RECENT CASES.

BANKING—DEPOSITS—CHECKS—Checks, indorsed in blank and deposited in bank, were lost in the mail. After six weeks, during which the bank made no effort to collect, the maker failed. *Held:* Neither the custom of the bank nor the rule that dishonor of checks will permit the bank, on due notice of non-payment, to charge depositor as indorser, for there was in fact no dishonor. Heinrich v. First National Bank of Middletown, 113 N. E. 531 (N. Y. 1916).

If a check is indorsed in blank, deposited and credited to the depositor as cash, the weight of authority is that title is *prima facie* in the bank, though that yields to the intention of the parties. South Park Foundry and Machine Co. v. Chicago R. R. Co., 75 Minn. 186 (1899); Aebi v. Bank of Evansville, 124 Wis. 73 (1905). Intention may be shown by the bank's action in granting a right to draw on the funds. Fourth National Bank v. Mayer, 89 Ga. 108 (1892). Some courts hold that title is *prima facie* in the depositor, as in the leading case of Balbach v. Frelinghuysen, 15 Fed. 675 (1883).

A bank receiving paper for collection undertakes to use due diligence in making demand at maturity, and in giving proper notices of non-payment, and unreasonable delay charges the bank for the amount of the loss. Capitol State Bank v. Lane, 52 Miss. 677 (1876); Manhattan Life Ins. Co. v. First National Bank, 20 Colorado App. 529 (1905). It is not necessary to prove an agreement for compensation, for the law implies such a contract. Manhattan Life Ins. Co. v. Bank, *supra*. Proof that the paper would not have been paid, if presented, is no defense. Capitol State Bank v. Lane, *supra;* Bank v. Kenan, 76 N. C. 340 (1877). Depositor is so far discharged that he is not liable even if he indorses a duplicate check sent by the maker. Aebi v. Bank, *supra*. If the depositor consents to pay the bank the amount of the loss, such an agreement is *nudum pactum*, for it lacks consideration. Bank v. Kenan, *supra*. Only a valid new contract will make him liable. Aebi v. Bank, *supra*. He will be held liable if the bank can show that a person of ordinary prudence would act as it did. Herider v. Phoenix Loan Assn., 82 Mo. App. 427 (1899). Depositors of paper for collection may be bound by a custom which is reasonable and sufficiently general to justify the presumption that it is a known custom. Farley National Bank v. Bernheimer, 145 Ala. 321 (1905). A bank is also relieved of liability, if the depositor requests that collection be delayed and that checks be sent to an out-of-the-way bank which fails. Bedell v. Harbine Bank, 62 Neb. 339 (1901).

In accord with the principal case is Spooner v. Bank of Donalsonville, 82 S. E. 625 (Ga. 1914).

BANKRUPTCY—PREFERENCES—VALIDITY—PLEDGE—DEFENSES—In an action by a trustee in bankruptcy to recover sums paid defendant creditor by the bankrupt within four months of the bankruptcy, and at a time when he

was insolvent, the court refused defendant creditors' offer to prove that the sums so paid were the proceeds of the sale of automobiles which, more than four months prior to the bankruptcy, the bankrupt had agreed to pledge with the creditor to protect him from liability on certain notes of the bankrupt which he had endorsed. Possession here was retained by the pledgor. *Held:* It was error to refuse evidence to establish this defense, and the jury should pass on it. Davis v. Billings, Appellant, 254 Pa. 595 (1916).

To be voidable as a preference under the Bankruptcy Act, Section 60b, it must appear that the transfer was made within four months before the petition in bankruptcy was filed; that the bankrupt was insolvent, and that the transferee had reasonable cause to believe that the enforcement of the transfer would effect a preference. Hagar v. Watt, 232 Fed. 373 (1916); Grandison v. Natl. Bank of Commerce of Buffalo, 231 Fed. 800 (1916). However, the exercise of a pre-existing right within the four months, unless made with intent to hinder of defraud creditors, is not an illegal preference. Macdonald v. Aetna Indemnity Co., 97 Atl. 332 (Conn. 1916). Where a pledgee takes possession in pursuance and in the enforcement of his pre-existing right, he is *prima facie* presumed to take in the belief in his right. Taney v. Penn Bank, 232 U. S. 174 (1913); Dale v. Pattison, 234 U. S. 399 (1913). When this pre-existing right attaches is a question of local, not federal, law. Thompson v. Fairbanks, 196 U. S. 516 (1904); Holt v. Crucible Steel Co. of America, 224 U. S. 262 (1912). The local law also determines the validity of the claim. It is the lien created by a levy, judgment, attachment or otherwise, that is invalidated by the act, and where the lien is obtained more than four months prior to the filing of the petition, its validity will be recognized. Metcalf v. Barker, 187 U. S. 165 (1902); Owen v. Brown, 120 Fed. 812 (1903). Though in the ordinary cases of the pledge of chattels, possession of the property by the pledgee is indispensable to the validity of the pledge, where the possession is by the agreement of the parties, to remain with the pledgor, all are bound who claim under him except purchasers for value without notice. Collin's Appeal, 3 Pennypacker Pa. Rep. 333 (1882); Fisher v. Zollinger, 149 Fed. 54 (1906).

Such an agreement as the one in the principal case creates an equitable lien upon the property indicated, enforceable against the property in the hands not only of the original pledgor, but of his heirs, administrator, executor, voluntary assignee, and purchasers or encumbrancers with notice. 3 Pomeroy's Eq. Juris., Sec. 1235.

CONFLICT OF LAWS—DIVORCE—A statute declared void all divorce decrees obtained by its inhabitants in foreign states or countries for causes occurring while they are resident in the home state, or for causes which are insufficient in such home state. *Held:* This law does not apply where such inhabitants, not domiciled in the foreign state, go there and procure a divorce for a cause recognized though not occurring in the home state. Chapman v. Chapman, 113 N. E. 359 (Mass. 1916).

A divorce decree of a court having no jurisdiction over the parties may be declared void elsewhere, People v. Dawell, 25 Mich. 247 (1872); *In re* James Estate, 99 Cal. 374 (1893), as where the parties are not resi-

dents of the state at the time its court issues the decree. Barber v. Root, 10 Mass. 260 (1813); Dunlop v. Dunlop, 3 Ky. Law Rep. 20 (1881). On the contrary, some courts consider appearance by the parties sufficient to give jurisdiction. Kinnier v. Kinnier, 58 Barb. 424 (N. Y. 1869); *In re* Ellis Estate, 55 Minn. 401 (1893). In such case personal service on the respondent is necessary. Holmes v. Holmes, 8 Abb. Prac. (N. S.) 1 (N. Y. 1870); Bell v. Bell, 40 N. Y. Sup. 443 (1896). Where the parties have *bona fide* left a state and have intentionally acquired residence elsewhere, a foreign divorce decree is valid in the home state, even though the cause accrued there. Gregory v. Gregory, 76 Me. 535 (1884).

Foreign decrees are void, particularly if obtained on a ground which does not justify a divorce in the domicile state. Jackson v. Jackson, 1 Johns 424 (N. Y. 1806); Sewall v. Sewall, 122 Mass. 156 (1877); seemingly *contra*, Davis v. Davis, 22 N. Y. Supp. 191 (1893). This is true whether the respondent appears or not. Chase v. Chase, 72 Mass. (6 Gray) 157 (1856). Such a decree is not void but voidable in Pennsylvania. Appeal of Richardson, 132 Pa. St. 292 (1890).

Article IV, Section 1, of the United States Constitution, requiring a state to give full credit to the records of sister states does not prevent the record of a decree of divorce granted in a sister state from being impeached for fraud. German Savings & Loan Society v. Dormitzer, 192 U. S. 125 (1904). Feigned ignorance of respondent's address, Doughty v. Doughty, 28 N. J. Eq. (1 Stew.) 581 (1877); or a fabricated case, Vischer v. Vischer, 12 Barb. 640 (N. Y. 1851); or intentional errors in the publication notice may constitute the fraud. Stanton v. Crosby, 9 Hun. 370 (N. Y. 1876); Field v. Field, 215 Ill. 496 (1905). Or it may consist only in the taking of residence in a foreign state solely to obtain divorce, Forrest v. Forrest, 2 Edm. Sel. Cas. 180 (N. Y. 1850); Chase v. Chase, *supra*.

It is presumed that a court had jurisdiction when the decree appears on its face to be regular. Rendleman v. Rendleman, 118 Ill. 257 (1886); McHenry v. Brackin, 101 N. W. 960 (Minn. 1904). But some courts hold that even a recital in the decree showing jurisdiction does not preclude inquiry as to this. Commonwealth v. Blood, 97 Mass. 538 (1867); People v. Dawell, *supra*.

CONSTITUTIONAL LAW—CONSTITUTION OF PENNSYLVANIA—WORKMEN'S COMPENSATION ACT—VALIDITY—To the objection that the Workmen's Compensation Act of 1915, P. L. 736, was unconstitutional, the Supreme Court *held:* First, the section which abolishes the defenses of "assumption of risk" and "negligence of fellow employee" is not in contravention of the Fourteenth Amendment to the Constitution of the United States, nor does it deprive the employer of his property without the "judgment of his peers or the laws of the land" under Article I, Section 9 of the Constitution of Pennsylvania. Second, the act does not preclude the right to a trial by jury as protected in Article I, Section 6, of the Pennsylvania Constitution, because of the election feature of the act. Third, the objection that it violates Article III, Section 21, which provides that the Legislature shall not limit the amount to be recovered for injuries is also met by this same

elective feature. Anderson v. Carnegie Steel Company, 255 Pa. 33 (1916).

It has been repeatedly held that an act which abolishes the common-law defenses of the fellow-servant rule, assumption of risk and contributory negligence is not thereby rendered unconstitutional. Matheson v. Minn. St. Railway Co., 148 S. W. 71 (Minn. 1914); Borguis v. The Falk Co., 147 Wis. 320 (1911), and cases therein cited. The ground upon which such a ruling has been based is that a person has no vested interest or property in a rule of common law, but simply in rights or property acquired under it. Mondon v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1 (1911); Young v. Duncan, 218 Mass. 346 (1914).

The Pennsylvania court in the principal case deals as most other courts have with the objection that a right to trial by jury is taken away. When the election has once been made, the act itself then becomes a part of the contract of employment, and can be enforced as between the parties as such. Desbeikis v. Link Belt Co., 261 Ill. 454 (1914); State, *ex rel.*, v. Creamer, 85 Ohio State 386 (1912).

The Pennsylvania act is similar to the recent Workmen's Compensation acts of the other states in its main features, and the grounds upon which these acts have been upheld by the other courts are much the same.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—In a prosecution for unlawful assault upon a girl, evidence that accused had assaulted another girl three years before, though offered to show intent, is inadmissible. Hall v. U. S., 235 Fed. 869 (1916).

Other crimes than the one for which the defendant is on trial are not admissible to prove the *corpus delicti*, but only where the act constituting the crime under investigation has been clearly established, and the motive, intent, or guilty knowledge is in issue. People v. Molineux, 168 N. Y. 264 (1901); Kahn v. State, 105 N. E. 385 (Ind. 1914). The prosecution cannot prove the commission of other like offenses for the purpose of increasing the likelihood that defendant committed the particular offense charged. McAllister v. State, 112 Wis. 496 (1900): People v. Bertsche, 265 Ill. 272 (1914). The rule is well established, that evidence of separate and similar offenses is admissible to show criminal intent. State v. Bowen, 134 Pac. 623 (Utah 1913): Taggett v. City of Tuscaloosa, 67 So. 780 (Ala. 1915). But such proof must be within reasonable limits. State v. Brown, 85 Atl. 797 (Del. 1912).

It must not be too remote in time. Rash v. State, 69 So. 239 (Ala. 1915); Moffatt v. U. S., 232 Fed. 522 (1916). Acts one year previous are admissible. Comm. v. Lindsey, 111 N. E. 869 (Mass. 1916). And such testimony can be admitted, when of substantive value, even though it establishes the commission of other offenses. Dykes v. State, 150 Pac. 84 (Okla. 1915); People v. Cornell, 155 Pac. 1026 (Cal. 1916). As in a prosecution for lewd acts with a child, proof of prior lascivious acts, even though showing the commission of the crime of sodomy, was relevant. People v. Love, 157 Pac. 9 (Cal. 1916). Acts of a kindred character both prior and subsequent are to be admitted. McCreary v. Comm., 163 Ky. 206

(1915); Trent v. U. S., 228 Fed. 648 (1916). Improper sexual relations of the accused, previous to the crime for which he is on trial, are admissible, when they will throw light upon the motive of accused, and also indicate his design in regard to his practices at a particular place. Frank v. State, 80 S. E. 1016 (Ga. 1914). But in all such cases where evidence of similar offenses is introduced, the jury should be charged that such evidence was to be considered in determining, whether the defendant intended to do the act, not whether he attempted to do it. Webb v. State, 187 S. W. 485 (Tex. 1916).

CRIMINAL LAW—JURISDICTION OF COURT OF QUARTER SESSIONS—PENNSYLVANIA ACT OF JUNE 2, 1871—Where a prisoner, sentenced to the House of Correction on a summary conviction before a magistrate was discharged on probation, it was held, the Court of Quarter Sessions, in *habeas corpus* proceedings under the Act of June 2, 1871, though not bound by defects in the magistrate's record, could not sentence the prisoner for a longer term than had been imposed by the committing magistrate. Com. v. Cohen, 63 Pa. Super. 581 (1916).

The Act of June 2, 1871, Sec. 13, P. L. 1301, provides that "Any person committed to the House of Correction by any other authority than the Court of Quarter Sessions of Philadelphia may apply for a writ of *habeas corpus* and if the judge shall deem there is sufficient or reasonable grounds for granting the same, he shall enter upon a rehearing of the evidence and either discharge the individual, modify or confirm the commitment."

Before the statute, the hearing in *habeas corpus* opened the matter *de novo* and the court sat as a committing magistrate. Com., *ex rel.*, Joseph v. Supt. House of Refuge, 1 Ash. 248 (Pa. 1831). The principal case holds that the act has limited the power of the court as a magistrate in that the time of re-commitment must not exceed the original commitment. Such action would not be within the term "modify" in the act. For similar interpretation of "modify" see State v. Lawrence, 12 Ore. 297 (1885), and State v. Tucker, 36 Ore. 291 (1900). Nevertheless, according to the principal case errors of the magistrate's record may be corrected, as the limitation of the act applies merely to the commitment. *Accord*, Com. v. Supr. House of Correction, 22 Dist. R. 92 (Pa. 1913); to remedy a defect in the transcript, Com. v. Supt. House of Correction, 18 Dist. R. 601 (Pa. 1909); to correct an omission in the charge, on which the prisoner was committed, Com. v. Supt. House of Correction, 19 Dist. R. 1054 (Pa. 1910). In one case it was held without discussion of the act that the court could not commit the prisoner where the magistrate's record was faulty. Com. v. Dvorkein, 48 Pa. Super. 618 (1912).

The courts are not limited in their power as magistrates except in so far as their power of commitment is limited by the act. Accordingly, the relator may be held in bail if it appear that he is guilty of another crime than the one charged before the magistrate. Com. v. Supt. House of Correction, 18 Dist. R. 507 (Pa. 1909); Com. v. Supt. House of Correction, 19 Dist. R. 1049 (Pa. 1910), following the earlier case of Com. v. Hickey, 2 Pars. 317 Pa. (1843).

EQUITY—SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—EFFECT OF ALTERED CONDITIONS—WAR—Where specific performance was sought of a contract which involved parties of different belligerent countries it was *held:* since the contract was immediately ended by the war, thus rendering performance impossible, therefore specific performance would not be granted. Lindenberger Cold Storage and Canning Co., Ltd., v. Lindenberger, Inc., *et al.*, 235 Fed. 542 (1916).

The English decisions are based upon the leading case of Taylor v. Caldwell, 3 B. & S. 826 (1863), which held that, where the parties must have contemplated the continued existence of the subject-matter of the contract as necessary for performance, the courts will imply the condition that the parties shall be excused where performance is rendered impossible by the accidental destruction by fire of the subject-matter. This decision was followed by the "Coronation Cases" which held that an unforeseen event, the failure of the king to be crowned upon a certain day, relieved the parties of further performance, though the contract was not void *ab initio*, and everything should remain as at the time of impossibility. Krell v. Henry, 2 K. B. 740 (1903). Money already paid could not be recovered, though the other did not perform. Chandler v. Webster, 1 K. B. 493 (1904). So, today, where the plaintiff has partly performed when the war rendered further performance impossible, the plaintiff could not even recover on a *quantum meruit* basis. Enoch Shipping Co., Ltd., v. Phosphate Mining Co., 139 L. T. 94 (1915). Seamen may recover additional wages for a contract to continue their voyage, for there is a new and valid contract. Liston v. Owners of Steamship Carpathian, 2 K. B. 42 (1915). The contract is *dissolved*, though a *suspension* in case of a force *majeur* is expressly provided for, if the postponement involves an alteration of the contract. Distington Hematite Co., Ltd., v. Possehl & Co., W. N. 117 (Eng. 1916). A contract to sell the whole of a zinc supply to a German firm, containing a stipulation that the contract should be *suspended* in case of a force *majeure*, is dissolved, for it would prevent the country from using its resources for the benefit of the nation. Zinc Corpn., Ltd., v. Hirsch, 1 K. B. 541 (1916). Since the contracts are absolutely dissolved, it follows that they cannot be enforced in equity.

The principal case might well have been decided upon the ground that the vendor here could not force the vendee to buy what he could not enjoy, Denne v. Light, 8 De G., M. & G. 774 (1857), and hence, on the ground of mutuality, the court will not force the vendor to sell.

EVIDENCE—BOOK ACCOUNTS—CORROBORATIVE PURPOSE—In an action on a book account, one of the parties used a memorandum book, to refresh his memory. Objection was made to the admission of this memorandum in evidence as corroborative of the party's testimony. *Held:* It was not error to admit the memorandum as corroborative of the party's testimony. Nelson & Wallace v. Gibson, 98 Atl. 1006 (Vt. 1916).

There is little harmony in the decisions on the question of whether a party's own books of account or book entries are admissible to corroborate his oral testimony. In some jurisdictions they are admitted. Donahue v.

Connor, 93 Pa. 356 (1880); Bean v. Lambert, 77 Fed. 862 (1896). In Massachusetts and New York among others they are held inadmissible. Bank v. Whitney, 85 Mass. 454 (1862); *Re* Smith, 85 Hun. 359 (N. Y. 1895). Where rejected it is on the ground that to admit them would be to allow parties to manufacture evidence in their own behalf. Bank v. Whitney, *supra.*

Where a party's witness is impeached, he is usually allowed to produce his books to corroborate that witness. Fain v. Edwards, 33 N. C. 305 (1850). So, also, a party's books may be used by his opponent to contradict the testimony of the party's witness. Hartley v. Weideman, 175 Pa. 309 (1896).

But where the book account has been used as a memorandum to refresh a witness's memory, and he then testifies from memory, not from the book, it is generally held that the book cannot be admitted to corroborate his testimony. Palmer v. Hartford Dredging Co., 73 Conn. 182 (1900); Lucas v. Metropolitan St. Rwy. Co., 56 App. Div. 405 (N. Y. 1900). *Contra* to these decisions are the principal case and Gross v. Scheel, 67 Neb. 223 (1903).

When a memorandum is used to refresh a witness's memory, it must be produced in court on demand for inspection and cross-examination by the opponent, Duncan v. Seeley, 34 Mich. 369 (1876), and it is reversible error to refuse to order this done, Tibbets v. Sterberg, 66 Barb. 201 (N. Y. 1870). The opponent may have it read or handed to the jury if he wishes to cast doubt on the reality of the refreshment of the witness's memory, Com. v. Jeffs, 132 Mass. 5 (1882); Smith v. Jackson, 71 N. W. 843 (Mich. (1897), or he may make use of it as evidence in his own favor. Payne v. Ibbotson, 27 L. J. Ex. 341 (Eng. 1858).

EVIDENCE—DOMICILE—DECLARATIONS—A third party made declarations concerning his domicile, which were attendant upon acts then performed. *Held:* The declarations were admissible to show an intention to reside, not because they were a part of the *res gestae*, but because they were made in support of his interest and material to the issue. Wilbur v. Town of Calais, 98 Atl. 913 (Vt. 1916).

The question of domicile involves an inquiry as to a person's acts and the intention with which such acts are done, as in the principal case. Chase v. Chase, 66 N. H. 588 (1891); Watson v. R. R. Co., 152 N. C. 215 (1910). The early Massachusetts cases were governed by a principle substantially that of the "Verbal Act Doctrine," Wigmore, Sec. 1784, and admitted evidence of the intention only when it accompanied, qualified, or explained acts relevant to the issue of domicile, or was part of the *res gestae*. Cole v. Cheshire, 67 Mass. 444 (1854). Though this is still the rule in some jurisdictions, Chase v. Chase, *supra:* Holyoke v. Holyoke, 110 Me. 469 (1913), it has been overruled in Massachusetts, where declarations showing intention are now admitted, whether or not they accompany acts in such cases. Viles v. Waltham, 157 Mass. 542 (1893). A libellee may testify as to his intent concerning the establishment of a domicile. Kapigian v. Der Minassian, 212 Mass. 414 (1912). A person's own testimony about such intention will control where there has been an actual removal, Kemme

v. Brockhaus *et al.*, 5 Fed. 762 (1881); or, if the declarations are free from suspicion, Wright v. R. R. Co., *et al.*, 151 N. C. 529 (1909). Though such declarations are sufficient, they are not conclusive. Wilberding v. Miller, 106 N. E. 665 (Ohio 1913). Less weight will be accorded the person's declarations than his acts and all the surrounding circumstances. Collins v. City of Ashland, 112 Fed. 175 (1901); Holt v. Hendee *et al.*, 248 Ill. 288 (1910). If unaccompanied by any act of which they are explanatory, such declarations are entitled to little or no weight as evidence. Gourlay v. Gourlay, 15 R. I. 572 (1887). Since the right to choose a domicile implies a right to declare one's choice, this declaration of intention is not inadmissible as a self-deserving declaration. *In re* Newcomb's Estate, 84 N. E. 950 (N. Y. 1908).

INSURANCE—FOREIGN CORPORATION—JURISDICTION OF SUBJECT MATTER—A foreign insurance company, not a mutual company, may be sued for illegal assessments in direct violation to a policy, since no interference with the internal management of the business is necessary. Frick v. Hartford Life Insurance Co., 159 N. W. 247 (Iowa 1916).

The rule is, that if a life insurance company, incorporated under the laws of one state, has agreed to subject itself to service of process in another state, then suits will lie both in law, and in equity, against such foreign corporation in favor of resident shareholders, who have clear contract rights to be protected. Cantagnino v. Reserve Fund Life Ass'n, 157 Fed. Rep. 29 (1907); Pfeffer v. Hartford Life Insurance Co., 160 App. Div. N. Y. 876 (1914). Because the assessments do not rest within the discretion of the defendant company's directors, but their amount is fixed by contract, and therefore it is within the scope of equity jurisdiction to cause an accounting to be made, and a balance rendered. Lake Shore Telephone Co. v. De Groat, 109 Minn. 168 (1909); Harrison v. Hartford Life Ins. Co., 201 N. Y. 545 (1911). But in many cases, it is hard to construe, whether the suit is one brought to enforce a policy, or one which will interfere with the internal management of the company. Eberhard v. Northwestern Life Ins. Co., 210 Fed. 520 (1914). Many states hold, that a suit to enjoin the collection of illegal assessments, is not maintainable, on the ground that the relief sought, would require an investigation into the internal affairs of the corporation. Clark v. Life Ass'n, 14 Dist. Col. 154 (1899); Royal Arcanum v. Green, 237 U. S. 531 (1915).

A member of a mutual insurance association is bound by all the rules and regulations which may be thereafter lawfully adopted. Benjamin v. Mutual Reserve Fund Ass'n, 146 Cal. 34 (1905), and therefore a court cannot undertake to control, or exercise visitorial power over the internal management of such a foreign association. Taylor v. Mutual Life Ass'n, 97 Va. 60 (1900); Kelly v. Thomas, 234 Pa. 419 (1911). But if such an association amends its by-laws and constitution as to destroy wholly the essential features of a contract of insurance, the policyholder or member may bring an action for the premiums paid, with interest thereon. Ebert v. Mutual Life Ass'n, 81 Minn. 116 (1900); Strauss v. Mutual Life Ass'n, 128 N. C. 465 (1901).

The reason that courts generally decline such jurisdiction rests on grounds of expediency and public policy, because of a want of power to enforce a decree, rather than on the question of jurisdiction to make it. Babcock v. Farwell, 245 Ill. 14 (1910).

PROPERTY—LANDLORD AND TENANT—NEGLIGENCE—LIABILITY TO THIRD PERSONS—A leased premises to B, who failed to keep closed a door in the sidewalk which gave access to steps leading to the basement. There was no allegation that the doors were improperly constructed. C fell into the cellar way and sued A for personal injuries received therefrom. *Held:* The premises were not dangerous when leased and became so only because of the way in which B, the tenant, used them, therefore the tenant alone is liable. Dammeyer *et al.* v. Vorhis, 113 N. E. 765 (Ind. App. 1916).

The principal case is in accord with the general rule that where there is no defect in the construction of the premises and the accident results from the manner of use, the tenant in possession alone is liable. Duffin v. Dawson, 211 Pa. 593 (1905); Opper v. Hellinger, 101 N. Y. Supp. 616 (1906); Taylor v. Loring, 201 Mass. 283 (1909). However, the tenant is not liable where some third party creates the dangerous condition and the tenant could not have discovered it by the exercise of reasonable care and diligence. Fehlhauer v. City of St. Louis, 178 Mo. 635 (1903). Where the premises leased are a nuisance the landlord, of course, remains liable, Cerchione v. Hunnewell, 215 Mass. 588 (1913), but he is not liable for a nuisance created by the act of his tenant. Shipley v. Fifty Associates, 101 Mass. 251 (1869). If the tenant covenants to repair, the landlord is not liable for injuries resulting from the breach of that covenant. Lindstrom v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 212 Pa. 391 (1905); likewise he is not liable for the tenant's negligence in making the repairs. Mayer v. Schumpf, 111 Mo. App. 54 (1905). The landlord who retains control of certain parts of the premises for the common use of his tenants must keep those parts in a reasonably safe condition. Shonenger Co. v. Mann, 219 Ill. 242 (1905). Where a nuisance arises necessarily from the expected use of the premises the landlord is liable. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727 (1903). If the landlord creates a nuisance on the demised premises he is equally liable with his lessee who has notice. Pickens v. Cool River Boom & Timber Co., 54 W. Va. 445 (1903). Where certain safeguards are required and are not put up, both the landlord and the tenant are liable. Doepfner v. Michaelis, 144 Fed. 1021 (1906).

PROPERTY—WILLS—TESTAMENTARY CAPACITY—INSANE DELUSION—SPIRITUALISM—A belief in spiritualism is not of itself conclusive evidence of mental aberration such as to destroy testamentary capacity; the jury must determine the effect of such belief. Dunham v. Holmes, 113 N. E. 845 (Mass. 1916).

In an action to probate a will, there must be substantive evidence of lack of mental capacity in order that the case may go to the jury. Thomasson v. Hunt, 185 S. W. 165 (Mo. 1916). *In re* McIntyre's Estate, 159 N. W. 517 (Mich. 1916). The will of one who believes in spiritualism is not on

that account void, nor is it evidence of mental unsoundness, Robinson v. Adams, 62 Me. 369 (1874); Raison v. Raison, 148 Ky. 116 (1912); nor is the fact that the belief is illogical or preposterous, evidence of insanity. *In re* White, 121 N. Y. 406 (1890). It must appear that the testator believed, or admitted, that he was influenced by the spirits in some way in the preparation of his will, that it was the offspring of such belief. Meuth v. Meuth, 157 Ky. 784 (1914). Thomas v. Thomas, 186 S. W. 993 (Mo. 1916). Mere belief in spiritualism is not sufficient to prove that testator did not have the requisite capacity to make a will, the delusion necessary, must be an insane delusion. Brown v. Ward, 53 Md. 376 (1879). *In re* Henry's Estate, 149 N. W. 605 (Ia. 1914).

A delusion, such as to render a will invalid, is an insane belief, a mere figment of imagination, a belief in the existence of something which does not exist. Grill v. O'Dell, 77 Atl. 984 (Md. 1910). Herr's Estate—Wilson's Appeal, 251 Pa. 223 (1916). The question always is, whether the act under investigation, was done upon consideration of existing facts, or under the influence of a delusion that controlled the will of the doer; the proof of a delusion may be found in the surrender of the will to imaginary directions, regarded by the victim as those of God, or of spirits speaking to him from another world. Middleditch v. Williams, 45 N. J. Eq. 726 (1889); Taylor v. Trick, 165 Pa. 586 (1895). But a mere belief in metempsychosis without more, is not an insane delusion. Buchanan v. Pierie, 205 Pa. 123 (1903). In considering whether the testator's free volition has been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding him. Lehman v. Lindenmeyer, 109 Pac. 956 (Col. 1910).

SURETYSHIP AND GUARANTY—NOTICE TO GUARANTOR OF ACCEPTANCE OF GUARANTY—In an action on a contract of guaranty, where the contract was executory and uncertain as to the amount and time, the court overruled a demurrer to the declaration. *Held:* Notice of acceptance not being alleged, and the contract sued upon not being positive and certain in its terms, the court erred in not sustaining the demurrer. Brown Grocery Co. v. Planters Bank of Americus, 89 S. E. 523 (Ga. 1916).

An absolute and unqualified guaranty becomes effective as soon as it is acted upon and notice to the guarantor is not necessary. Hall's Ex'r v. Farmers Bank of Ky., 23 Ky. L. R. 1450 (1901); Frost v. Standard Metal Co., 215 Ill. 240 (1905). A guarantor of future credit is entitled to notice from the party extending the credit. Acme Mfg. Co. v. Reed, 197 Pa. 359 (1900); Wanamaker v. Benn, 50 Atl. 512 (Del. 1901). The principal case is in accord with the above general rules. If the guarantor would not know, of himself, whether the offer had been accepted or not, he is not bound without notice reasonably given after performance. Bishop v. Eaton, 161 Mass. 496 (1894).

Where notice is necessary, it may, however, be waived by the guarantor. Swisher v. Deering, 204 Ill. 203 (1903); Sands v. Marchionda, 186 Mass. 270 (1904). Notice of acceptance need not be proved to have been given in writing, or in any particular form, but it may be inferred

by the jury from facts and circumstancecs which will warrant such an inference. Hickox v. Fels, 86 Ill. App. 216 (1899). Information from any source is sufficient. Greer Machinery Co. v. Sears, 23 Ky. L. R. 2025 (1902); Lynn Safe Deposit and Trust Co. v. Andrews, 180 Mass. 527 (1902). Where notice is necessary it must be pleaded, or a waiver thereof must be pleaded. Goff v. Janeway and Carpenter, 26 Ky. L. R. 1266 (1904). The construction of a contract of guaranty is governed by the same rules as any other contract, Leyenson v. Lindenbaum, 158 N. Y. S. 355 (1916); thus in case the contract is ambiguous, it is construed most strictly against the guarantor. Hurley v. Fidelity and Deposit Co., 68 S. W. 958 (Mo. 1902). Where there is a proposal to guarantee the performance of a party under a contract, before the contract is approved, the guarantor is entitled to notice of acceptance. Barnes Cycle Co. v. Schofield, 111 Ga. 880 (1900).

TORTS—CONSPIRACY TO PROCURE A BREACH OF CONTRACT—A, knowing enough about a contract between B and the plaintiff to charge him with a knowledge that it had not lapsed, though he supposed, in good faith, that it had, entered into contract with B, the vendor of the land, to purchase it. *Held:* This was a fraud in law, which rendered A and B liable for conspiracy. McLennan v. Church *et al.*, 158 N. W. 73 (Wis. 1916).

Acts which do not constitute grounds for an action on the case, if done by one alone, based upon fraud, force, coercion, *etc.*, will not support a civil action for conspiracy. Karges Furniture Co. v. Amalgamated Woodworkers Union No. 131, 165 Ind. 421 (1905); Sleeper v. Baker, 22 N. D. 386 (1911). The quality of the act and the nature of the injury are the chief factors in such a case. Kimball v. Harman, 34 Md. 406 (1871). Actual damage is the gist of the action. Haskins v. Rouster, 70 N. C. 601 (1874); White v. White, 132 Wis. 121 (1907).

Where the defendant procures a breach of contract of personal service, the majority of the courts follow the leading case of Lumley v. Gye, 2 E. & B. 216 (1853), and hold the one procuring such a breach liable. Moran v. Dunphy, 177 Mass. 485 (1901); Huskie v. Griffin, 75 N. H. 345 (1909). *Contra*, Brown Hardware Co. v. Ind. Stove Works, 69 S. W. 805 (Tex. 1902); Boulier v. Macauley, 91 Ky. 135 (1891). From this and from the rule laid down in the preceding paragraph, it follows that a conspiracy to entice a servant to break his contract is actionable. Thacker Coal and Coke Co. v. Burke, 53 S. E. 161 (W. Va. 1906). But these laboring cases are based upon the English idea that the employer has a property right in the employee and that the laborer is bound to the land, and hence are not authorities in the case of a breach of an ordinary contract. Chambers v. Baldwin, *supra;* and in case of conspiracy, Sleeper v. Baker, *supra.*

Where the contract is not one of personal service, advice given in good faith does not render one liable for a breach resulting therefrom. Legris v. Marcotte, 129 Ill. App. 67 (1906). If the advice is given in malice, one counselling such a breach is liable. Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556 (1908); Wheeler Co. v. American Window Glass Co., 202 Mass. 471 (1909). It has been held that maliciously procuring

a breach of contract with a third person will not create a liability without the addition of threats, fraud, falsehood, or coercion. Boysen v. Thorn, 78 Cal. 578 (1893). As would be expected these rules apply to cases of conspiracy. Thus an action for procuring a breach of contract will not lie, except where fraud, force or coercion has been used. Sleeper v. Baker, *supra*.

TORTS—DUTY TO TRESPASSER—MISFEASANCE—The plaintiff jumped upon the step of a closed vestibuled car of a moving train and clung to the hand bars. The conductor's attention being brought to his predicament, he failed either to open the door or cause the train to be stopped. Due to exhaustion, the plaintiff fell off. He brought suit against the conductor and the railroad. *Held:* He may recover against both. Southern R. R. v. Sewell, 90 S. E. 94 (Ga. 1916).

The plaintiff was a trespasser, but the case falls within the rule that, after the discovery of a trespasser, one is bound not to do any wilful or wanton act to injure him. Tanner v. R. R., 60 Ala. 621 (1877). Any act of misfeasance after knowledge of his presence is held wilful and wanton. Haley v. R. R., 113 Ala. 640 (1896). The court rightly decides the act of the conductor to be one of misfeasance. Though the failure to open the door is non-feasance, the maintenance of motion is a positive act. It has been repeatedly held that the continuing of a train after discovery of a helpless trespasser on the tracks is an act of misfeasance, Galveston R. R. v. Olds, 112 S. W. 787 (Tex. 1908), and it has been held misfeasance to continue the operation of a trolley car after knowledge that an infant trespasser was on the platform. Pittsburgh R. R. v. Caldwell, 74 Pa. 421 (1873). As the conductor has the power to stop the train by signal, he is responsible for its maintained speed, and the continuance through him is a repeated positive act. The maintenance of a force started and controlled by the actor is affirmative conduct.

One is not liable to a trespasser for non-feasance. Union Stock Yards v. O'Rourke, 40 Ill. App. 474 (1881). The reason for the lack of positive duties in the common law has been said to be the "attitude of extreme individualism so typical of Anglo-Saxon legal thought." F. H. Bohlen, 47 U. OF PA. L. REV. 220. The inability of the trespasser to recover is not because of contributory negligence. Pollock, Torts, 10th Ed. 186. Before the Statute of Westminster II, 13 Edw. 1, c. 24, the sole remedy for personal injuries was the action of trespass. After 1285, the action on the case was allowed to licensees for injuries resulting from non-feasance —the failure to warn, Oliver v. Worcester, 102 Mass. 489 (1869), but trespassers could not recover even for injuries resulting from misfeasance unless the act was wilful and wanton. Blyth v. Topham, Cro. Jac. 158 (1607). Later "wilful and wanton" was interpreted as any misfeasance. Palmer v. Gordon, *supra*. This seems to deny to the trespassers the benefit of the Statute of Westminster II; the courts, due to their respect for rights in land, seem at first to have limited the trespasser to his rights before the statute, *i. e.*, recovery for the *quasi* criminal trespass, and have not as yet extended to him the full benefit of the action on the case.

By the French Code Civil, Articles 1382, 1383, no discrimination is made between trespassers and others; fault in the plaintiff, even though a contributing element, being but a ground for mitigation of damages. Trib. Civ. Lyon, 5 Mai 1865, Aff. Loup, D. P. 66. 3. 63.

TORTS—NEGLIGENCE—ELECTRIC COMPANIES—*Res Ipsa Loquitur*—A boy, turning an electric switch in his father's barn, was killed by a shock. The shock was alleged to be due to the unsafe condition of a transformer. *Held:* The doctrine of *res ipsa loquitur* applies. Seeherman v. Wilkes-Barre Co., 255 Pa. 11 (1916).

Where all the appliances for generating and delivering the electric current are under the control of the electric company furnishing the same, and injury results from handling the lights in the usual way, the doctrine of *res ipsa loquitur* generally applies. Alexander v. Nanticoke Light Co., 58 Atl. 1068 (Pa. 1904); Alabama City R. Co. v. Appleton, 54 S. 638 (Ala. 1911). It is not essential that the current be generated by the company charged with negligence. It has been held that the doctrine applies when the injury is received while using a telephone, although the current causing the injury was not generated by the telephone company. Delahunt v. United Telephone Co., 64 Atl. 515 (Pa. 1906). The doctrine does not apply, however, when the telephone is used during an electrical storm, and lightning causes the injury. Rocap v. Bell Telephone Co., 79 Atl. 769 (Pa. 1911).

The cases generally hold that the doctrine does not apply when the accident is due to defective wiring which was installed by the owner of the building. Minneapolis Electric Co. v. Cronon, 166 Fed. 651 (1908); Harter v. Colfax Electric Co., 100 N. W. 508 (Ia. 1904). It seems, however, that the doctrine applies in such cases if a dangerous current is sent through the wires. Reynolds v. Electric Co., 59 Atl. 393 (R. I. 1904). Of course, the doctrine does not apply if there is a more reasonable explanation of the accident than the negligence of the company. Western Coal Co. v. Garner, 112 S. W. 392 (Ark. 1908).

The doctrine of *res ipsa loquitur* applies generally if an injury is caused by a rail in the street which becomes charged with electricity. Clarke v. Nassau Electric Rwy. Co., 41 N. Y. S. 78 (1896); Way v. Charlestown Rwy. Co., 84 S. E. 893 (W. Va. 1915). But it has been held that in Pennsylvania there is no presumption of negligence when a person traveling on the street is injured by an appliance of a company using electricity on or over the street. Accordingly, if a live wire falls, the doctrine of *res ipsa loquitur* cannot be invoked; actual negligence must be proved. Lanning v. Electric Co., 229 Pa. 575 (1911); Kahn v. Kittaning Electric Co., 238 Pa. 71 (1913). If the company, in such cases, knew the wire was down, this is proof of negligence. Herron v. Pittsburgh, 204 Pa. 509 (1903).

TRADE MARKS—TRADE NAMES—GEOGRAPHICAL AND DESCRIPTIVE WORDS—"OLD LEXINGTON CLUB"—An application for registration of a trade name for whiskey consisting of the words "Old Lexington Club" was opposed on the ground that it was a combination of a geographical name and a word descriptive of quality. *Held:* These words used in combination are a fanciful designation, arbitrarily selected to designate a certain product, and

may be registered. Old Lexington Club Distillery Co. v. Kentucky Distilleries and Warehouse Co., 234 Fed. 464 (1916).

It is fundamental in the law of trade-marks that no one can acquire exclusive property in a geographical name. Canal Co. v. Clark, 13 Wallace 311 (U. S. 1871), or in a word, letter, figure or symbol which is descriptive of the product, or its kind or quality. Amoskeag Mfg. Co. v. Spear, 2 Sandf. Super. Ct. 599 (N. Y. 1849). A misspelled descriptive word is within this rule, Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446 (1900), as is likewise the nickname of a geographical place, "Quaker City" for Philadelphia. Quaker City Flour Mills Co. v. Quaker Oats Co., 43 App. D. of C. 260 (1915). These principles are embodied in the Federal Statute providing for the registration of trade-marks. Act of February 20, 1905, c. 592, par. 5 (U. S. Comp. Stat. 1913, par. 9490). For examples of such descriptive and geographical words see Hesseltine's "Law of Trade-marks," pp. 34 and 61.

Some measure of protection is, however, accorded the use of such words. Though no one can claim an exclusive right to the use of a geographical name, he may prevent another from falsely using the same name. California Fruit Canners' Association v. Myer, 104 Fed. 82 (1899). And even though another truthfully uses the same name, if he does so in such a way as to amount to a fraud on the first user and the public, such use will be restrained. Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665 (1901). In such cases it is said that the word, from long use in connection with a particular article, has acquired a secondary meaning, indicating that it is the product of a particular manufacturer rather than the place where it is made. Metcalfe v. Brand, 86 Ky. 331 (1887). Descriptive words may also acquire such a secondary meaning. Furniture Hospital v. Dorfman, 179 Mo. App. 312 (1914). The protection in these cases is accorded on the ground that it is unfair competition for another manufacturer to use these names or words except in their strictly geographical or descriptive signification. Sharer v. Heller and Merz Co., 108 Fed. 821 (1901); Standard Paint Co. v. Rubberoid Roofing Co., 224 Fed. 695 (1915).

Under the Act of February 20, 1905, if such words have been exclusively used for ten years before that date, they can be registered. Rossman v. Garnier, 211 Fed. 401 (1914).

For other cases in this series, see 57 U. of PENNA. L. REV., 272; 62 U. of PENNA. L. REV., 458 and 466; 65 U. of PENNA. L. REV., 100.