RECENT CASES.

CARRIERS—CARRIAGE OF GOODS—ACT OF GOD—A carload of chickens stranded by the Dayton flood was confiscated by the military authorities at the carrier's request although the poultry was being well cared for and in no danger of loss. *Held:* The negligence of the carrier in causing the appropriation denies it relief from liability because of the act of God. Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed. 857 (C. C. A., 7th Circ., 1916).

An act of God which will excuse a common carrier for loss of goods is such an inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes such as lightning, tempests, floods, *etc.* Tompkins v. Dutchess of Ulster, Fed. Cas. No. 14,087 Atl. (U. S. 1851); Carpenter v. B. & O. Ry. Co., 64 Atl. 252 (Del. 1906). The carrier is liable where its negligence concurs in, or contributes to, the loss, Jones v. Minneapolis & St. L. Ry. Co., 97 N. W. 892 (Minn. 1904); for the act of God must be the immediate and not the remote cause of the loss. King v. Shepherd, Fed. Cas. No. 7804 (3 Story 349), (U. S. 1844). Some cases demand that it be the only cause. Merritt v. Earle, 31 Barb. 38 (N. Y. 1859); Wolf v. American Express Co., 43 Mo. 421 (1869).

The decisions vary as to when the carrier has been negligent in this connection. Some courts hold that failure to transport goods in reasonable time destroys the act of God defense. Alabama Great So. Ry. Co. v. Quarles & Couturie, 40 So. 120 (Ala. 1906); Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co., 106 N. W. 498 (Iowa 1906), the delay being considered the proximate and concurring cause of the loss, whether the goods are perishable or not. Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry. Co., 102 N. W. 709 (Minn. 1905). Other courts hold that although a breach is caused by delay, the carrier is nevertheless not liable for destruction caused by unforeseen and unanticipated floods as such a consequence was not in contemplation of the parties as a probable result of the breach. Moffatt Commission Co. v. Union Pacific Ry. Co., 88 S. W. 117 (Mo. 1905). So an unprecedented storm is such a proximate cause, Hunt Bros. v. Missouri, K. & T. Ry. Co. of Texas, 74 S. W. 69 (Texas 1903); Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 457 (U. S. C. C. A., Kan. 1906); or a fire, the carrier not being negligent with respect to it, Yazoo & M. V. Ry. Co. v. Millsaps, 25 So. 672 (Miss. 1899); General Fire Extinguisher Co. v. Carolina & N. W. Ry. Co., 49 S. E. 208 (N. C. 1904).

The carrier is negligent when it acts without proper care or foresight in the event of an act of God, as when it unloads goods below high-water mark on a rising river, Savannah, F. & W. Ry. Co. v. Commercial Guano Co., 30 S. E. 555 (Ga. 1898), or fails to remove cars from lowlands when warned of flood by the Weather Bureau, Wabash R. R. Co. v. Sharpe, 107 N. W. 758 (Neb. 1906). It must provide against an unprecedented emergency if it has reason to suppose it will arise, such as an extraordinary flood, Nashville & C. Ry. Co. v. David, 19 Am. Rep. 594 (Tenn. 1871); Missouri, K. & T. Ry. Co. of Texas v. Davidson, 60 S. W. 278 (Texas 1901).

Although the burden is on the shipper to show that damage was sus-

tained, Smith v. American Express Co., 66 N. W. 479 (Mich. 1896); Silver man v. St. Louis, *etc.*, Ry. Co., 26 So. 447 (La. 1899); the carrier must prove that the damage was caused by an act of God, Central of Ga. Ry. Co. v. Hall, 52 S. E. 679 (Ga. 1905); J. H. Cownie Glove Co. v. Merchants' Dispatch Transportation Co., 106 N. W. 749 (Iowa 1906). If the carrier succeeds in establishing this the shipper must then show any concurrent negligence on the part of the carrier, Elam v. St. Louis & S. F. Ry. Co., 93 S. W. 857 (Mo. 1906).

CIVIL PROCEDURE—PROHIBITION—The writ of prohibition is an extraordinary legal remedy, its object being to prevent a court or tribunal of peculiar, limited, or inferior power, from assuming jurisdiction of a matter beyond its cognizance. It cannot be made to serve the purposes of a writ of error to correct mistakes of a lower court in deciding questions of law within its jurisdiction. State, *ex rel.*, Garrison v. Brough, 113 N. E. 683 (Ohio 1916).

The writ of prohibition is a discretionary one, not a writ of right. City of Sheridan v. Cadle, 157 Pac. 892 (Wyo. 1916). It runs only to judicial tribunals, State, *ex rel.*, McAnally v. Goodier, 193 Mo. 551 (1906); although it has been held to issue to prevent the holding of an illegal and unauthorized election. Perrault v. Robinson, 158 Pac. 1074 (Idaho 1916). It lies to prevent any interference with, or vacation of, a judgment rendered at the Supreme Court's direction. State, *ex rel.*, Knisely v. Board of Trustees of Y. W. C. A., 186 S. W. 680 (Mo. 1916). It will not be granted where there is a remedy by way of appeal, People, *ex rel.*, N. Y. Disposal Corp. v. Freschi, 159 N. Y. S. 23 (1916); or to usurp the function of a *certiorari*, Wand v. Ryan, 166 Mo. 646 (1902), or to control a discretition vested in an inferior court. Com. v. Davis, 184 S. W. 1121 (1916). It has been held that the writ lies to prevent the exercise of judicial power where there is a total lack of jurisdiction, or where the court is proceeding in excess of its jurisdiction. State, *ex rel.*, Buckingham Hotel Co. v. Kimmel, 183 S. W. 657 (Mo. 1916). It will not lie where the proceedings sought to be enjoined are only ministerial. Stein v. Morrison, 75 Pac. 246 (Idaho 1904). This writ is used very seldom in Pennsylvania, but often in New York and California, where there are many inferior courts. It was used in England to prevent the encroachment of the ecclesiastical on the civil courts.

CIVIL PROCEDURE—TRIAL—CONDUCT OF JUROR—On an issue of whether or not a building was set afire by sparks, a specimen of the roofing, not exposed to the weather, was taken to the jury room and experimented upon with matches. *Held:* This is not such misconduct as to require a new trial, especially when there was nothing to show the result of the experiment. Bradford v. Boston & M. R. R., 113 N. E. 1042 (Mass. 1916).

The jury should decide the case upon proper reflection and deliberation of the evidence produced at the trial and not from outside sources. City of Fort Worth v. Young, 185 S. W. 983 (Tex. 1916); Brunson v. Graham, 2 Yeates 166 (Pa. 1796), annotated in Loyd's Cases on Trial by Jury, page 68. The fact that one juror tested a specimen of material submitted for inspection is not ground for reversal. McKechney v. Chicago, 160 Ill. App. 544 (1911). It is stated that the jury can carry out experiments within the line

of offered evidence, but cannot invade new fields, as that would be taking evidence without the knowledge of the parties. Higgins v. Los Angeles Gas & Electric Co., 115 Pac. 313 (Cal. 1911). But the jurors are not allowed during a recess to listen to and watch explanations by a witness of his testimony. Wooldridge v. White, 48 S. W. 1081 (Ky. 1899). The fact that two jurors were seen looking at coupling pins somewhat resembling those involved in the trial is not misconduct. Burho v. Railway Co., 121 Minn. 326 (1913). If the jurors in viewing the premises do more than they strictly had a right to do, it will not vitiate the verdict in the absence of anything showing they were influenced thereby. Indianapolis v. Scott, 72 Ind. 196 (1880). If a party knows of improper conduct by the jury, but waits until the result of the trial is known before bringing it up, he loses what rights he had. Ice Machine Co. v. Ice Co., 57 Fed. 898 (1893). A statute allowing a view of the premises by the jury does not authorize experiments with cars before them as bearing upon the question of collision; and if authorized, it would be within the trial court's discretion to allow it. Smith v. St. Paul Cy. Ry. Co., 32 Minn. 1 (1884).

Matters happening within the jury room which are prejudicial to a party will be grounds for a new trial, as where the jury talked over matters concerning the plaintiff's private affairs and one said that he was the meanest man on earth. Jolly v. Doolittle, 149 N. W. 890 (Ia. 1914). The fact that the jury was allowed to disperse without the consent of counsel is not ground for a new trial in a civil case when there is no evidence of improper conduct. Lumber Co. v. Strickland, 144 Ga. 445 (1915). There must be an injury to the appellant because of the misconduct if it is to be grounds for reversal. Electric Co. v. Hanson, 187 S. W. 533 (Tex. 1916).

CONTRACTS—SPECIFIC PERFORMANCE—MORTGAGE—A debtor made a contract with his creditor to give a mortgage on foreign land to secure his indebtedness, but died without having executed the mortgage. *Held:* That equity would compel the representatives, in whom the legal title was vested, to execute the mortgage in favor of the creditor. *Re* Smith, Lawrence v. Kitson, 115 L. T. 68 (Eng. 1916).

Agreements to execute mortgages upon real estate, as security for the payment of money, are generally specifically enforced, Lowe v. Walker, 91 S. W. 22 (Ark. 1905); Morris v. McCutcheon, 62 Atl. 982 (Pa. 1906), especially where such agreement is entered into on the part of the obligee, for the purpose of making an investment. It has well been pointed out that in such a case the recovery of money damages would fall far short of accomplishing the purpose of the agreement. Irvine v. Armstrong, 31 Minn. 216 (1883). However, if the redress sought is not the specific thing contracted for, *viz.*, a mortgage, but rather mere pecuniary compensation, equity will not interfere, in the absence of an allegation and proof of insolvency of the debtor or that the remedy at law is not adequate. Brown v. Van Winkle Gin and Machine Works, 39 So. 243 (Ala. 1904).

Where the agreement is verbal, it must be clear and specific in its terms and contain within itself such elements of certainty, that the court can give effect, by its decree, to the real understanding of the parties, *i. e.*, the court should not be required, in order to give effect to the agreement, to add terms,

wherein the agreement is deficient. McClintock v. Laing, 22 Mich. 212 (1871).

It is to be noted that the land involved, in the principal case, was situated in a foreign jurisdiction, but the doctrine is quite universal, that equity, when it has jurisdiction of the parties, will compel them to do equity in regard to lands located outside of its jurisdiction and to perform their contrade in relation to such foreign *res*. In such a case the court acts *in personam*. Toller v. Carteret, 2 Vernon 494 (Eng. 1705); Gardner v. Ogden, 22 N. Y. 327 (1860); British South Africa Co. v. DeBeers Consolidated Mines, 2 Ch. Div. 502 (Eng. 1910).

COPYRIGHTS—PHOTOGRAPHS—ORIGINALITY—In an action for an infringement of a copyright on a photograph of a scene on Fifth Avenue, in New York City, from Forty-first to Fortieth Street, which includes the Public Library, a demurrer to the complaint was overruled. The photograph and its setting shows originality. "The photographer caught the men and women in not merely lifelike, but artistic positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineer's Club and the small trees on Forty-first Street, is most pleasing, and the lights and shades are exceedingly well done. . . . There are other features, such as the motor cars waiting for the signal to proceed." Pagano v. Chas. Beseler Co., 234 Fed. 963 (1916).

Photographs did not come within the terms "print, cut, or engraving" of the Copyright Act of 1831, 4 U. S. St. at Large 466. Wood v. Abbott, 5 Blatch. 325 (1866). But a subsequent act included them. Section 4952 of Revised Statutes (1873). In order, however, to come within this statute, the photograph must be representative of the author's original conceptions—something beyond a mere mechanical picture. Lithograph Co. v. Sarony, 111 U. S. 53 (1884). Since this decision, courts have protected copyrighted photographs of Oscar Wilde, Lithograph Co. v. Sarony, *supra;* a baby elephant, Schreiber, *et al.*, v. Thornton, 17 Fed. 603 (1883); an actress in a catchy pose, Falk v. Engraving Co., 37 Fed. 202 (1888); Julia Marlowe, Falk v. Engraving Co., 48 Fed. 262 (1891); Julia Marlowe as Parthenia, Falk v. Donaldson, 57 Fed. 32 (1893); an unusual picture of a woman and child, Falk v. Butt Lithographing Co., 48 Fed. 678 (1891); and a woman attired in up-to-date styles for a trade catalogue, National Cloak and Suit Co. v. Kaufman, 189 Fed. 215 (1911). As in the principal case, copyrighted photographs revealing exceptional merit, of natural scenery have been protected. Bolles v. Outing Co., 77 Fed. 966 (1897); Cleland v. Thayer, 121 Fed. 71 (1903). To be an infringement, the copy must be of the copyrighted photograph itself, and it must be more than a mere following of the same general idea. Munro v. Smith, 42 Fed. 266 (1890); Falk v. City Item Printing Co., 79 Fed. 321 (1897); National Cloak and Suit Co. v. Kaufman, *supra.*

In the first motion-picture copyright to come before the court, it was held that each individual photograph on the film would have to be copyrighted. Edison v. Lubin, 119 Fed. 993 (1903). But this decision was reversed on appeal to the Circuit Court. Edison v. Lubin, 122 Fed. 240 (1903). A film can be protected by one copyright whether the photographs be taken at the same place and time, or at different localities at different times. Biograph

Co. v. Edison Manufacturing Co., 137 Fed. 262 (1905).

In England, the statute of 25 and 26 Vict., c. 68 (1862), gave the author of any original "painting, drawing, or photograph," the right of copyright. So a photograph of a lion is subject to copyright. Bolton v. London Exhibitions, *etc.*, 14 T. L. R. 550 (1898). But in some cases it is questionable who the author of the photograph is. Nottage v. Jackson, 11 Q. B. D. 627 (1883); Stackeman v. Patton, L. R. [1906] 1 Ch. Div. 774.

CRUELTY TO ANIMALS—STATUTORY CONSTRUCTION—COURSING—A statute made unnecessary suffering to animals an offense of cruelty, but excepted coursing, provided the animal was not liberated in an injured condition. Rabbits were let loose in an enclosed field, from which the chance of escape was negligible, then pursued and caught by dogs, which caused considerable pain and suffering to the rabbits. *Held:* This came within the exception of the statute. Waters v. Meakin, 115 L. T. 110 (Eng. 1916).

Cruelty to animals, or malicious mischief, is not an indictable offense at common law. State v. Wheeler, 3 Vt. 344 (1830); State v. Beekman, 27 N. J. L. 124 (1858). But a conviction for this offense has been sustained as being a public wrong, Respublica v. Teischer, 1 Dallas 335 (Pa. 1788); Commonwealth v. Taylor, 5 Binney 297 (Pa. 1812), as a nuisance, United States v. Jackson, 4 Cranch. C. C. 183 (1834), and on general moral principles, People v. Stakes, 1 Wheeler Cr. Cas. 111 (N. Y. 1822).

Now, however, statutes make cruelty to animals an offense in practically every jurisdiction. Several of these make it an offense to "needlessly mutilate and kill." These terms have been held to mean "simply an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction." Grise v. State, 37 Ark. 456 (1881). The act of fighting dogs comes within these terms, Commonwealth v. Thornton, 113 Mass. 457 (1873), as freeing a captive fox to be chased and mangled by dogs, Commonwealth v. Turner, 145 Mass. 296 (1887), or cutting a cock's comb for fighting, Murphy v. Manning, 2 Ex. Div. 307 (Eng. 1877), or dishorning cattle, Ford v. Wiley, 23 Q. B. D. 203 (Eng. 1889), or shooting and wounding pigeons in marksmanship practice. Paine v. Bergh, 1 Cy. Ct. Rep. 160 (N. Y. 1874); State v. Porter, 112 N. C. 887 (1893); Waters v. People, 23 Colo. 33 (1896). *Contra,* State v. Bogardus, 4 Mo. App. 215 (1877). It is also said that the object of such statutes is to protect animals from wilful or wanton cruelty and not from incidental pain and suffering. Hodge v. State, 11 Lea 528 (Tenn. 1883). So an indictment alleging ill-treatment and abuse of certain cocks is not sufficient when the accused only fought the cocks, for then the injury is incidental. Morrow's Case, 26 Pitts. Leg. Jour., O. S. 86 (Pa. 1879). A conviction for "wantonly and cruelly ill-treating, *etc.*," was upheld when marksmen in practice shot and wounded pigeons. Commonwealth v. Lewis, 7 Pa. Co. Ct. 558 (1890). But this decision was reversed on appeal. Commonwealth v. Lewis, 140 Pa. 261 (1891).

Facts similar to those of the principal case were held not to be within a statute prohibiting baiting animals in Pitts v. Millar, L. R. 9 Q. B. 380 (Eng. 1874). The decisions in these cases depend to a great extent upon the court's personal view of the particular circumstances, and one case can hardly be taken as a precedent for another.

EQUITY—ARBITRATION—ENFORCEMENT OF AGREEMENT—By an agreement, the defendant was to pay the plaintiff *pro rata* from moneys he should collect, and the parties further agreed that if any differences arose, they were to be referred to arbitrators, whose decision would be final. *Held:* The stipulation for arbitration was unconnected with and independent from the other part of the contract and is not a condition precedent to an action upon the principal contract. Brocklehurst & Potter Co. v. Marsch, 113 N. E. 646 (Mass. 1916).

It is universal law that equity will not specifically enforce an agreement to arbitrate or to name arbitrators. Street v. Rigby, 6 Ves. Jr. 818 (Eng. 1802); Terrel v. Terrel, 253 Mo. 167 (1913). But where the broken agreement for arbitration is part of a contract relating to land, a court of equity may grant relief by assuming the arbitrator's duties. Johnson v. Conger, 14 Abb. Pr. 195 (N. Y. 1861); Coles v. Peck, 96 Ind. 333 (1884); Black v. Rogers, 75 Mo. 441 (1882).

A mere agreement to arbitrate future differences is revocable and bringing suit before the award is a revocation. Needy v. Insurance Co., 197 Pa. 460 (1901); Crilly v. Rinn Co., 135 Ill. App. 198 (1907). But a stipulation, whether express or by necessary implication, that arbitration be a condition precedent to the right to sue is irrevocable. Hamilton v. Insurance Co., 136 U. S. 242 (1889); Parsons v. Ambos, 48 S. E. 696 (Ga. 1904); Davisson v. Land & Water Co., 96 Pac. 88 (Cal. 1908). If the agreement is to arbitrate all questions of law and fact, it is void, being against public policy as an attempt to oust the court's jurisdiction; but if it relates to a particular issue of fact and leaves the ultimate decision to the courts, it is valid. Jones v. Power Co., 92 S. C. 263 (1912). The mere provision for arbitration does not make it a condition precedent. Reed v. Insurance Co., 138 Mass. 572 (1885); Anderson v. Odd Fellows, 90 Atl. 1007 (N. J. 1914). It must be more than a collateral undertaking. Akt., *etc.*, Kompagniet v. Red. Atlanten, 232 Fed. 403 (1916). If, however, a breach of the agreement to arbitrate cannot be pleaded in bar to an action on the principal contract, it will support a separate action. Hamilton v. Insurance Co., 137 U. S. 370 (1890).

If the arbitration stipulation is a condition precedent, a defendant who repudiated it cannot rely upon it in an action by the other party. Willett v. Smith, 214 Mass. 494 (1913); Jureidini v. Insurance Co., L. R. [1915] App. Cas. 499. And it is not necessary that the other party demand or offer to arbitrate after repudiation. Calhoun, *et al.*, v. Pederson, 85 Wash. 630 (1915). If all complaints are to be referred to arbitrators whose award is a condition precedent, the other party must be notified of any complaints, if the agreement is to be effective. Symms-Powers Co. v. Kennedy, 146 N. W. 570 (S. D. 1914).

EVIDENCE—OTHER ACTS—In a prosecution for assault, wherein the defense was an alibi, the prosecution introduced evidence tending to prove that the accused had visited the prosecutor's shop a fortnight before, and there criminally destroyed some of the latter's goods. *Held:* The evidence was admissible, on the ground that it tended to prove the identity of the accused. People v. Thau, 113 N. E. 556 (N. Y. 1916).

As a general rule, any evidence tending to prove the commission of other separate and distinct crimes or offenses is not admissible purely for the purpose of proving the commission of the particular crime charged in the indictment. Commonwealth v. Wilson, 186 Pa. 1 (1898); Simpson v. State, 85 S. W. 16 (Tex. 1905); People v. Grutz, 212 N. Y. 72 (1914). The foregoing is but a different way of saying that in all cases, be they civil or criminal, the evidence must be confined to the point in issue. To admit evidence of other offenses would require the trial of matter collateral to the main issue; Fish v. United States, 215 Fed. 544 (1914), would put an undue burden upon the accused, by requiring him to stand ready to defend his whole past record, Farris v. People, 129 Ill. 521 (1889), and would often prejudice the jury against him. Fish v. United States, *supra*.

There are, however, several well-recognized exceptions to the general rule as formulated above. People v. Molineux, 168 N. Y. 264 (1901). Evidence, although tending to prove other offenses, may be admitted to prove, first, intent, where a particular intent constitutes an essential element of the crime charged, United States v. Snyder, 14 Fed. 554 (1882); Commonwealth v. Farmer, 218 Mass. 507 (1914); State v. Corcoran, 143 Pac. 453 (Wash. 1914), second, motive, State v. Williamson, 106 Mo. 162 (1891); Thompson v. United States, 144 Fed. 14 (1906), third, the absence of mistake or accident, Goersen v. Commonwealth, 99 Pa. 388 (1882), fourth, a preconcerted scheme or plan, Goersen v. Commonwealth, *supra*, fifth, the identity of the accused, and it was on the basis of this last exception that the principal case was decided. United States v. Boyd, 45 Fed. 851 (1890); Frazer v. State, 34 N. E. 817 (Ind. 1893); Davis v. State, 44 S. W. 1099 (Tex. 1898).

Furthermore, if the evidence tends directly to prove the crime charged, it is not rendered incompetent because it also tends to prove the commission of another crime. State v. Adams, 20 Kan. 311 (1878); State v. Madigan, 57 Minn. 25 (1894); Glover v. People, 204 Ill. 170 (1903).

EVIDENCE—WITNESS—ADVERSE INTEREST—In a suit by an administrator, the defendants relied on a gift *inter vivos*. *Held:* The defendant was not a competent witness. Katz v. Smith, 98 Atl. 608 (Pa. 1916).

The modern source of the rule that one having an adverse interest cannot testify against a testator's estate was laid down by Lord Romilly in Grant v. Grant, 34 Beav. 623 (1865), where the proposition was advanced that, while the evidence is admissible there must be corroborative proof to support it. This was followed in Down v. Ellis, 35 Beav. 578 (1865); Hartford v. Power, Ire. R. 3 Eq. 602 (1869); Hill v. Wilson, L. R. 8 Ch. App. 888 (1873). In 1883 Sir George Jessel repudiated the rule of the above cases, alleging it to be a question for the jury whether they believed the witness. *In re* Finch, L. R. 23 Ch. Div. 267 (1883). Lord Brett later followed *In re* Finch. Gandy v. MacCaulay, L. R. 31 Ch. Div. 1 (1883). In 1886 Lord Romilly's rule was laid down in Ireland. *In re* Harnett, L. R. Ire. 543 (1886). Canada follows Lord Romilly's rule, Rankin v. McKenzie, 3 Man. 323 (1885). *Ex parte* Simpson, 15 New. B. 142 (1874) *contra*.

In United States the question is generally settled by statutes, the evidence being generally inadmissible, while some statutes are modeled on Grant v. Grant, *supra*. See Wigmore, Evidence, Sec. 488, for a compilation of the statutes.

In Pennsylvania a party in interest could not testify at all, Graves v. Griffin, 7 Harris 176 (Pa. 1852) until the Act of April 15, 1869, which allowed parties in interest to testify except against a decedent's estate. This was affirmed by the Act of 1887, P. L., p. 158.

At early common law no one having an adverse interest could testify, 15 Ja. B. R., 2 Rolle's Abridgement 658, and a legatee could not be a witness to prove the will. Dowdeswell v. Nott, 2 Vern. 317 (1694).

SURETYSHIP—HUSBAND AND WIFE—DISABILITIES—In order to give security for a debt of her husband's, a wife conveyed her individual lands to him and then joined with him in a mortgage to the creditor. The creditor knew of the transaction. *Held:* The mortgage is void under a statute prohibiting either husband or wife from becoming surety. Vinegar Bend Lumber Co. v. Leftwich, 72 So. 538 (Ala. 1916).

While at common law a married woman could not become surety, statutes authorizing her to contract as though unmarried have been interpreted to include the power to guarantee her husband's debts. Hackfeld & Co. v. Metcalf, 20 Hawaiian 47 (1910); Royal v. Southerland, 168 N. C. 405 (1915). They have also been held to give her the power to pledge her personal property; in some states even in the face of a statutory prohibition like that in the principal case. Just v. State Savings Bank, 132 Mich. 600 (1903); Eagle v. Wright, 110 S. W. 361 (Ky. 1908); Eagle v. New York Life Insurance Co., 48 Ind. App. 284 (1911). For citations showing conflict as to whether a pledge of personal property is valid under such a prohibition, see note 87A. S. R. 503 and 13 R. C. L., p. 1300; also Herr v. Reinoehl, 209 Pa. 483 (1904).

The courts generally endeavor to determine whether or not the effect of the transaction was an evasion of the disability created by the statute, and if it was it will be set aside. Sibley v. Robertson, 212 Pa. 24 (1905); Third National Bank v. Tierney, 128 Ky. 836 (1908). Thus a contract of a wife to indemnify the surety of her husband was held to be within the statutory prohibition, the distinction under the Statute of Frauds between an indemnitor and a surety not applying. Bank of Tifton v. Smith, 142 Ga. 663 (1914). So also, where a wife mortgages her separate estate to secure a debt of her husband's, she becomes a surety for the debt, Red River Bank v. Brag, 132 S. W. 968 (Tex. 1911), and the mortgage is void. Indianapolis Brewing Co. v. Bekuke, 41 Ind. App. 288 (1907); Gross v. Whitley, 128 Ga. 79 (1907). Pennsylvania is *contra*, however. Righter v. Livingston, 215 Pa. 28 (1906). Nor is a mortgage on lands held by husband and wife as tenants by the entireties valid when given to secure the husband's debt, Webb v. The John Hancock Mutual Life Ins. Co., 162 Ind. 616 (1903), unless, of course, it is for purchase money, Kelly v. York, 183 Ind. 628 (1915), or for money loaned both of them. American Freehold Land Mortgage Co. v. Thornton, 108 Ala. 258 (1895).

A wife does not become surety under these statutes when she releases her dower by signing a mortgage on her husband's land for his debt. Crawford v. Hazebrigg, 117 Ind. 63 (1888). See, however, Titcher v. Griffiths, 216 Mass. 174 (1913), where it was held that she had in such a case the rights of a surety against her husband.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYEE—The owner of a team of horses was killed while hauling lumber for a lumber company. The driver was paid so much per thousand; the duration of the employment was indefinite, and the lumber company exercised some control over the hauling. *Held:* The driver was an employee and not an independent contractor. Tuttle v. Embury-Martin Lumber Co., 158 N. W. 875 (Mich. 1916).

The question of whether the relationship existing is that of employer and employee, or whether the injured party was an independent contractor, is largely a question of fact. Jones v. Penwyllt Brick Co., 6 B. W. C. C. 492 (Eng. 1913). But if any element is controlling in determining the relation, it is the extent to which the one undertaking the work is subject to, or is free from, the control of the person for whom it is done. Beck v. Hill and Sons, 8 B. W. C. C. 592 (Eng. 1915); State *ex rel.* v. District Court, 150 N. W. 211 (Minn. 1914). Another test employed is whether the contract is for personal service, or whether some other person could be substituted by the person contracting to do the work. Chisholm v. Walker and Co., 2 B. W. C. C. 261 (Scot. 1908); Western Indemnity Co. v. Pillsbury, 159 Pac. 721 (Cal. 1916).

The relationship of employer and employee may not exist originally, but the independent contractor may perform such services as make him an employee at the time of the accident. Powley v. Vivian & Co., 169 App. Div. (N. Y.) 170 (1915).

The employee may be engaged by more than one person at the same time to do similar work, and this does not destroy the relationship of employer and employee. In such a case, it has been held that he was the employee of the person on whose premises he was injured. Western Metal Supply Co. v. Pillsbury, 156 Pac. 491 (Cal. 1916).

Some cases are very liberal in construing the compensation acts and in deciding that the relationship is that of employer and employee. It has been said that the only cases to be considered as controlling in deciding this question are cases decided under the identical principle represented by the compensation acts. *In re* Rheinwold, 153 N. Y. S. 598 (1915). Cf. Western Indemnity Co. v. Pillsbury, *supra.*

Under its facts, the principal case is in accord with the trend of decisions under compensation acts. Congreve v. Alberta Coal Mining Co., 7 B. W. C. C. 1020 (Canada 1912); Ryan v. County Council, 8 B. W. C. C. 415 (Ireland 1914); Thompson v. Twiss, 97 Atl. 328 (Conn. 1916).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—An insurance agent was injured by the overturning of an automobile in which he was riding, at the invitation of a prospective customer, in order to explain the policy. *Held:* The injury did not arise out

of the employment. Hewitt v. Casualty Co., 113 N. E. 572 (Mass. 1916).

Many compensation acts, unlike the Pennsylvania Act of June 2, 1915, P. L. 738, provide that the injury must arise out of and in the course of the employment. The leading English and American cases on the subject may be found in 64 UNIV. OF PENNA. L. REV. 108, 326, 637 and 638. Since that time many cases have been decided, and it would be a hopeless task to attempt to reconcile them all.

It has been held that where an employer lends his employee to a third person, and injury results while working for the third person, the employee may recover from his original employer. Dale v. Saunders Bros., 157 N. Y. S. 1062 (1916). However, some courts take the view that such injury is not in the course of the original employment. Bayer v. Bayer, 158 N. W. 109 (Mich. 1916). Cases where the employee is the subject of personal assault present difficulties. If the employment is attended with risk of personal assault, then the injury from such assault is considered to have been received in the course of and to have arisen out of the employment. Walther v. American Paper Co., 98 Atl. 264 (N. J. 1916) (watchman); State *ex rel.* v. District Court, 158 N. W. 713 (Minn. 1916) (bartender). The same result is reached if the assault is due to the employee's desire to have the employer's service correctly performed. *In re* Heitz, 112 N. E. 750 (N. Y. 1916). But, in general, if there is no peculiar risk, the injury does not arise out of the employment and is not compensable. Schmall v. Weisbrod and Hess Brewing Co., 97 Atl. 723 (N. J. 1916) (collector).

If the employee is injured while doing work for the employer which he is not required to do, his injury is received in the course of the employment. Hartz v. Hartford Faience Co., 97 Atl. 1020 (Conn. 1916). But if he does it in disobedience of express orders, he is not acting in the course of employment. Bischoff v. American Car & Foundry Co., 157 N. W. 34 (Mich. 1916). The employee is still within the course of employment, if he is injured while aiding another injured employee engaged in the same operation. Waters v. William J. Taylor Co., 112 N. E. 727 (N. Y. 1916).

The decisions are not in harmony on the question as to whether the employee is injured in the course of the employment, when he is injured while going from place to place. If the employment requires the employee to go from place to place, he is generally held to be in the course of the employment while so doing. Kunze v. Detroit Shade Tree Co., 158 N. W. 551 (Mich. 1916). But cf. De Voe v. N. Y. State Rwys., 113 N. E. 256 (N. Y. 1916).

PARTNERSHIP—DISSOLUTION—NEW FIRM—Where a partner on dissolution, formed a new firm, taking over the assets and assuming all liabilities of the old firm, and the new firm became bankrupt, it was held that debts due from the old firm could be proved against the new firm. *In re* Stringer, 234 Fed. 454 (N. Y. 1916).

To render a new firm liable for debts of an old firm, an express agreement is generally necessary. La Montague v. Bank of N. Y., 88 N. Y. S. 21 (1904). This agreement will be implied from the purchase of a retir-

ing partner's share. Beverly v. Tarns, 17 Pa. 485 (1851). A misrepresentation as to the amount of the debts invalidates the agreement. Trotter v. Rotan, 50 Tex. Civ. App. 448 (1908). Slight evidence will support the finding of an agreement by the jury. Shaw v. McGregory, 105 Mass. 96 (1870). This agreement does not fall within the Statute of Frauds. Staver v. Jones, 320 Okla. 713 (1912). It has been held that the creditor cannot sue on this agreement, not being in privity thereto, Hicks v. Wyatt, 23 Ark. 55 (1861), but he can sue in Massachusetts. Shaw v. McGregory, *supra.*

There is a split of opinion on the question whether the creditor has his election as to whom to sue after notice of the agreement. Some courts follow the early English rule of Oakley v. Pasheller, 4 Clark 2 F. 207 (1836), that the original firm is, after notice to the creditor, a surety. Wiley v. Temple, 85 Ill. App. 69 (1899). Others follow the later English case of Swire v. Redman, L. R. 1 Q. B. 536 (1876), overruling Oakley v. Pasheller, *supra,* that until assent by the creditor, the latter has his election. Weil v. Jaeger, 73 Ill. App. 266 (1899). The old and new firms are surety and debtor *inter se.* Strong evidence is necessary to show assent by the creditor. Nickerson v. Russell, 172 Mass. 584 (1899). It has been held that a novation was necessary. Anniston v. Cheyney, 114 Ala. 536 (1894).

PROPERTY—ADVERSE POSSESSION—COLOR OF TITLE—CONSTRUCTIVE POSSESSION—Trespass action to recover land claimed under color of title and adverse possession. *Held:* Adverse possession under color of title is not broken by purchase of an outstanding claim. Constructive possession extends to entire tract of land specified in deed. Alsworth, *et al.,* v. Richmond Cedar Works, 89 S. E. 1008 (N. C. 1916).

The case is a clear exposition of the better opinion on the points discussed.

The law expressed, that adverse possesion under color of title for the statutory period gives complete title, is, in its definitions of the terms, in accord with the weight of opinion. In general, to have color of title, possessor must have something in writing limiting his claim, Thompson v. Burkhaus, 79 N. Y. 93 (1879); Deffeback v. Hawk, 115 U. S. 392 (1885). In Hollinshead v. Nauman, 45 Pa. 140 (1863), writing was held to be unnecessary and in a few exceptional cases such as possession by "descent cast," Peadro v. Carriker, 168 Ill. 570 (1897), or by judgment, Keener v. Union Pac. R. Co., 31 Fed. 126 (1881), or by statutory provision. Kron v. Hinson, 53 N. C. 347 (1861), writing has been held unnecessary. A defective or void deed is good color of title, Beaver v. Taylor, 1 Wall. 637 (U. S. Sup. Ct. 1863); Maring v. Meeker, 263 Ill. 136 (1914).

The general rule is that purchase of an outstanding claim by an adverse possessor does not interrupt the continuity of the possession. Owens v. Myers, 20 Pa. 134 (1852); Elder v. McClaskey, 70 Fed. 529 (1895), though there is one case *contra* to this rule, Croan v Joyce, 3 Bush 454 (Ky. 1867).

Generally constructive possession under color of title is co-extensive

with the claim of the color of title, Montoya v. Gonzales, 232 U. S. 375 (1914), but in recent cases this doctrine has been limited where the tract of land described in the color of title is too large, Louisville & Nashville R. Co. v. Land Co., 82 Miss. 180 (1903), or where two tracts are not contiguous, Georgia Pine Co. v. Holton, 94 Ga. 551 (1894). Where a tract of land under one color of title has been divided into lots, possession of one or more lots extends constructively to the entire tract, Gregg v. Forsyth, 24 How 179 (U. S. Sup. Ct. 1860); Kerr v. Nicholas, 88 Ala. 346 (1889), which expresses the general rule, although Gainus v. Bowman, 10 Heisk. 600 (Tenn. 1873) is *contra*.

PROPERTY—WILLS—CONSTRUCTION—DETERMINATION OF BENEFICIARY AT DATE OF WILL—By a trust deed, the income of a fund was given to the donor's son, and after the son's death to his widow. The son's wife predeceased him and he remarried. *Held:* "Widow" in the deed must be interpreted "wife," and the second wife is not entitled. *In re* Solms' Estate, 98 L. 596 (Pa. 1916).

It is difficult to formulate a general rule as to the construction of a will where the word "wife" or "widow" is used. Every will must be interpreted in the light of all the circumstances of the case, and as has been well said: "No will has a brother." Meeker v. Draffin, 22 Ann. Cas. 930 (N. Y. 1911). In general, a devise to the "wife" of a designated married man is a devise to the wife existing at the time of the making of the will. Van Brunt v. Van Brunt, 19 N. E. 60 (N. Y. 1888); Van Syckel v. Van Syckel, 26 Atl. 156 (N. J. 1893). A devise to the "widow" of a designated married man has a broader application, and is a devise to such wife as may survive him. Swallow v. Swallow's Adm., 27 N. J. Eq. 278 (1876); Crocheron v. Fleming, 70 Atl. 691 (N. J. 1908).

These rules of interpretation are by no means inflexible, and the slightest circumstance tending to indicate a contrary intention suffices to alter them. If the will says "wife" and the intention appears to be to devise to any wife, it will be interpreted "widow." *In re* Harris, 136 N. Y. S. 711 (1912), but see dissenting opinion. The tendency is to limit the will to the wife at the time of the will, if "wife" is mentioned. Davis v. Kerr, 38 N. Y. S. 387 (1896). When the will mentions the "widow," anything which shows that the wife at the time of the will was contemplated by the testator, suffices to limit the devise to her. This has been done where the "widow" referred to was a niece of the testator. Anschutz v. Miller, 81 Pa. 212 (1876). And where the will stipulated that the "widow" should take only so long as she remained widow, it was interpreted to refer to the wife at the time of the will. Beers v. Narramore, 22 Atl. 1061 (Conn. 1891).

If the will mentions the "wife" and marriage is contemplated but not yet celebrated, the person described as "wife" cannot take. Steen v. Steen, 59 Atl. 675 (N. J. 1905). The same rule applies if the parties thought they were married, but the marriage was not legal. Collard v. Collard, 67 Atl. 190 (N. J. 1907). In case a divorce has followed the will, if the divorced wife is referred to as "wife," she is entitled. Jones'

Estate, 211 Pa. 364 (1905); *In re* Brown's Estate, 117 N. W. 260 (Ia. 1908); *In re* Gruendike's Estate, 98 Pac. 1057 (Cal. 1908). But see, *contra*, Lansing v. Haynes, 54 N. W. 699 (Mich. 1893).

SURETYSHIP—TERMINATION OF GUARANTY—CHANGE OF CIRCUMSTANCES—Defendant guaranteed payment of past debts and future purchases of a dry goods store, in consideration of the sale of dry goods to store on credit by plaintiff. Plaintiff, with all the other creditors of the store, three days later took over the management of the store in informal bankruptcy proceedings. *Held:* The guaranty only applied to purchases by the store as a going concern. Hence the guaranty failed by lack of consideration, as plaintiff never acted upon guaranty offer, Western Dry Goods Co. v. Hamilton, 159 Pac. 373 (Wash. 1916).

The case is fully in accord with the better law on the subject. Forbearance to sue is good consideration if for a definite time. Traders National Bank v. Parker, 130 N. Y. 415 (1892); McMicken v. Safford, 197 Ill. 540 (1902), or in some cases for a reasonable time, Moore v. McKenney, 83 Me. 80 (1890). This must be carried out, however, Cobb v. Page, 17 Pa. 469 (1851). Consideration of previous sales is invalid, Hedden v. Scheblin, 104 S. W. 887 (Mo. 1907); Standard Supply Co. v. Finch, 147 N. C. 106 (1908). However, if there is any good consideration guaranties may be retrospective, People v. Lee, 104 N. Y. 442 (1887); Barnes v. Cushing, 168 N. Y. 542 (1901).

Generally a guaranty is deemed a unilateral contract accepted by performance, but the Federal courts require notice to guarantor of acceptance, Douglas v. Reynolds, 7 Pet. 113 (U. S. 1833); Davis v. Wells, 104 U. S. 165 (1881), except where the proposal of a guaranty comes from the creditor making the guaranty itself an acceptance, MacFarlane v. Wadhams, 165 Fed. 987 (C. C. Wis. 1908), or where a valuable consideration exists apart from creditor to debtor, Davis Sewing Mach. Co. v. Richards, 115 U. S. 524 (1885). The majority of the State courts do not require notice, Nat. Bank of Poughkeepsie v. Phelps, 86 N. Y. 484 (1880), except a few that follow the Federal courts, Bishop v. Eaton, 161 Mass. 496 (1894).

Any material change of circumstances is generally held to relieve the surety of all obligation. Rankin v. Tygard, 198 Fed. 795 (U. S. C. C. 1912). A surety can insist on literal performance of the contract, Whitcher v. Hall, 5 Barn. & Cr. 269 (1826). In Young v. Amer. Bonding Co., 228 Pa. 373 (1910), a distinction was drawn between private sureties and bonding companies for hire, permitting the latter a less strict right to literal performance. The guaranty does not extend to the successor of debtor, Coan v. Partridge, 98 N. Y Supp. 570 (1906), even when creditor does not know of the change in debtor, Manhattan Gaslight Co. v. Ely, 39 Barb. 174 (N. Y. 1863). But see *In re* Cinque, 109 Fed. 455 (U. S. C. C. 1901), where it was held that a secret understanding whereby one partner continued in business under the firm name did not relieve the guarantor of the firm's purchases from liability.

For further discussion of these points see 60 U. OF PENNA. LAW REVIEW, 219, 522, 597.