RECENT CASES.

AGENCY—DUTY OWED TO TRESPASSER.—Defendant's servant, a truck driver, while making deliveries, invited the plaintiff to ride with him. When the driver attempted to turn into an intersecting street at forty miles an hour, the plaintiff was thrown from the truck and injured. The plaintiff's suit was based on alleged wanton, wilful and reckless conduct of the defendant's servant. *Held:* Judgment for defendant. *O'Leary v. Fash*, 140 N. E. 282 (Mass. 1923).

The general rule is that one whom a servant invites on his master's property without authority, is a trespasser. Collins v. Chicago, 187 Ill. App. 30 (1914); Kalmich v. White, 95 Conn. 568, 111 Atl. 845 (1920). The master through his servant, is then bound to refrain from wilful, wanton and reckless misconduct toward the intruder. Evarts v. St. Paul Ry. Co., 56 Minn. 541, 57 N. W. 459 (1894); Stipetich v. Security Stove Co., 218 S. W. 964 (Mo. App. 1920); Higbee v. Jackson, 101 Ohio St. 75, 128 N. E. 61 (1920). An able discussion of the question is contained in the majority and dissenting opinions in Higbee v. Jackson, *supra*. See Shearman and Redfield, Negligence (6th Ed. 1913), 159.

This rule appears to well settled in Pennsylvania. Petrowski v. Philadelphia & Reading R. R., 263 Pa. 531, 107 Atl. 381 (1919); Lafferty v. Armour & Co., 272 Pa. 588, 116 Atl. 515 (1922); Nelson v. Johnstown Traction Co., 276 Pa. 178, 119 Atl. 918 (1923).

The Massachusetts court seems to have uniformly protected trespassers on realty against wilful, wanton and reckless misconduct of the owner and his servants. Romana v. Boston Elevated Ry. Co., 218 Mass. 76, 105 N. E. 598 (1914); Adamowicz v. Newburyport Gas Co., 238 Mass. 244, 130 N. E. 388 (1921). The principal case, however, expressly refuses a similar right to a trespasser on personal property. In so doing; it offers no basis for the distinction; and until some such basis is proposed, it is submitted that the rule in the principal case is arbitrary.

BILL OF LADING—INNOCENT HOLDER—CARRIERS' LIABILITY FOR MISDATING.—The plaintiff, a grain dealer, purchased wheat to be delivered via the defendant carrier. His vendor presented interstate bills of lading duly signed by the agent of the defendant company, and received the purchase price of the wheat. In the meantime the plaintiff had negotiated a re-sale of the wheat, but the contract was later rescinded by his vendee, on the ground that the goods had not been shipped on the bill of lading date. The plaintiff sold at a loss and claims damages resulting from the defendant's negligence in misdating the bill. *Held:* (Johnston, *C. J.*, Harvy, *J.*, and Hopkins, *J.*, dissenting): The *bona fide* holder of a bill of lading cannot recover for shipper's negligence in dating same. *Brown v. Union Pacific R. Co.*, 216 Pac. 299 (Kan. 1923).

The Federal Bill of Lading Act which governs cases of this kind, and upon which the plaintiff relies for recovery, expressly provides that, when a carrier has issued an order bill, it shall be liable thereon to the innocent

holder, who has given value "relying upon the description . . . of the goods, for damages caused by . . . their failure to correspond with the description thereof in the bill at the time of its issue." Bill of Lading Act, 39 Stat. at L. 538 (1916).

The case evolves itself into a very interesting and hitherto undecided question of fact, *viz.:* is the date of shipment part of the description of the consignment? The dissenting justices answered this in the affirmative, holding that the principal object in the passage of the act was to make such bills negotiable in order to afford every protection to the innocent holder. They further contended that the date may be and is in fact sometimes a vital part of the description. See Raffles v. Wichelhaus, 2 Hurlstone & Coltman, 906 (Eng. 1864), (a leading case on importance of shipping date in ascertaining subject matter of contract). The majority of the court contended that a description of a carload of goods only includes a recital of their character, of their sort, kind, or species.

It is submitted that the uncertainty of the statute which permits of such ambiguous interpretations is lamentable since the courts can, in the absence of statutory or former judicial definitions, do little more than make an educated guess as to the legislative intent.

CARRIERS—DUTY TO INTOXICATED PASSENGER.—Plaintiff's husband when intoxicated received fatal injuries in a fall from a street car platform. *Held:* A higher degree of care than to ordinary passengers was owed where the conductor knew or ought to have known of the condition of the deceased. *Jameitis, Appellant, v. Wilkes-Barre Rwy. Co.*, 277 Pa. 437, 121 Atl. 317 (1923).

There seems to be no unanimity among the courts with regard to the duty of a carrier to an intoxicated passenger. Starting with the principle of "utmost caution characteristic of very prudent men"; Meier v. Pennsylvania Railroad, 64 Pa. 225 (1870); Pennsylvania Co. v. Roy, 102 U. S. 451 (1880), the courts have uniformly held, that when a person known to be mentally or physically disabled is accepted as a passenger, a degree of care is owed commensurate with the circumstances; this has been the decision in the case of an infant, Yazoo & M. V. R. Co. v. O'Keefe, 125 Miss. 536, 88 So. 1 (1921); sick or infirm, Steketee v. Waters, *et al.*, 193 Mich. 177, 159 N. W. 368 (1916); insane, Chicago R. I. & G. Ry. Co. v. Sears, 210 S. W. 684 (Tex. 1919). This additional burden of care imposed is offset by permitting the carrier to refuse as a passenger any of this class without an attendant. Connors v. Cunard Co., 204 Mass. 310, 90 N. E. 601 (1910). The carrier may also refuse an intoxicated person. Pittsburgh and Connellsville Railroad v. Pillow, 76 Pa. 510 (1874); Chesapeake & O. Ry. Co. v. Gatewood, 155 Ky. 102, 159 S. W. 660 (1913); Parks v. D. L. & W. R. R. Co., 85 N. J. L. 577, 89 Atl. 983 (1914).

Where disability is voluntary through intoxication, although the courts hesitated to impose a greater degree of care, the weight of authority enforces this duty of additional precaution. Donovan v. Greenfield and J. F. St. Rwy. Co., 183 Fed. 526, 106 C. C. A. 72 (1910); Warren v. Pittsburgh &

Butler Rwy. Co., 243 Pa. 15, 89 Atl. 828 (1914); Fagan v. Atlantic Coast Line R. R. Co., 220 N. Y. 301, 115 N. E. 704 (1917). In conflict is the rule that an intoxicated man is to be judged by the same standard as a sober man. Fisher v. West Virginia & Pittsburg R. R. Co., 42 W. Va. 183, 24 S. E. 570 (1896); Johnson v. Louisville & N. R. R. Co., 104 Ala. 241 (1893); Louisville & N. R. Co. v. Payne, 104 S. W. 752 (Ky. 1907). Ingerson v. Grand Trunk Rwy., 79 N. H. 154, 106 Atl. 488 (1919), requires that the carrier must know of the incapacity, not merely ought to have known. A Texas case varies the degree of care with the degree of intoxication. Paris & G. N. Ry. Co. v. Robinson *et al.*, 53 Tex. Civ. App. 12, 114 S. W. 658 (1908). Since intoxication is not negligence as a matter of law; Holmes v. The Or. & Cal. Rwy. Co., 5 Fed. 523, 6 Sawyer 262 (1880); Kingston v. Ft. Wayne & E. Ry. Co., 112 Mich. 40, 70 N. W. 315 (1897); Houston T. & C. R. v. Bryant *et al.*, 31 Tex. Civ. App. 363, 72 S. W. 885 (1903); those jurisdictions which accept the last clear chance doctrine generally favor the plaintiff by drawing the shadowy line between intoxication as a condition and a cause. Black v. New York, New Haven and Hartford Railroad Co., 193 Mass. 448, 19 N. E. 797 (1907); Wheeler v. Grand Trunk Ry. Co., 70 N. H. 607, 50 Atl. 103 (1901); Fagan v. Atlantic Coast Line R. R. Co., *supra*. One case holds the question of contributory negligence cannot arise where the conductor knew of the passenger's disability. Price *et al.* v. St. Louis I. M. & S. Ry. Co., 75 Ark. 479, 88 S. W. 575 (1905). It is submitted that the principal case is logically sound and socially beneficial, and that it represents the better view.

CITIZENSHIP—DUAL CITIZENSHIP—BRITISH CITIZEN LIABLE AS GERMAN NATIONAL.—The plaintiff, a British citizen by birth, became a German citizen by operation of German law. He never divested himself of British citizenship. An order in Council, of statutory force, Treaty of Peace Order, 1919, carrying out Article 297 of the Treaty of Versailles, subjected property of "German nationals" in England to certain charges. Plaintiff sought to have his English property freed from these charges. *Held:* The property was subject to the charges. *Kramer v. The Attorney-General*, 129 Law Times R. 390 (House of Lords, 1923).

In both the Treaty and the Order in Council, the term "national," as applied to individuals, is equivalent to citizen. Plaintiff is admittedly a British citizen, and as such claimed to be outside the terms of the Order. The Order, not the Treaty, is the basis of the decision.

Formerly a citizen of Great Britain could not expatriate himself without the consent of his sovereign. Men of English birth who had lived most of their lives abroad, were convicted of treason in England when captured in an enemy's forces. Storie's Case, 3 Dyer 300 b, 73 Reprint 675 (Eng. 1571); MacDonald's Case, 18 How. St. Tr. 858 (Eng. 1747); 1 Blackstone Comm. 370. And, although expatriation is now allowed, Stat. 33-34 Vict. c. 14 (1870), until a citizen has expatriated himself in accordance with the statute, prior to this time he has been considered in law to be a British citizen only. If he was also a citizen of another country, that fact was ignored. Rex v. Lynch, L. R. 1 K. B. 444 (Eng. 1903); Rex v. Middlesex Regiment, *ex*

parte Freyberger, L. R. 2 K. B. 129 (Eng. 1917); likewise in the United States. Ludlum v. Ludlum, 26 N. Y. 356 (1863); State v. Jackson, 79 Vt. 504, 65 Atl. 657 (1907); Hammerstein v. Lyne, 200 Fed. 165 (1912).

In the principal case, however, an English court construes an English law as declaring that a British citizen is also a German citizen, and deals with him as a German. He is at once a citizen and an alien. If this principle is extended to cases that do not arise under this Order, it will be interesting to note whether it will be applied where the obligations of a citizen to the nation are sought to be enforced, or whether it will be reserved for cases such as the present one where a person claims protection from the nation on the basis of his citizenship.

CONFLICT OF LAWS—ANNULMENT OF MARRIAGE.—A female of fourteen years went from Oklahoma into Arkansas and contracted a marriage legal and binding under the laws of that state. The parties then returned to Oklahoma, where both were domiciled. An Oklahoma statute prohibited females under fifteen years from entering the marriage relation. Bill in equity by the girl's grandfather, to annul the marriage. *Held:* Bill granted. *Ross v. Bryant*, 217 Pac. 364 (Okla. 1923).

The general rule in this country is that a marriage valid where celebrated is valid everywhere, even though it would have been invalid if celebrated in the domicile of the parties. *In re* Chace, 26 R. I. 351, 58 Atl. 978 (1904); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897); Green v. McDowell, 242 S. W. 168 (Mo. 1922).

This rule is subject to the following exceptions:

(1) Where a marriage, contracted under foreign law is deemed generally in all the states to be contrary to the laws of nature, *e. g.*, marriage between uncle and niece in Russia was held void in Pennsylvania; Devine v. Rodgers, 109 Fed. 886 (1901). A marriage between Indians of a tribe which permitted polygamy held void in North Carolina. State v. Tachanatah, 64 N. C. 614 (1870).

(2) Where a statute expressly states that a certain marriage is void whether celebrated within or without the state. Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908); State v. Tutty, 41 Fed. 753 (1890).

(3) Where it is considered that a particular statute expresses so distinctive a public policy that it will be construed to have extra-territorial force, although other states, differing in their concepts of morality, allow such a marriage, *e. g.*, marriage between divorcee and his paramour in Maryland held void in Pennsylvania. *In re* Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1897). Marriage between white man and Indian held void in Washington. *In re* Wilbur, 8 Wash. 35, 35 Pac. 407 (1894).

Most courts properly endeavor to restrict the scope of this last exception, and will disregard, as immaterial, the intent to evade the law of the domicile. Harding v. Allen, 9 Me. 140 (1832); Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255 (1889). Generally statutes setting an age of consent are not construed extra-territorially. Heller v. Heller, 28 Chicago Legal News, 288 (1896). Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40 (1921). The

principal case would seem an unwarranted extension of the exception. If a marriage is valid in one state it should be valid everywhere. Application of such a restrictive doctrine in statutory construction would tend to produce uniformity in the law.

CONSTITUTIONAL LAW—SPENDING POWER OF CONGRESS—THE MATERNITY ACT.—The Sheppard-Towner Act of November 23, 1921, 42 Stat. at L. 224, c. 135, appropriates a sum of money, to be allotted and paid to such states as shall accept the provisions of the act, and co-operate with the states to reduce maternal and infant mortality and protect the health of mothers and infants. Two suits, one by a state, and one by an individual as a "taxpayer of the United States," were brought to enjoin enforcement of the act. *Held:* Dismissing both cases, that the court did not have jurisdiction. *Massachusetts v. Mellon, Secretary of the Treasury,* and *Frothingham v. Same,* 43 Sup. Ct. 597 (1923).

The Frothingham case was dismissed on the ground that a taxpayer, as such, has no standing to attack the constitutionality of a Congressional appropriation.

The interest of a taxpayer in municipal and state expenditures is generally held to be sufficiently direct to allow him to attack their constitutionality. Crampton v. Zabriskie, 101 U. S. 601 (1879); Roberts v. Bradfield, 12 D. C. App. 453 (1898); Mayor of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004 (1902). *Contra:* Miller v. Grandy, 13 Mich. 541 (1865); State *ex rel.* Bolens v. Frear, 148 Wis. 456, 134 N. W. 673 (1912). But the present case holds that the effect of a Congressional appropriation on a taxpayer is too remote and indirect to allow him to question its constitutionality. The suit by Massachusetts, insofar as it claimed to be in behalf of its citizens, was dismissed on the ground that a state may not intervene to protect its citizens from acts of the Federal Government.

The question involved in the merits of these cases as to the extent of the spending powers of Congress has never been passed on by the court, although it was much debated by Presidents and statesmen of earlier days. See 36 HARV. L. REV. 548. Appropriations for the Pacific Railroad and for the Panama Canal, when attacked, were justified under the commerce, postal and war powers. California v. Pacific R. R., 127 U. S. 1 (1887); Wilson v. Shaw, Secretary of the Treasury, 204 U. S. 24 (1907). But appropriations made for relief of victims of catastrophes, and to promote education, agriculture and science, seem never to have been questioned.

The present decision, although purely on jurisdictional grounds, is important, as its practical effect may well be to make impossible attacks on any appropriation of Congress. It is possible, however, that, if a case should be presented of which the court would assume jurisdiction, a decision of different effect would be rendered on the merits.

EQUITY—INJUNCTION—TRADE NAMES AND UNFAIR COMPETITION.—The plaintiff corporation or its predecessors had conducted a preparatory school under the name of the "Columbia Grammar School," since 1864. Since 1921

the defendant has been conducting a similar school in the same city under the name of the "Columbia Preparatory School." The plaintiff sought an injunction to restrain the defendant's use of "Columbia" in connection with "school" on the ground of unfair competition. *Held:* Injunction granted. *Columbia Grammar School v. Clauson*, 200 N. Y. S. 768, 120 Misc. Rep. 841 (1923).

It is well settled law, that, where the plaintiff corporation has an exclusive right to its name, any simulation thereof will be enjoined. Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142 (1895); Atlas Assur. Co. v. Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232 (1907); Finney's Orchestra v. Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198 (1910). Intentional fraud need not be shown in such cases. Holmes v. Holmes, 37 Conn. 278 (1870); Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665 (1901); Thaddeus Davids Co. v. Davids Manufacturing Co., 233 U. S. 461 (1914).

In the case of non-exclusive trade names, the courts have prescribed two grounds for the granting of injunctions: (1) Where there is an intent to get an unfair and fraudulent share of another's business, the court will generally grant an injunction on the ground of unfair competition. Singer Mfg. Co. v. Long, 8 App. Cas. 15, 52 L. J. Ch. 481 (Eng. 1882); American Brewing Co. v. St. Louis Brewing Co., 47 Mo. App. 14 (1891); Buzby v. Davis, 150 Fed. 275, 80 C. C. A. 163 (1906). (2) Where the effect of the defendant's action is to produce confusion in the public mind and consequent loss to the complainant, the tendency of the courts is to grant an injunction irrespective of intent. Martell v. St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116 (1909); Hartzler v. Goshen Churn Ladder Co., 55 Ind. App. 455 (1914); German-American Button Co. v. A. Heymsfeld, Inc., 170 N. Y. App. Div. 416, 156 N. Y. S. 223 (1915).

Some courts have carried the last principle even further and have awarded an injunction because of the confusion created in the public mind regardless of the damage. Bagby & Rivers Co. v. Rivers, 87 Md. 400, 40 Atl. 171 (1898); Y. W. C. A. Int. Com. v. Y. W. C. A., 194 Ill. 194 (1902); People v. Rose, 225 Ill. 496, 80 N. E. 293 (1907). In Potter v. Osgood, 79 Pa. Super. 397 (1922), the court went so far as to grant an injunction to restrain the defendant's use of a name resembling plaintiff's, solely on the ground that great confusion in plaintiff's correspondence had resulted therefrom. See 71 U. of Pa. L. Rev. 175 (Jan. 1923).

In contrast to that decision, the court in Munn Co. v. American Co., 83 N. J. Eq. 309, 91 Atl. 87 (1914), refused relief, holding that the basis of suits to enjoin the use of complainant's name should be the damage or possibility of damage to the individual complaining and not the damage or probability of damage to the public. But that case may be distinguished from the instant case in that the suit was not brought by the company whose name was simulated by the defendant, but rather by a third company which had conspired with the defendant to effect the original simulation.

It seems doubtful whether a modern court would require proof of absolute damage to the complainant so long as it can be shown that a name so similar to his has been adopted as to confuse the public.

EQUITY—UNDISCLOSED PRINCIPAL—CONTRACT UNDER SEAL.—By sealed instrument, the plaintiff's assignors agreed to sell, and one Begen agreed to buy, a certain piece of land. Plaintiff sought specific performance on the theory that the defendant was the undisclosed principal of Begen. *Held:* Decree granted. *Van Ingen v. Belmont*, 121 N. Y. Misc. 109, 200 N. Y. S. 847 (1923).

The inflexible rule of the common law was that an undisclosed principal could not be held on a sealed instrument, since he was not a party to the obligation. Huntington v. Knox, 7 Cush. 374 (Mass. 1851); Schaefer v. Henkel, 75 N. Y. 378 (1878); Badger v. Drake, 31 C. C. A. 378, 88 Fed. 48 (1898). This has long been held in Pennsylvania. Quigley v. De Hass, 82 Pa. 267 (1876).

The principal case is an advanced step in the slow process of breaking down this rule. No case has been found where a court has taken the initiative in departing from the old rule; and even where the legislature has shown the way, as in the principal case, the judiciary has been slow to follow.

In Texas, under a statute which in terms abolished the effect of a seal (McEachin's Civ. Stat., 1913, Art. 7092), it is held that nevertheless the undisclosed principal is not bound. Sanger v. Warren, 91 Tex. 472, 44 S. W. 477 (1898). Several years later, however, under a similar provision in the laws of Minnesota (Gen. Stat. 1913, sec. 5704), the courts of that state followed the literal import of the act and permitted suit against an undisclosed principal. Efta v. Swanson, 115 Minn. 373, 132 N. W. 335 (1911).

However, under statutes which do not pretend to abolish the seal entirely, the process has been still more slow. In Michigan, after the legislature had declared the seal to be merely presumptive evidence of consideration (Comp. Laws 1871, sec. 5947), the common law principle as to a suit against the undisclosed principal was held to have remained unchanged. Ferris v. Snow, 124 Mich. 559, 83 N. W. 374 (1900). The similar statute in New York (Civ. Code 840), was at first likewise interpreted. Stanton v. Granger, 125 N. Y. App. Div. 174, 109 N. Y. S. 134 (1908). However, as noted in 70 U. OF PA. L. REV. 58, the strictness of this rule broke down when, in Lagumis v. Gerard, 116 N. Y. Misc. 471, 190 N. Y. S. 207 (1921), the undisclosed principal was permitted to sue on a contract under seal. The next step was taken in Ressler v. Samphimor, 201 N. Y. App. Div. 344, 194 N. Y. S. 363 (1922), when an undisclosed principal was held. This case was rendered almost valueless on this point because the decision was placed primarily on the ground of obvious fraud on the part of the principal.

The principal case is stronger than Ressler v. Samphimor, *supra*, because there was no evidence of fraud; the court attaches weight to the fact that no seal was here necessary, and that therefore it might be disregarded. The statute is the element which makes the case depart from the common law rule.

EVIDENCE—ADMISSIBILITY OF COPY OF STATUTE OF ANOTHER STATE.—In an action to recover damages for the negligence of the defendant in New Jersey, the Municipal Court of Philadelphia refused to admit as proof of the law of New Jersey, a copy of a New Jersey statute, upon the ground that the only way to prove the law of another state was by calling a lawyer of that jurisdiction to testify. *Held:* Error. *Bayuk Bros., Inc., v. Wilson-Martin Co.*, 81 Pa. Sup. 195 (1923).

It is fundamental that the unwritten law of a foreign jurisdiction may be proved by parol, but a great diversity of judicial opinion has arisen as to the means of proving a foreign statute. The early English cases held that all foreign statutes were provable by parol. Gage v. Bulkeley, Ridgw. Cas. Temp. Hardw. 263 (Eng. 1744); Mostyn v. Fabrigas, Cowp. 161 (Eng. 1774). Although a few English cases of about the year 1800 required proof by a copy; Harford v. Morris, 2 Hagg. Cons. 423 (Eng. 1800); Millar v. Heinrick, 4 Camp. 155 (Eng. 1815); subsequent cases affirmed the view that expert testimony was admissible to prove a foreign statute. Sussex Peerage Case, 11 Cl. & F. 85 (Eng. 1844); Baron de Bode's Case, 8 Q. B. 208 (Eng. 1845). Despite the precedent set by the English cases, many courts of the new-born United States required either a copy of the statute with the great seal of the state, a copy proved to be a true copy, or a copy certified by an authorized official. Story, Conflict of Laws, § 641 (1883); Bailey v. McDowell, 2 Harr. 34 (Del. 1835); Isabella v. Pecot, 2 La. An. 387 (1847). Some states realizing that the mere language of a statute was insufficient to give a true conception of the law and that a knowledge of the exposition, interpretation and adjudication of the statute was necessary for its complete understanding, passed statutes allowing parol evidence. Others by statute only allowed parol evidence when accompanied by a copy of the statute to be explained; and some states still do not allow parol evidence. For statutes see Wigmore, Evidence, § 1271, Note 4 (1923).

Much to its credit, Pennsylvania as early as 1789 refused to be bound by the narrow rules of admissibility adopted by many of her sister states and began a course of judicial legislation which eventually accomplished the result later achieved by statutory enactment in other states. Thompson v. Musser, 1 Dallas 458 (Pa. 1789), held that a copy of a Virginia statute printed by a state printer was of sufficient authenticity to be admitted in evidence. This decision was followed in some jurisdictions and has been broadened to admit statute books "purporting to be printed by authority." Phillips v. Gregg, 10 Watts 158 (Pa. 1840); The Pawashick, 2 Low. 142 (D. C. 1872); Dawson v. Peterson, 110 Mich. 431, 68 N. W. 246 (1896). But the Pennsylvania decisions have gone farther and now admit parol evidence of statute law when the peculiar circumstances of the case justify. Phillips v. Gregg, 10 Watts 158 (Pa. 1840); Amer. Life Ins. & Trust Co. v. Rosenagle, 77 Pa. 507 (1875). With these decisions in mind the Municipal Court was clearly wrong in rejecting the copy of the New Jersey laws. It might demand expert testimony to explain the statute, had it been complicated and confused, but it should not have ruled that the only way to prove a foreign statute was by calling a lawyer of the jurisdiction to testify.

EVIDENCE—DECLARATION OF PORTER SEARCHING FOR LOST BAGGAGE—RES GESTAE.—The plaintiff, a passenger in the defendant's sleeping car, placed his handbag under his berth when he retired for the night. In the morning it was missing. He called the porter, who, while searching for it, stated that, when the Pullman Company let people go through the aisle continually as they had the previous night, he (the porter) could not be expected to keep a watch on the passengers. The trial court refused permission of the plaintiff to testify to what the porter had said. *Held:* The statement of the porter is admissible because it is a part of the *res gestae*. *Fisher v. The Pullman Co.*, 254 S. W. 114 (Mo. 1923).

The scope of the term "*res gestae*" is exceedingly vague. It is used by the courts in a number of different senses, and the resulting confusion has greatly embarrassed the leading writers and commentators. 3 Wigmore, evidence, 735; Bohlen, in 42 AMER. L. REG. (N. S.) 187; Hunter v. State, 40 N. J. L. 495 (1878). The phrase is used, on the one hand, in allowing the admission of verbal acts, words which constitute, accompany, or explain the fact or transaction in issue. Verbal acts, however, are not hearsay, but are original evidence, offered to prove, not the truth of what was said, but merely that it was said. 3 Wigmore, Evidence, 776; Lund v. Tyngsborough, 63 Mass. 36 (1851). Again, the phrase is used in referring to spontaneous exclamations, words which are the product of some startling event, such as an assault, or an accident. Alsever v. Minneapolis & St. Louis Railroad Co., 115 Iowa 338, 88 N. W. 841 (1902); People v. DelVermo, 192 N. Y. 470, 85 N. E. 690 (1908). These need not be spoken precisely at the moment the event occurs; Waters *et al.* v. Spokane International Railway Co., 58 Wash. 293, 108 Pac. 593 (1910); Roach v. Great Northern Railway Co., 133 Minn. 257, 158 N. W. 232 (1916); Eby v. Travelers' Insurance Co., 258 Pa. 525, 102 Atl. 209 (1917); but must be uttered so soon afterwards that the speaker has had no time to reflect on the effect of what he says. Savannah, etc., Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200 (1888); Norwood Trans. Co. v. Bickell, 207 Ala. 232, 92 So. 464 (1922).

There is a third use of the phrase which is unfortunate. Courts employ it in speaking of admissions of agents which are sought to be introduced against their principals. But whether or not such an admission should bind the principal is a matter of agency, depending on whether or not it was within the scope of the agent's authority to make the statement. According to the better authority this use of the phrase "*res gestae*" is inaccurate. Mechem, Agency, 1360; Thayer in 15 AMER. L. REV. 80; Adams Express Co. v. Berry and Whitmore Co., 35 App. D. C. 208; Drinker, *Res Gestae* in Pennsylvania, 91 (1905).

In the principal case, the statement of the porter is not a verbal act, because it is offered to prove the truth of the fact stated. It is not a spontaneous exclamation, since it is not the result of an event which would afford a circumstantial guaranty of its truth. It is admissible under the third and incorrect use of the phrase, though its admission should be properly placed upon the basis of agency law. It has been held that the statement of an agent of a carrier, made when a shipper demanded his baggage

of him, was admissible against his principal because it was within the scope of his authority. Morse v. Connecticut River R. R. Co., 72 Mass. 450 (1856); Levi & Co. v. M. K. & T. Ry. Co., 157 Mo. App. 536, 138 S. W. 699 (1911); Prew v. South Dakota Central Ry. Co., 37 S. D. 72, 156 N. W. 582 (1916). Similarly, statements made by Pullman porters have been admitted. Pullman Car Co. v. Gardner, 3 Penny. 78 (Pa. 1883); Hampton v. Pullman Palace Car Co., 42 Mo. App. 134 (1890); Hill v. Pullman Co., 188 Fed. 497 (C. C. A. 1911). While the principal case in its decision is in accord with the weight of authority, it is submitted that the admission of the evidence as part of the *res gestae* was contrary to the better reasoned opinions.

INSURANCE—AUTOMOBILES—SCOPE OF THEFT POLICY.—The owner of a car insured against theft, robbery and pilferage, left it at a garage for repairs. The proprietor took it out for his own purposes, and in returning struck a telegraph pole damaging the car. *Held:* This was both common law and statutory larceny so as to create liability in the insurer. *Van Vechten v. American Eagle Ins. Co.*, 200 N. Y. S. 514 (1923).

Common law larceny cannot be found here since the supposed thief was a bailee of the car. 17 R. C. L. 10; People v. Anderson, 14 Johns. (N. Y.) 294 (1817); see note in 88 A. S. R. 566. Further, there was no attempt to show an intent permanently to deprive the owner of his property, a necessary element of the offense. Parr v. Loder, 97 N. Y. App. Div. 218, 89 N. Y. S. 823 (1904); Smith v. State, 66 Tex. Cr. 246, 146 S. W. 547 (1912); State v. Boggs, 181 Ia. 358, 164 N. W. 759 (1917). See also 16 MICH. L. REV. 260 and 88 A. S. R. 606.

Unquestionably the offense was larceny under Section 1293 (a) of the New York Penal Code. "Any chauffeur or other person who without the consent of the owner shall take, use, operate or remove . . . from a garage, stable or other building . . . an automobile or other vehicle and operate or drive the same for his own profit, use or purpose, steals the same and is guilty of larceny."

The case then rests on the meaning of the term "theft" as used in an insurance policy. In general it is taken as the equivalent of common law larceny. 8 Words & Phrases 6938; 38 Cyc. 272. Therefore it does not cover a taking by a bailee: Gunn v. Globe & Rutgers Fire Ins. Co., 24 Ga. App. 615, 101 S. E. 691 (1919); Ledvinka v. Home Ins. Co. of N. Y., 139 Md. 434, 115 Atl. 596 (1921); nor a taking without the intent permanently to deprive the owner of his property. Stuht v. Md. M. C. Ins. Co., 90 Wash. 576, 156 Pac. 557 (1916); Miller v. Phoenix Ins. Co. of London, 221 Ill. App. 75 (1921); Weir v. Central National Fire Ins. Co., 194 Ia. 446, 189 N. W. 794 (1922). See Huddy on Automobiles, 5th Ed. (1919) 1045.

The popular conception of the term "larceny," even though it may be broader than technical common larceny, hardly goes so far as to include a mere temporary appropriation; even by construing the policy against the party drawing it up, it is not easy to find an intent to have the policy include losses arising from "joy-riding." Yet this is what one of the three concur-

ring justices would do, the other two not distinguishing between the common law and statutory offenses.

In Texas, where larceny under the code includes a taking by a conditional vendee in possession, the insurer has been held liable on a theft policy, when the facts did not constitute common law larceny. Security Ins. Co. v. Motor Co., 235 S. W. 617 (Tex. Civ. App. 1921). But the decision of the principal case marks a change in the attitude of the New York Courts. Previously that jurisdiction refused to apply the statutory definition to a policy where the taking was under a belief of right; Rush v. Boston Ins. Co., 88 Misc. (N. Y.) 48, 150 N. Y. S. 457 (1914), or even where fraud supplied the necessary intent to bring the case within the common law offense; Delafield v. London & Lancashire Fire Ins. Co., 164 N. Y. S. 221 (1917); a situation in which other states have seen fit to hold the insurer. Hill v. North River Ins. Co., 111 Kan. 225, 207 Pac. 205 (1922); Illinois Automobile Ins. Exchange v. Southern Motor Sales Co., 92 So. 429 (Ala. 1922).

NAVIGABLE WATERS—RIGHT OF LITTORAL OWNERS.—The plaintiff, a yacht club, and the defendant, a refinery, owned adjoining properties on a navigable arm of the sea. The defendant erected a wall across the tidal flats of his own property, which caused a large amount of sand to be deposited on the plaintiff's beach, thereby rendering plaintiff's pier and boathouse practically useless. The plaintiff sought a decree to prevent the maintenance of the wall. *Held:* Decree refused. *Jubilee Yacht Club v. Gulf Refining Co.*, 140 N. E. 280 (Mass. 1923).

By the common law rule, followed in many states, the shore between high and low water marks is the property of the state. Rex v. Smith, 2 Doug. 441 (Eng. 1780); Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665 (1907); Oregon v. Portland Gen. Elec. Co., 52 Oreg. 502, 95 Pac. 722, 98 Pac. 160 (1908). Massachusetts and some other states, however, give the littoral owner a title in fee to the land as far as low-water mark. Storer v. Freeman, 6 Mass. 435 (1810); East Haven v. Hemingway, 7 Conn. 186 (1828); Hart v. Hill, 1 Whart. 124 (Pa. 1836). Thus, the wall of the defendant extending to a point above low-water mark, was entirely upon land to which he had title in fee.

The court concludes that the defendant is justified in doing as it pleases on its own property regardless of possible incidental harm to its neighbors. This would be correct if the resulting injuries were minor in character and primarily matters of convenience, as in the cases cited by the court. But cases arise in which the injury is serious. Van Orsdol v. The B. C. R. & N. R. Co., 56 Iowa 470 (1881), (gravel washed upon plaintiff's land); Meeker v. East Orange, 77 N. J. L. 623 (1909), (well pumped dry by unreasonable use of adjoining well); Heath v. Minneapolis, St. P. & St. M. R. Co., 126 Minn. 470, 148 N. W. 311 (1914), (sand from fill washed upon plaintiff's land). That an equitable remedy will be given for threatened failure to furnish natural support to adjoining property is fundamental. Mears v. Dole, 135 Mass. 508 (1883); Barnes v. Waterbury, 82 Conn. 518, 74 Atl. 902 (1909); Freseman v. Purvis, 51 Pa. Super. 506 (1912).

A riparian owner may protect himself from the cutting of the current by building dikes and walls, but he may not divert the channel so that it cuts away the land of others. King v. Pagham, 8 Barn. & C. 355 (Eng. 1828); Freeland v. P. R. R. Co., 197 Pa. 529, 47 Atl. 745 (1901); Lexington & Eastern R. R. v. Boatright, 164 Ky. 374, 175 S. W. 648 (1915). See note in 6 L. R. A. (N. S.) 162. Since the land formed by gradual accretion belongs to the abutting owner there have been few cases where objection has been made to the cause of its formation. 71 U. OF PA. L. REV. 157 (1922-23). But there may well be cases where the formation of land is as objectionable as the destruction of it. In French v. The Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113 (1887), where a boom caused a shoal which blocked access to the plaintiff's hotel pier, an injunction issued to remove the boom.

In the principal case the plaintiff's pier, floats, runways, etc., had to be extended in order to reach deep water and it has suffered "great interference in the use of its property." The accession is as harmful and damaging to the plaintiff as an avulsion would be, and there is no reason why it should be protected from one and not from the other. Taking the view it does, the court naturally does not discuss the extent of the change in the channel or the possible continuance of the deposit, but it seems that the legal remedy would be inadequate and that an injunction should issue.

WILLS—CONSTRUCTION—CONTINGENT WILLS.—The testator, before setting out on a journey, made a will which contained the clause, "this in case that I meet with accident on this journey . . . etc." The testator returned safely, lived until a year later and died without revoking the will. *Held:* The will was not contingent and should be probated. *Merriman v. Schiel et al.*, 140 N. E. 600 (Ohio 1923).

It is well settled that the validity of a will may depend upon the fulfillment of a condition. Tarver v. Tarver, 9 Pet. (U. S.) 174 (1835); Damon v. Damon, 8 Allen, 192 (Mass. 1864). But the intention to make a will conditional must clearly appear from the language employed therein. Kelleher v. Kernan, 60 Md. 440 (1883); Likefield v. Likefield, 82 Ky. 589 (1885). The courts look with disfavor upon conditional wills and are not inclined to regard one as such where they can reasonably hold that the testator was merely expressing his reason for making it at that time. Eaton v. Brown, 103 U. S. 411 (1904); *In re* Forquer's Estate, 216 Pa. 331, 66 Atl. 93 (1907). The courts will go far in examining the surrounding circumstances of each case in order to construe away the condition. See Damon v. Damon, *supra*.

When the contemplated contingency did not take place the following expressions were held unconditional: "I am going on a journey and may never return. If I do not . . ." Eaton v. Brown, *supra;* "In case of a sudden and unexpected death . . . I give . . ." Skipwith v. Cabell, 19 Gratt. 758 (Va. 1870); "If any accident should happen to me that I die from home . . ." Likefield v. Likefield, *supra;* "In case of any serious accident . . . I direct . . ." *In re* Tinsley's Will, 187 Iowa 23, 174

N. W. 4 (1919); but "I am going to town . . . and I ain't feeling good and in case if i shouldend get back do as i say on this paper" was considered a condition. Morrow's Appeal, 116 Pa. 440, 9 Atl. 660 (1887); see *In re* Forquer's Estate, *supra*.

While the phraseology of the will in the principal case strongly suggests a condition, the decision reached by the court is in accord with the usual interpretation.