, "Freedom of Speech and Labor Injunctions," 9 L. Soc. J. 599 (1941); Tepper, "Freedom of Speech and the National Labor Relations Act," 10 L. Soc. J. 5 (1942); 10 KAN. B. A. J. 198 (1942); 16 IND. L. J. 594 (1941); 1942 WIS. L. REV. 115.

[1] See generally the excellent comment by Clark, 32 YALE L. J. 483 (1923). As to the practice in code states, see Bedell, "Pleading Negligence in Iowa," 16 IOWA L. REV. 480 (1931); 6 MO. L. REV. 512 (1941). For the procedure under the new federal rules, see 28 CAL. L. REV. 235 (1940).

POWERS — WHETHER GENERAL TESTAMENTARY POWER IS EXERCISED BY RESIDUARY CLAUSE IN WILL — Under her husband's will testatrix was given "the right to dispose by will of $20,000" of a trust fund. Without referring to this power or to the trust fund, testatrix devised and bequeathed "all the rest, residue and remainder" of her property to a named nephew. The trustee under the will of the husband applied to the court for instructions as to the distribution of the trust fund. *Held*, that the residuary clause did not exercise the power of appointment. This is the common law rule followed in twelve states and set forth in the *Property Restatement*.[1] While five jurisdictions [2] have enacted statutes to the contrary, only two [3] have changed the common law rule by judicial decision. If a change is desired, a statute is the proper course, since legislation operates prospectively while a decision of this court would operate retroactively. Lawyers and their clients are entitled to rely on the common law where not changed by statute. *In re Proestler's Will*, (Iowa, 1942) 5 N. W. (2d) 922.[4]

PROCESS — POWER OF COURT TO DESIGNATE OR APPROVE A METHOD OF SERVICE OF PROCESS UPON THE STATE WHERE NONE PROVIDED BY STATUTE — A taxpayer sued to recover taxes paid under protest under a statute which was later declared unconstitutional. Service was obtained on the governor and attorney general. On petition of the state an alternative writ of prohibition was issued to enjoin the lower court from proceeding in the case. On the first hearing the alternative writ was made permanent.[1] Upon rehearing, *held* alternative and permanent writs are quashed and set aside. It is clear that under the tax statutes the state had consented to be sued for the recovery of a tax paid under protest. Although no method of service of process on the state has been designated by the legislature, the court is authorized to adopt a suitable method by the statute granting power to carry into effect any jurisdiction conferred.[2] A dissenting judge thought that only the legislature could prescribe the method of service. *State v. District Court of Salt Lake County*, (Utah, 1942) 128 P. (2d) 471.

[1] 3 PROPERTY RESTATEMENT, § 343 (1940).

[2] Kentucky, New York, Pennsylvania, Rhode Island and Virginia. The Property Restatement lists a number of others.

[3] Massachusetts and New Hampshire.

[4] See annotations, 32 A. L. R. 1395 (1924); 91 A. L. R. 433 (1934); 127 A. L. R. 248 (1940); 1 SIMES, FUTURE INTERESTS, § 270 (1936); 2 MD. L. REV. 155 (1938).

[1] State v. District Court of Salt Lake County, (Utah, 1942) 115 P. (2d) 913.

[2] Utah Rev. Stat. (1933), § 20-7-25: "When jurisdiction is, by statute, conferred on a court or judicial officer, all means necessary to carry it into effect are also given; and in the exercise of jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the codes of procedure."

STATES — SOVEREIGN PREROGATIVES — WAIVER OF IMMUNITY FROM SUIT AS WAIVING IMMUNITY FROM LIABILITY FOR NEGLIGENCE IN PERFORMANCE OF GOVERNMENTAL FUNCTIONS — Plaintiff, an employee of the state highway commissioner, sued the state and the commissioner in the court of claims for injury sustained by him in a collision between the steam ferry on which he was employed and another state-owned and operated steam ferry. Plaintiff relied on the federal statute known as the Jones Act [1] giving seamen the option of suing at law for personal injuries rather than under the employers liability provisions. It was assumed that plaintiff was free from fault and that other state employees had been negligent. The highway commissioner has a statutory duty to operate the ferry in question,[2] and under the local law state instrumentalities are immune from liability for negligence in the performance of governmental functions. The state statute setting up the court of claims [3] gave it jurisdiction "to hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies." But that statute also provided that the act "shall in no manner be construed as enlarging the present liabilities of the state." The court of claims dismissed the action. *Held*, affirmed. By the court of claims act the state has waived its immunity to suit, but it has not waived any defenses to liability it may have, particularly as any relinquishment of sovereign immunity must be strictly construed. It is argued that since suit against the state has been permitted, federal rather than local law should be applied to a maritime injury, and the United States Supreme Court decision in *Workman v. City of New York* [4] is cited. This concerned a suit in a federal district court against the New York City Fire Department and applied federal rather than local law since "a court of admiralty . . . may reach persons having a general capacity to stand in judgment." [5] But the court of claims does not have the jurisdiction of a court of admiralty and the state does not have "a general capacity to stand in judgment." *Manion v. State Highway Commissioner*, 303 Mich. 1, 5 N. W. (2d) 527 (1942), cert. den. (U. S. 1942) 63 S. Ct. 159.[6]

TAXATION — EFFECT OF COLLECTOR'S MISINFORMATION TO OWNER ON VALIDITY OF SALE FOR DELINQUENT TAXES — In 1938 John and Launia Hall, owners of certain land, acting under a state statute which was later declared unconstitutional, obtained a reduction of the assessed valuation of their property for prior years and gave the county treasurer a check for the amount due as so computed. The treasurer stated that a receipt would be mailed later and repeated that promise upon a later inquiry. However, the check was lost

[1] 46 U. S. C. (1940), § 688.

[2] Mich. Comp. Laws (1929), § 4598, Stat. Ann. (1936), § 9.1391.

[3] Mich. Pub. Acts (1939), No. 135, §§ 8, 24, as amended by Mich. Pub. Acts (1941), No. 137, Mich. Stat. Ann. (Supp. 1942), § 27.3548 (8), (24).

[4] 179 U. S. 552, 21 S. Ct. 212 (1900).

[5] Id., 179 U. S. at 565.

[6] See generally as to effect of statute permitting state to be sued upon the question of its liability for negligence or tort, annotation in 13 A. L. R. 1276 (1921).

and never presented for payment. In 1940 on tax sale this property was purportedly sold to Headley and others. The Halls brought action to recover the property, tendering payment of all delinquent taxes. From a judgment for plaintiff, defendant appealed. *Held*, judgment affirmed. According to the great weight of authority [1] where the nonpayment of delinquent taxes is due to misinformation given by a tax collector upon inquiry by the property owner, the property owner will be protected and any tax deed thereafter issued against his property so long as he remains in ignorance of the existing delinquency will be treated as subject to cancellation on equitable considerations. The fact that the actions in this case were taken under a statute later declared unconstitutional does not change the situation. *Headley v. Hall*, (Okla. 1942) 129 P. (2d) 1018.

TAXATION — FEDERAL GIFT TAX — GIFT IN TRUST AS PRESENT OR FUTURE INTEREST — In 1937, petitioner created two trusts for her four grandchildren of approximately $10,000 each. Two of the grandchildren were nineteen and two were sixteen years of age. The trustees were given power to hold the estate in trust for the beneficiaries "during their lifetime or for the duration of this trust." They were directed, in their sole discretion, to use the principal and income for the education and preparation for "desirable positions in life" of the beneficiaries. At the age of twenty-four, each beneficiary was to be paid his share of the estate then in the hands of the trustees. Petitioner claimed a $5,000 exclusion under the gift tax for each beneficiary. The commissioner and the Board of Tax Appeals both denied the exclusion on the ground that the gifts to the trust beneficiaries were gifts of future interests.[1] *Held*, reversed. The gifts were present interests, since the primary purpose of the trust, borne out by the amounts of the gifts and the ages of the beneficiaries, was for the immediate use of the beneficiaries for their education and preparation for life. Other cases construing trusts as gifts of future interests were distinguished.[2] *Smith v. Commissioner of Internal Revenue*, (C. C. A. 8th, 1942) 131 F. (2d) 254.[3]

TAXATION — FEDERAL INCOME TAX — RIGHT TO DEDUCT UNPAID INTEREST WHERE BOOKS KEPT ON ACCRUAL BASIS — In 1936 and 1937 the petitioning taxpayer, which kept its books on the accrual basis, deducted for

[1] See cases collected in 134 A. L. R. 1299 (1941), and cases cited by court. Cf. 26 A. L. R. 622 (1923); 118 A. L. R. 578 (1939).

[1] See Treas. Reg. 79 (1936), art. 11.

[2] United States v. Pelzer, 312 U. S. 399, 61 S. Ct. 659 (1941); noted 22 OHIO OP. 426 (1942); Commissioner v. Gardner, (C. C. A. 7th, 1942) 127 F. (2d) 929; Commissioner v. Phillips, (C. C. A. 5th, 1942) 126 F. (2d) 851; Commissioner v. Brandegee, (C. C. A. 1st, 1941) 123 F. (2d) 58; Commissioner v. Taylor, (C. C. A. 3d, 1941) 122 F. (2d) 714, noted 30 GEO. L. J. 413 (1942); Helvering v. Blair, (C. C. A. 2d, 1941) 121 F. (2d) 945; Welch v. Paine, (C. C. A. 1st, 1941) 120 F. (2d) 141, noted 55 HARV. L. REV. 302 (1941).

[3] Cf. 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 15.11 (1942).

income tax purposes large amounts of interest it owed on debts.[1] The taxpayer was on the verge of bankruptcy and there was no reasonable expectation that the interest would ever be paid. The Board of Tax Appeals sustained the commissioner's deficiency assessments and the taxpayer sought review in the federal circuit court. *Held*, reversed. The law is that if a method of bookkeeping employed by a taxpayer "does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." [2] But there can be no net income where the interest on what the taxpayer owes amounts to more than his gains, even though there is no reasonable expectation of its being paid. *Zimmerman Steel Co. v. Commissioner of Internal Revenue*, (C. C. A. 8th, 1942) 130 F. (2d) 1011.[3]

TAXATION — FEDERAL INCOME TAX — WHAT AMOUNTS TO AN INFORMAL CLAIM FOR REFUND OF TAXES — In her income tax return for 1932, *A* claimed a charitable deduction of some $12,000. This was disallowed by the local internal revenue agent, and *A* filed a written protest, which was denied. On review the commissioner also refused to allow the deduction and two conferences brought no change in result. In June 1936 *A* executed a "waiver of restriction on assessment and collection of deficiency in tax" and forwarded it to the commissioner, thus allowing the assessment of the deficiency before the expiration of the statutory sixty days after notice. However, *A* attached to the waiver a letter stating that the waiver was signed with the express condition that in case of a change in the basis of computing charitable deductions by decision of the Supreme Court or change in treasury regulations, *A* would have the right to have the return revised. In 1939 the Supreme Court handed down a decision approving the method used by *A* in computing the deduction. Thereafter *A* requested the commissioner to recompute her 1932 tax liability. Upon the refusal of the commissioner to do so, *A* filed a formal claim for refund, which was rejected. *A* then brought suit in the federal district court and obtained judgment, from which the collector has appealed, contending that the statute of limitations had run and that the condition attached to the waiver was not an informal claim. *Held*, an informal claim may be perfected by an amendment filed after the statute of limitations has run and anything to the contrary in the regulations may be waived by the commissioner and was so waived by his conduct in the instant case. The condition amounted to an informal claim. It was so treated by the taxpayer and her representative, who were not so ignorant as to suppose the commissioner would consider a request for recomputation of the tax if a claim had not been timely filed. And it must be treated as having been accepted by the commissioner as an informal claim for, not having rejected the condition, to deny it any effect would be to ensnare the

[1] Revenue Acts of 1936, 49 Stat. L. 1659, § 23 (b), 26 U. S. C. (1940), § 23 (b).

[2] Id., § 41.

[3] Noted 56 HARV. L. REV. 373 (1942). See generally on deduction of interest, 80 A. L. R. 214 (1932); C. C. H., FEDERAL TAX SERVICE, ¶ 171 et seq.; 55 HARV. L. REV. 1189 (1942).

unsuspecting taxpayer.[1] *Neilson v. Harrison*, (C. C. A. 7th, 1942) 131 F. (2d) 205.[2]

TAXATION — SOCIAL SECURITY TAX — INDIVIDUAL MEMBERS OF ORCHESTRA ENGAGED BY RESTAURANT AS EMPLOYEES — Plaintiff restaurant, during the period 1937 to 1940, engaged various orchestras of from four to five musicians. The original engagement was made by an oral contract with one Roberts, a drummer, who agreed to assemble an orchestra of four. Thereafter the leader and members varied from time to time. No definite term of engagement was fixed and plaintiff could reduce the number of performances per week or terminate the engagement at will. The musicians were assembled by the leader for the sole purpose of playing in plaintiff's restaurant. Payment for each week was by a single check payable to the leader, but was based on the union pay for the number of musicians engaged plus the additional compensation provided in the union scale for the leader. In a suit for refund of social security taxes paid under protest, *held*, plaintiff, not the leader, was the employer. While particular musicians could be hired and fired only by the leader, the creation or termination of their employment in the broader sense was in the control of plaintiff. The leader was not an independent contractor since he was not engaged in making a profit from the services of others. The only benefit he received therefrom was the slight additional compensation prescribed by union regulations for the leader of an orchestra. *General Wayne Inn v. Rothensies*, (D. C. Pa. (1942) 47 F. Supp. 391.[1]

TAXATION — VALIDITY OF AD VALOREM TAX ON INTANGIBLES OF NONRESIDENT OWNER — WHAT AMOUNTS TO A LOCAL BUSINESS — A county tax collector assessed the Georgia ad valorem tax on intangibles against plaintiff mortgage corporation, for certain promissory notes executed in its favor by residents of Georgia and secured by mortgages on Georgia land. Plaintiff was a nonresident who had purchased the notes from a local loan company. The notes were kept outside the state, although returned to the local company as agent for collection or renewal. In a suit against the tax collector, the trial court found for the defendant. *Held*, reversed and motion for rehearing denied. The property in question is not taxable for it had not become "an integral part of some local business conducted by [the taxpayer] or his agent" within the

[1] Citing United States v. Kales, 314 U. S. 186, 62 S. Ct. 214 (1942), holding a paragraph in a protest to be an informal claim; Night Hawk Leasing Co. v. United States, 84 Ct. Cl. 596, 18 F. Supp. 938 (1937) (few lines on back of a check held a claim).

[2] For cases on informal claims, see C. C. H., FEDERAL TAX SERVICE, ¶ 1578.054 to 1578.08.

[1] On tests of employment under social security and unemployment insurance acts, see McQuade, "The Employment Relationship under the Federal Social Security Act," 7 BROOK. L. REV. 480 (1938); Seitz, "Some Aspects of Coverage of the Social Security Act: What is 'Employment'," 16 IND. L. J. 469 (1941); 36 ILL. L. REV. 873 (1942); 29 KY. L. J. 82 (1940); 15 ST. JOHNS L. REV. 331 (1941); 1 WASH. & LEE L. REV. 232 (1940); 124 A. L. R. 682 (1940); 134 A. L. R. 1029 (1941).

Georgia rule.[1] The two companies were independent and there is no extrinsic evidence to show that the contract of sale was merely colorable. Possibly since the decision in *State Tax Commission of Utah v. Aldrich*,[2] although it involved a successions tax, the present tax would be good as far as the United States Constitution is concerned. But at this time there is no reason for changing previous holdings as to the due process requirements of the state constitution. *National Mortgage Corp. v. Suttles*, (Ga. 1942) 22 S. E. (2d) 386.

TORTS — ATTRACTIVE NUISANCE — SAND PIT — Plaintiff seeks damages for the death of his nine-year-old son, alleging that defendant was the owner of a large sand pit, ten feet deep, which was attractive to children, that plaintiff's son went there to play, dug a cave in the wall of the pit and was killed in the cave-in which followed. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. *Held*, judgment affirmed. The doctrine of attractive nuisance does not apply to "those dangerous conditions which are obvious and common to nature, against which danger children are presumed to have received early instructions." The sand pit was simply a duplication of a natural cliff or embankment and the nature of the soil does not create a new danger, although it may increase the probability of harm. *Anderson v. Reith-Riley Construction Co.*, (Ind. App. 1942) 44 N. E. (2d) 184.[1]

WITNESSES — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT — PRESENCE OF THIRD PERSON — In a suit against Jayne, an incompetent, and his wife, who was also his general guardian, the court appointed an attorney as guardian ad litem for Jayne. In a second trial with a new attorney, the former attorney ad litem was permitted to testify over timely objection to the substance of a conversation with Jayne and his wife, at their home, a

[1] Suttles v. Northwestern Mutual Life Ins. Co., 193 Ga. 495 at 507, 19 S. E. (2d) 396, 21 S. E. (2d) 695 (1942).

[2] 316 U. S. 174, 62 S. Ct. 1008 (1942), noted 41 MICH. L. REV. 351 (1942); 22 BOST. UNIV. L. REV. 618 (1942); 10 UNIV. CHI. L. REV. 84 (1942); 6 UNIV. DETROIT L. J. 53 (1942); 37 ILL. L. REV. 280 (1942); 17 IND. L. J. 560 (1942); 27 MINN. L. REV. 83 (1942); 19 N. Y. UNIV. L. Q. REV. 443 (1942); 16 TEMP. L. Q. 435 (1942); 51 YALE L. J. 1398 (1942); 139 A. L. R. 1458, 1463 (1942); and Guterman, "Revitalization of Multiple State Death Taxation," 42 COL. L. REV. 1249 (1942).

On business situs, see 76 A. L. R. 806 (1932); 79 A. L. R. 344 (1932); 123 A. L. R. 179 at 184 (1939).

On taxation of intangibles generally, see Brown, "Present Status of Multiple Taxation of Intangible Property," 40 MICH. L. REV. 806 (1942); Lowndes, "Bases of Jurisdiction in State Taxation of Inheritances and Property," 29 id. 850 (1931); Mason, "Jurisdiction for the Purpose of Imposing Inheritance Taxes," id. 324; also 29 id. 93 (1930), 389 (1931); 35 id. 1032, 1398 (1937); 36 id. 337 (1937); 38 id. 81 (1939).

[1] For collections of cases, see 36 A. L. R. 34 at 164 (1925); 39 A. L. R. 486 at 489 (1925); 45 A. L. R 982 at 990 (1926); 53 A. L. R. 1344 (1928); 60 A. L. R. 1444 (1929). Cf. rule as to artificial ponds, 29 MICH. L. REV. 1092 (1931); 30 MICH. L. REV. 477 (1932), and above A. L. R. collections of cases.

friend of the attorney being also present. *Held*, the conversation was privileged and its admission was reversible error. The wife may be considered as a client also, since she was the general guardian of her husband. Nor does the presence of the attorney's friend remove the communication from the protected class, since the scene and circumstances of the conversation were not chosen by the client. *Jayne v. Bateman*, (Okla. 1942) 129 P. (2d) 187.[1]

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN-PATIENT PRIVILEGE — WAIVER — In a suit by an insurance company to cancel a policy for fraud and false statements in the application, the company proferred the testimony of a physician who had once been consulted by the insured. Plaintiff claimed that defendant had waived the physician-patient privilege by filing the affidavit of this physician in support of a preliminary motion. *Held*, affirming the trial court, the privilege had not been waived. Publication of the information does not waive the privilege, for consent once given may later be recalled. *Polish Roman Catholic Union of America v. Palen*, 302 Mich. 557, 5 N. W. (2d) 463 (1942).[1]

[1] On presence of third person, see 22 MINN. L. REV. 110 (1937); on double privilege, see 34 MICH. L. REV. 875 (1936); generally, see Radin, "The Privilege of Confidential Communications between Lawyer and Client," 16 CAL. L. REV. 487 (1928); 9 KAN. B. A. J. 166 (1940).

[1] See generally, Curd, "Privileged Communications between the Doctor and his Patient—An Anomaly of the Law," 44 W. VA. L. Q. 165 (1938); 3 BROOK. L. REV. 104 (1934); 20 CAL. L. REV. 302 (1932); 33 ILL. L. REV. 483 (1938); 9 KAN. B. A. J. 162 (1940); 7 OHIO ST. L. J. 92 (1940); 9 SO. CAL. L. REV. 149 (1936); 81 UNIV. PA. L. REV. 755 (1933). As to physician's certificate of cause of death as not waiving privilege, see 17 A. L. R. 370 (1922); 42 A. L. R. 1454 at 1455 (1926).