RECENT CASES

ANIMALS—INJURIES BY—RESPONSIBILITY OF OWNER.—LYMAN V. DALE, 171 S. W. (Mo.) 352.—Held, every Missouri mule has one kick.

Anyone keeping a wild animal does so at his own risk and is responsible for whatever damage it may do. *Phillips v. Garner,* 64 So. (Miss.) 735 (monkey); *Hays v. Miller,* 43 So. (Ala.) 818 (wolf). But the owner of a domestic animal is not responsible for damage it does, if it is rightfully in the place where the mischief was done, unless it is shown, not only that the animal was vicious, but also that the owner or keeper had knowledge of that fact. *Kitchens v. Elliott,* 114 Ala. 290; *Dix v. Somerset Coal Co.,* 217 Mass. 146; *Carney v. Donk Bros. Co.,* 169 Ill. App. 124; *Earl v. Van Alstine,* 8 Barb. (N. Y.) 630 (bees). Therefore the owner of a horse is not liable in damages to the first person that horse bites. *Reed v. Southern Ex. Co.,* 95 Ga. 108. So a dog has one bite. *Domm v. Hollenbeck,* 259 Ill. 382. This, however, is changed by statute in some states. See *Legault v. Malacker,* 156 Wis. 507. Likewise the owner of a cat is entitled to notice of its dangerous propensities. *McDonald v. Jodrey,* 8 Pa. Co. Ct. 142.

The principal case is correct and the concurring opinion of Lamm, J., is one of the finest examples of sustained judicial humor to be found in the books.

BILLS & NOTES—WRONGFUL TRANSFER—RIGHT OF ACTION.—PATTERSON & CO. V. PETERSON, 84 S. E. (GA.) 163.—*Held,* the wrongful transfer of a negotiable note to a bona fide purchaser, thereby cutting off the maker's valid defense, gives rise to a cause of action for the damages resulting therefrom.

For a discussion of this and kindred points, see comment in 24 Yale Law Journal 419, written before the principal case appeared.

BURGLARY—ELEMENTS OF OFFENSE—"FORCIBLE BREAKING."—GOINS ET AL. V. STATE, 107 N. E. (OHIO) 335.—*Held,* where any force, however slight, is required to effect an entrance into a building through a doorway partly open, such act constitutes a forcible breaking.

Breaking is any act of physical force by which an obstruction to entering is forcibly removed. *Metz v. State,* 46 Neb. 507. Though the word breaking implies the use of force, it is universally held that the slightest force will be sufficient. *State v. Lapoint,* 88 Atl. (Vt.) 523; *Bass v. State,* 1 Lea (Tenn.) 444; *State v. Snow,* 51 Atl. (Del.) 607; *Commonwealth v. Stephenson,* 8 Pick. (Mass.) 354. Entry through an opening which is an unusual place has been held to constitute a breaking. *Donahoo v. State,* 36 Ala. 281; *Knotts v. State,* 32 S. W. (Tex.) 532; *Marshall v. State,* 94 Ga. 589. It is a sufficient breaking to push open a door held by friction against the sill, or to raise a window which is completely closed but unlocked. *Parker v. State,* 38 S. W. (Tex.) 790;

May v. State, 40 Fla. 426; *State v. Henderson,* 212 Mo. 208. Where the outer door is open, merely opening an unlocked inner door is a breaking. *State v. Scripture,* 42 N. H. 485; *Rolland v. Commonwealth,* 85 Pa. 66. But entering by an unobstructed opening is not a breaking. *State v. Hart,* 77 S. E. (S. C.) 862; *Smith v. Commonwealth,* 128 S. W. (Ky.) 68. Where entry is made through a door or window partly open, there is a conflict. Leaving the door or window ajar, even to a slight degree, would constitute such an invitation that opening further would not amount to a burglarious breaking. May's Criminal Law, p. 244. This is the law in England. *Rex v. Smith,* 1 Moody 178; *Rex v. Hyams,* 7 C. & P. 441. And it is the weight of authority in this country. *Commonwealth v. Strupney,* 105 Mass. 508; *Collins v. Commonwealth,* 146 Ky. 698. The holding of the principal case lays down the opposite rule, namely, that where entry is made through a partly open window or door by pushing it further open, there is a sufficient breaking, and is supported by the more recent decisions. *Claiborn v. State,* 83 S. W. (Tenn.) 352; *People v. White,* 153 Mich. 617, *State v. Sorenson,* 138 N. W. (Iowa) 411; *State v. Lapoint, supra.* The decision of the principal case is logical and reasonable, and is in accord with the later burglary statutes which require no breaking at all.

COMMERCE—INTERSTATE COMMERCE—WHAT CONSTITUTES.—MCAULIFF V. NEW YORK CENT. & H. R. R. Co., 150 N. Y. S. 512. Plaintiff, a conductor of a freight train, took it from the New Jersey terminal into New York and the next day was employed in carrying freight between two New York points. The following day, while returning to the New Jersey terminal he was injured. In a suit for damages under the Federal Employers' Liability Act, claiming that at the time of his injury he was engaged in interstate commerce, *held,* that plaintiff was not so engaged when he was injured. Stapleton and Rich, JJ., *dissenting.*

To bring the employee within the Act the employer must be engaged in interstate commerce and the employee must be therein employed. *St. Louis R. Co. v. Seale,* 229 U. S. 156; *Pedasen v. D. L. & W. R. Co.,* 229 U. S. 146. The acts of a fireman in preparing his engine for a trip in interstate commerce have been held to bring him within the Act. *N. C. R. Co. v. Zachary,* 232 U. S. 248. An employee injured while repairing a refrigerator car, used indiscriminately in interstate and intrastate commerce, comes within the Act. *N. P. R. Co. v. Maerkl,* 198 Fed. 1. A repairer of a switch used for both interstate and intrastate commerce is within the Act. *Calasurdo v. Cent. R. of N. J.,* 192 Fed. 901. So also a servant who was acting as a watchman or caretaker of a "dead" engine, which was being hauled by an interstate train from one state to another. *Atl. Coast Line R. Co. v. Jones,* 63 So. 693. Likewise a fireman under orders to take transportation to relieve a fireman on an interstate commerce train. *Lamphere v. Oregon R. & Nav. Co.,* 196 Fed. 336. The courts construe the Act as broadly and liberally as possible. *Behrens v. Ill. Cent. R. Co.,* 192 Fed. 581. The principle which the decisions lay down is that if the effect of the injury or death of the employee is to directly hinder, delay or impede interstate commerce, the employee is

brought within the provisions of the Act. This case is on the border line, but from the evidence seems sound.

CONTRACTS—ASSIGNMENT—SALE ON CREDIT—PERSONAL TRUST AND CONFIDENCE.—MAGNOLIA PETROLEUM CO. v. HAVOLINE AUTO SUPPLY CO., 172 S. W. (TEX.) 759.—*Held,* that a contract to sell on credit such quantity of gasoline as the obligee might need for his business, subject to maximum and minimum limitations, is non-assignable, as involving personal credit, trust, and confidence.

It is agreed, wherever the question has been squarely presented, that a contractual obligation is never assignable in such sense as to enable the assignor to divest himself of his original liability. *Martin v. Orndorff,* 22 Iowa 504; *Currier v. Taylor,* 19 N. H. 189. It follows that a vendor on credit would still have recourse to the original vendee after an assignment by the latter. Nevertheless it has been usual not to allow an assignment of the rights of a purchaser on credit. *Demarest v. Dunton Lumber Co.,* 88 C. C. A. (U. S.) 310; *Sims v. Cordele Ice Co.,* 119 Ga., 597; *Hardy Implement Co. v. Iron Works,* 129 Mo. 222. Some of these cases might better have gone upon the insolvency of the original purchaser and the consequent right of the vendor to repudiate. *Demarest v. Dunton Lumber Co., supra.* Indeed in such cases an assignment has sometimes been allowed, conditioned upon an undertaking of immediate payment by the assignee, on the questionable assumption that a cash sale involves no relation of trust and confidence. *In re Niagara Radiator Co.,* 164 Fed. 102. A contract right is assignable unless a relation of personal confidence is involved on the part of obligor toward obligee. *Bonding & Trust Co. v. R. R. Co.,* 60 C. C. A. (U. S.) 52. Often the right is non-assignable because inseparable from a duty of the assignor which involves personal confidence. *R. R. Co. v. Bedgood,* 116 Ga. 945. Cf. *City of Philadelphia v. Lockhardt,* 73 Pa. St. 211. But sometimes a confidential relationship is involved in the intrinsic nature of the right itself, irrespective of the admissibility of a substituted performance of the assignor's duty. *Redheffer v. Leathe,* 15 Mo. App. 12 (contract of hiring); *Glass Co. v. Land Co.,* 35 Ind. App. 45 (contract to supply gas to meet needs of neighboring factory). This, on principle, is eminently true of rights involving the exercise of an option. *McQueen v. Chouteau,* 20 Mo. 222 (option to select). This is well recognized in the case of an undertaking of guaranty for such advances as should be made by the obligee. *Friedlander v. Plate-Glass Insurance Co.,* 38 App. Div. (N. Y.) 146; *Schoonover v. Osborne,* 108 Iowa 453. By the weight of authority however, rights involving options are assignable. *Rice v. Gibbs,* 33 Neb. 460 (option to purchase); *Horner v. Wood,* 23 N. Y. 350 (option to extend continuance of contract); *R. R. Co. v. Gluck,* 31 Tex. Civ. App. 211 (option as to quantity); *Oil & Mineral Co. v. Babb.,* 122 La. 415 (option as to quantity). *Contra, R. R. v. Bedgood* and *Demarest v. Dunton Lumber Co., supra* (option as to quantity). The principal case ignores the question last raised; its *ratio decidendi,* while supported by authorities, overlooks the distinction between an admissible substitution of performance and an inadmissible assignment of a liability.

DOMICILE—DOMICILE OF CHOICE—INTENT.—BAKER ET AL. V. BAKER, ECCLES & CO. ET AL., 173 S. W. (KY.) 109.—*Held,* where a person has removed to a place with an intention of remaining there indefinitely, that becomes his domicile, despite an indefinite "floating intention" to return to his place of former abode at some time.

Most of the cases hold that to effect a change of domicile there must be residence in the new location, with an intention to remain there. *Eisele v. Oddie,* 128 Fed. 941; *Cabot v. City of Boston,* 66 Mass. 52. If there is an intention to return at a definite future time, the former place continues to be the domicile. *Collins v. City of Ashland,* 112 Fed. 175. The difficulty in the cases, however, comes when there is a change of actual residence, but no *animus manendi. In re Titterington's Estate,* 130 Iowa 356, held that domicile could not be defeated by mere vague intent to return at some future time. *Contra, State v. Snyder,* 182 Mo. 462. An extreme case holding that intent does not control is that of *Cruger v. Phelps,* 47 N. Y. Supp. 61, where a native of New York resided in Europe with his family the greater part of the time for 50 years before his death, and stated that he preferred Europe and intended to make it his home in the future. Despite these declarations, it was held New York continued to be his domicile. Some cases make the question of intention decisive. *Maslin's Ex'rs v. Hiett,* 37 W. Va. 15. The rule of the principal case seems to be in accord with the weight of the decided cases and clearly correct in principle, in that it gives effect to the legal results of acts rather than the legal results intended in defiance of them.

EXECUTORS AND ADMINISTRATORS—PRIORITIES OF CLAIMS—FUNERAL EXPENSES—MONUMENTS.—IN RE LESTER'S ESTATE, 150 N. W. (IOWA) 1033.—*Held,* under a statute providing that as soon as the executor or administrator has sufficient means he shall pay charges of deceased's last sickness and the funeral expenses,—the expense of a tombstone may be allowed after paying the expenses of the last sickness although the estate is insolvent. It is not strictly a funeral expense but the court can in its sound discretion so regard it.

The general rule is that expenses for tombstones are proper as part of the funeral expenses. *Pierce v. Fulmer,* 165 Ala. 344; *Phillipps v. Duckett,* 112 Ill. App. 587. Such an allowance is sometimes provided for by statute. Kentucky Statutes, Sec. 3885. But the expenditure for such a purpose must be reasonable considering all the circumstances of the deceased. *In re Koppikus' Estate,* 1 Cal. App. 84; *Pease v. Christman, supra.* It has been held on the other hand, however, that the cost of a tombstone never can be included under funeral expenses. *Hisem v. Lemel's Curator,* 19 La. 425. Where the estate is insolvent, as in the principal case, the courts differ in allowing such claims. In England the rule is that no more than is necessary should be allowed and some courts have fixed an arbitrary maximum at £10 for all the funeral expenses. *East India Co. v. Skinner, Comb.* 342. The American cases, as a rule, hold that the Probate Court may allow a reasonable expenditure for a tombstone even where the estate is insolvent. *Fairman's*

Appeal, 30 Conn. 205; *Ferrier v. Myrick,* 41 N. Y. 315; *Crapo v. Armstrong,* 61 Iowa 697. But such an allowance was refused in *Little v. Williams,* 7 Ill. App. 67. The principal case seems to be in accord with the better American view in leaving the matter to the discretion of the court having supervision of the settlement of the estate.

HOMICIDE—CAUSES OF DEATH.—PEOPLE V. KANE, 107 N. E. (N. Y.) 655.—*Held,* where defendant's shooting deceased caused a miscarriage, followed by blood poisoning, from which she died, it is no defense that medical negligence intervened to cause death, unless such negligence was the sole cause of the death.

Notwithstanding the numerous conflicting *dicta* found in the reports, the actual adjudications in this country are overwhelmingly in accord with the principal case. *People v. Lewis,* 124 Cal. 551; *Thompson v. L. & N. R. R. Co.,* 91 Ala. 496. One inflicting an unlawful bodily injury is accountable for all consequences that flow from the injury in natural sequence. *Taylor v. State,* 41 Tex. Cr. R. 564. And medical attention, though erroneous and negligent, is in natural sequence. *Perdue v. State,* 69 S. E. (Ga.) 184. Although the chain of causation is broken by the intervention of an independent wrongdoer or disease, the original injury does not necessarily cease to operate as a cause of death ensuing within a year and a day from the inflicting thereof. *People v. Lewis, supra.* To excuse the original wrongdoer, it must appear that the intervening independent agency was the sole cause; that is, that at the moment of death the original injury was not contributing at all to the fact of the dying. *Hollywood v. State,* 120 Pac. (Wyo.) 471; *State v. Foote,* 58 S. C. 218; *Thompson v. R. R. Co., supra; Wagner v. Woolsey,* 48 Tenn. 235. And the presumption on this point is *prima facie* against the accused. *State v. Morphy,* 33 Iowa 270; *Loew v. State,* 60 Wis. 559. But the accused may in each case show to the jury the extent of the wound inflicted by him to aid them in their determination. *Wilson v. State,* 24 S. W. (Tex.) 409. In Texas, by statute, the general rule as to intervening agencies does not apply where the intervening agency consists of improper treatment. *Penal Code,* Art. 652. In a few jurisdictions the rule of the principal case is not followed, on the theory that its application involves the punishing of mere intent and the absurdity of having more than one murder of the same man. *State v. Wood,* 53 Vt. 560; *State v. Angelina,* 80 S. E. (W. Va.) 141. But this view overlooks the point that the homicide does not occur as a fact until death ensues within a year and a day, no matter how many persons may have done wrongful acts which contribute as causes of the death. *Com. v. Macloon,* 101 Mass. 1; *Robbins v. State,* 8 Oh. St. 131.

HUSBAND AND WIFE—"DESERTION."—WELCH V. STATE, 67 So. (FLA.) 224.—*Held,* that the word "desertion" has a broader meaning than mere physical separation, and that under the title "An act to provide punishment for the desertion of wife or child," the legislature may punish the withholding of means of support from such dependents.

The term desertion as used in reference to husband and wife is generally held to contemplate a voluntary separation of one party from the other, without justification, with the intention of not returning. *Williams v. Williams,* 130 N. Y. 193; *Kikell v. Kikell,* 25 Nebr. 256, 41 N. W. 180. "Wilful desertion is the voluntary separation of one of the married parties from the other with the intent to desert." Rev. Codes of N. Dak. 1905, Sec. 4052. The word "desertion" as used in connection with the marital relation is synonymous with "abandonment." *People v. Crouse,* 83 N. Y. Supp. 812; *State v. Weber,* 48 Mo. App. 500, 504. Absence is desertion, as the term "desertion" is used making such act a ground for divorce. *Elzas v. Elzas,* 171 Ill. 632, 49 N. E. 717. By the weight of authority the refusal of sexual intercourse does not constitute desertion. *Fritz v. Fritz,* 138 Ill. 436; *Southwick v. Southwick,* 97 Mass. 327; *Segelbaum v. Segelbaum,* 39 Minn. 258; *Contra, Whitfield v. Whitfield,* 89 Ga. 471; *Evans v. Evans,* 93 Ky. 510; *Rector v. Rector,* 78 N. J. Eq. 386. Upon the point involved in the principal case what little authority there is seems to support a contrary rule, namely, that non-support is not sufficient to constitute desertion. *Proudlove v. Proudlove,* 46 Atl. (N. J.) 951; *Howell v. Howell,* 64 N. J. Eq. 191; *Bennett v. Bennett,* 43 Conn. 413; *Hammond v. Hammond,* 15 R. I. 40. To hold that non-support is desertion, is to add a meaning to the latter term which does not seem justified by its use in either ordinary or legal phraseology.

INSURANCE—REVIVER AFTER TEMPORARY BREACH OF CONDITION.—COTTINGHAM V. MARYLAND MOTOR CAR INS. CO., 84 S. E. (N. C.) 274.—*Held,* that a chattel mortgage given on the insured property merely suspended the policy and the removal of the incumbrance revived the insurance, even though the policy provided that it should be "void . . . if the property hereby insured be or become incumbered by a chattel mortgage."

The court made no attempt to review all the conflicting decisions on this question nor to reconcile them for the reason that it would have been impossible. In the case of a warranty the weight of authority seems to be that a breach *ipso facto* avoids the policy, though the breach be but temporary in character, and that there can be no reviver except by consent of the insurer; that is, there must be a new contract. *Kyte v. Com. Union Ass. Co.,* 149 Mass. 116; *Fernandez v. Great Western Ins. Co.,* 48 N. Y. 571. Logically the breach of a condition should have the same effect as a breach of warranty but the weight of authority does not so consider it. The cases allowing a reviver where there is no provision in the policy against change of interest by mortgage may perhaps be distinguished though the same reasons are given in both. *Worthing v. Bearse,* 12 Allen 382; *Lane v. Maine Mut. Fire Ins. Co.,* 12 Me. 44. The confusion is made worse by the fact that the same courts have arrived at different conclusions in dealing with different conditions and sometimes with the same condition. Compare *Tompkins v. Hartford Fire Ins. Co.,* 49 N. Y. Supp. 184 with the *dictum* in *Gray v. Guardian Ass. Co.,* 31 N. Y. Supp. 237; *Ring v. Phoenix Assur. Co.,* 145 Mass. 426 (holding that vacancy merely suspended the policy); *Hinckly v. Germania Fire Ins. Co.,* 140 Mass. 38 (holding that temporary failure to renew license for a

billiard table as provided did not avoid the policy); *Kyte v. Com. Union Ass. Co., supra; Hill v. Middlesex Mut. Assur. Co.*, 174 Mass. 542 (holding that increase of risk absolutely forfeited the policy). The courts of Illinois have often and consistently held that a breach of condition merely suspends the policy. *Trader's Ins. Co. v. Catlin*, 163 Ill. 256 (increase of risk); *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599 (other insurance); *Insurance Co. of N. A. v. Garland*, 108 Ill. 220 (unoccupancy); *Crete Farmers Mut. Twp. Ins. Co. v. Miller*, 70 Ill. App. 599 (unauthorized use of the premises). For a review of the authorities see *Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.*, 10 L. R. A. (N. S.) 736, 56 S. E. (S. C.) 654. The cases allowing reviver of a policy after a temporary breach of condition have stretched the rule that policies of insurance are construed in favor of the insured. The only remedy for the conflicting state of the law on practically every question in insurance is a uniform statute such as the Sales Act and the Negotiable Instruments Law.

JUDGMENT—COLLATERAL ATTACK—ERROR—FRAUD.—YOUNG V. WILEY, 107 N. E. (IND.) 278.—*Held*, a judgment of a court of competent jurisdiction cannot be collaterally impeached because erroneous, though it may be impeached for want of jurisdiction or because it was procured through fraud.

A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree. *17 Am. & Eng. Encyc. of Law 848.* Errors of law which might be corrected on appeal by proper proceedings cannot be made the ground of collateral attack on a judgment. *Jones v. Edeman*, 223 Mo. 312. Whenever judgment is absolutely void, it is subject to collateral attack. *Barnett v. Bauer Cooperage Co.*, 145 Ky. 163. A judgment or decree rendered without jurisdiction is absolutely void. *Buffum v. Ramsdell*, 55 Me. 252; *Denk v. Fiel*, 249 Ill. 424. The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion was right or wrong. *Board of Comm. of Lake County v. Platt*, 79 Fed. 567. And where the court has jurisdiction to enter a default, a judgment on default is as conclusive against collateral attack as any other form of judgment. *Ruppin v. McLachlen*, 122 Iowa 343. In order to make a judgment void, the want of jurisdiction over the parties or the subject-matter must appear on the face of the judgment record. *Hahn v. Kelly*, 34 Cal. 391. But a few courts hold that the recital of the record does not impart absolute verity and may be controverted by evidence *aliunde*. *Ferguson v. Crawford*, 86 N. Y. 609. Where court had jurisdiction of the parties and subject-matter, it is well settled that the judgment is not void, though erroneous, and cannot be impeached collaterally. *Smith v. Schlink*, 44 Colo. 200; *Torey v. Bruner*, 60 Fla. 365. A judgment will not be set aside in a collateral proceeding because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. *United States v. Throck-*

morton, 98 U. S. 61. Nor could a judgment be questioned collaterally for fraud at common law. *Nelson v. Felsing,* 32 App. D. C. 420. However, equity will grant relief by setting aside a judgment obtained by fraud, where the fraud was extrinsic to the matter on which the judgment was rendered. *French v. Raymond,* 82 Vt. 156; *Graves v. Graves,* 132 Iowa 199.

WITNESSES—IMPEACHMENT—RIGHT TO IMPEACH.—PEOPLE V. DEMARTINI, 107 N. E. (N. Y.) 501.—Where, in a prosecution for homicide, the main question was defendant's identity, and the state introduced witnesses on such issue whose testimony was destroyed on cross-examination, although this testimony was a surprise, it was *held* error to permit the state to impeach them by proving that they had identified accused as the murderer both at the police station and in their testimony before the coroner. Miller and Cardozo, JJ., *dissenting.*

As a general rule a party may not introduce evidence to prove his own witness at different times made declarations at variance with his testimony. *Cox v. Eayres,* 55 Vt. 24; *Chamberlain v. Sands, 27* Me. 458. But most of the cases make an exception where a party is surprised by the testimony of his witness. *Moore v. Railroad Co.,* 59 Miss. 243; *Harlburt v. Bellows,* 50 N. H. 105. In Massachusetts, however, a rigid exclusionary rule was adhered to (*Adams v. Wheeler,* 13 Gray 67), until the rule was changed by statute. Revised Laws, 1902, c. 175 sec. 24. In Connecticut it is held that it is within the court's discretion to allow the party to interrogate his witness as to former inconsistent statements. *Appeal of Carpenter,* 74 Conn. 431. But a third party can not be called for this purpose. *Wheeler v. Thomas,* 67 Conn. 577. In *Ballard v. Pearsall,* 53 N. Y. 230, there was a ruling similar to the last case. An exception on the ground of surprise was conceded in *Coulter v. Express Co.,* 56 N. Y. 585, but the New York law was definitely settled in accord with the ruling of the principal case in *Becker v. Koch,* 104 N. Y. 394. The weight of authority is contrary to this view, some cases holding that a party may impeach his witness in any way except as to bad character. *White v. State,* 10 Tex. App. 381; *Owens v. State,* 46 Tex. Cr. R. 14. The theory of the cases that admit such testimony qualifiedly is differently expressed. New York goes on the theory of "probing recollection." *Ballard v. Pearsall, supra.* But in general it seems to be because the rule of absolute exclusion works badly, and in the states where the rule has not been relaxed by judicial construction it has been changed by statute.