RECENT CASES

ACCORD AND SATISFACTION—EXECUTORY ACCORD—PLEADING AN ACCORD AS A BAR TO THE ORIGINAL ACTION.—REILLY V. BARRETT (1917) 115 N. E. (N. Y.) 453.—As a bar to an action to recover damages for personal injuries, the defendant pleaded an agreement with the plaintiff whereby the latter agreed to receive $200 in full satisfaction. Tender of the money and the plaintiff's refusal to accept it were alleged, but there was no allegation that the defendant's promise was to be received in satisfaction of the claim. *Held,* that this was a mere executory accord, not followed by satisfaction, and therefore no bar to the action.

The rule is that an accord without satisfaction is insufficient to bar the original action. *Schwartzfager v. Pittsburg, etc., Ry.* (1913) 238 Pa. St. 158; *Kennedy v. Maddox* (1914) 15 Ga. App. 684. A consideration is necessary to render an accord and satisfaction valid; but the amount of satisfaction is immaterial. *Decker v. Smith* (1916) 88 N. J. L. 630; *Beebe v. Worth* (1914) 146 N. Y. S. 146. In the case of a liquidated claim, payment of a less sum is not a consideration; where the claim is unliquidated, the acceptance of any sum is an accord and satisfaction of the whole claim. *Nassoiy v. Tomlinson* (1896) 148 N. Y. 326; *Hand Lumber Co. v. Hall* (1906) 147 Ala. 561. If the agreement is to accept a promise in satisfaction, without requiring performance of that promise, the promise itself is a good satisfaction. *Manley v. Life Ins. Co.* (1906) 78 Vt. 331; *Bell v. Pitman* (1911) 143 Ky. 521. To be available as a defence, accord and satisfaction must be specially pleaded. *Covell v. Carpenter* (1902) 24 R. I. 1; *Fogil v. Boody* (1903) 76 Conn. 194. It can not be set up under the general issue or a plea of not guilty. *Gosset v. R. R.* (1905) 115 Tenn. 376. The plea must allege that the matter was accepted in satisfaction; mere readiness to perform the accord, or a tender of performance, or even a part performance, will not do. *Hearn v. Kiehl* (1861) 2 Wright (Pa.) 147; *Cooke v. McAdoo* (1914) 85 N. J. L. 692; *Hancock v. Yaden* (1889) 121 Ind. 366. When pleaded, accord and satisfaction must be proved as any other agreement. *Phillips v. Graham Co.* (1915) 17 Ariz. 208; *Meyers v. Grantham* (1916) 187 S. W. (Tex.) 532. If pleaded by the defendant, the burden is upon him to show every element necessary to constitute it. *La Plata County v. Durnell* (1902) 17 Col. App. 85. Where the plaintiff in making out his own case is compelled to get rid of an accord, his evidence should go far enough to make out at least a *prima facie* case against it. *Browning v. Crouse* (1880) 43 Mich. 489. The earlier courts said that no action would lie for breach of an executory accord. *Lynn v. Bruce* (1794) 2 H. Bl. 317. Though recognizing that until executed an accord can be no bar to an existing action, the courts of to-day treat an executory accord as a bilateral contract for the breach of which an action may be brought.

G. E. W.

BANKRUPTCY—DISCHARGE—COMPOSITION—NEW PROMISE.—HERRINGTON v. DAVITT ET AL. (1917) 115 N. E. (N. Y.) 476.—The defendant's testator having been discharged as a bankrupt under the Federal Act of 1898 (c. 541, 30 St. 544) a compromise was effected under the provisions of the act. The plaintiff accepted this compromise. Later the defendant's testator promised to pay the plaintiff the balance as soon as he sold his mill. *Held,* that a discharge in bankruptcy through a composition was not a voluntary extinguishment of the debt and that a subsequent promise was binding.

A subsequent promise to pay a debt voluntarily discharged is not binding for want of legal consideration. *Stafford v. Bacon* (1841) 1 Hill (N. Y.) 532; (erroneously reported in 25 Wend. (N. Y.) 384); *Warren v. Whitney* (1845) 24 Me. 561; *Evans v. Bell* (1885) 15 Lea (Tenn.) 569. Yet a subsequent promise to pay a debt discharged by operation of law is binding. *McNair v. Gilbert* (1829) 3 Wend. (N. Y.) 344; *Wait v. Morris* (1831) 6 Wend. (N. Y.) 394; *Fitzgerald v. Alexander* (1838) 19 Wend. (N. Y.) 402; *Dusenbury v. Hoyt* (1873) 53 N. Y. 521; Code of Civil Procedure of N. Y., sec. 481. A discharge in bankruptcy through a composition is not a voluntary release or extinguishment of the debt. *Cohen v. Lachenmaier* (1912) 147 Wis. 649; *In matter Merriman's Estate* (1878) 44 Conn. 587; *Guild v. Butler* (1877) 122 Mass. 498; *contra, Taylor v. Skiles* (1904) 113 Tenn. 288 (authorities cited not in point). Hence it is submitted that the principal case is correct and seems to be the first in New York to sustain this proposition.

F. C. H.

CARRIERS—BURIAL OF BODY AT SEA—DUTY TO NEXT OF KIN.—FINLEY v. ATLANTIC TRANSPORT CO., LTD. (1917) 115 N. E. (N. Y.) 715.—A passenger on defendant's steamship died five days before the ship arrived at New York. The body was embalmed and put into such condition that it could have been carried to New York, but the day before reaching port the body was buried at sea. *Held,* that it was the common-law duty of the steamship company to transport the body to New York and deliver it for burial to the parties entitled to its possession, and for breach of such duty a son had a cause of action. Collin, J., *dissenting.*

The courts have frequently declared that a dead body is not property or a subject of property rights. *In re Wong Yung Quy* (1880) 6 Sawy. (U. S.) 442. Thus no writ or action of replevin will lie for a dead body, nor is a dead body subject to a lien for the price of goods furnished during life, or for the value of the casket enclosing the remains. *Guthrie v. Weaver* (1876) 1 Mo. App. 136; *Reg. v. Fox* (1841) 2 Q. B. 246; *Keyes v. Konkel* (1899) 119 Mich. 550. It is well settled, however, that there is a legal right to possession and control for purposes of burial and for preserving the remains inviolate for breach of which an action lies. *Williams v. Williams* (1882) 20 Ch. D. 659; *Larson v. Chase* (1891) 47 Minn. 307; *Palenzke v. Bruning* (1900) 98 Ill. App. 644; *Pierce v. Proprietors of Cemetery* (1872) 10 R. I. 227. The right in question is held to be in the next of kin. *Larson v. Chase, supra; Darcy v. Presbyterian Hospital* (1911) 202 N. Y. 259. Under ordinary circumstances,

burial at sea with the custom in such matters discharges the duty which the law imposes. But under the novel circumstances of the principal case, in the light of changing custom, due to improvements in embalming and in the rapidity of transportation, it is submitted that the decision is correct.

E. J. M.

CARRIERS—NON-DELIVERY—RESTRAINT OF PRINCES.—NORTH GERMAN LLOYD CLAIMANT OF KRONPRINZESSIN CECILIE v. GUARANTY TRUST CO. OF N. Y. AND NATIONAL CITY BANK OF N. Y. (1917) 37 SUP. CT. REP. 490.—The defendant contracted with the plaintiffs respectively to deliver shipments of gold at London *via* Plymouth and at Paris *via* Cherbourg; but was not to be liable for loss by "arrest and restraint of princes, rulers or people." When still two days from Plymouth the master received a telegram from the ship's owners at Bremen, stating, "War has broken out with England, France and Russia. Turn back to New York." The master turned back, putting into Bar Harbor, Me. The owners knew the message to be false, but the master did not. *Held,* that this was not a breach of defendant's contract. Pitney and Clarke, JJ., *dissenting.*

For a discussion of the principles involved in this case, see (1917) 26 YALE LAW JOURNAL, 247.

F. W. D.

CHARITABLE INSTITUTIONS—LIABILITY FOR TORTS.—LOEFFLER v. TRUSTEES OF SHEPPARD AND ENOCH PRATT HOSPITAL (1917) 100 ATL. (MD.) 301.—The plaintiff, a fireman properly engaged in extinguishing a fire, was injured because of the defective condition of a fire-escape in the building of the defendant, a charitable institution. *Held,* that the doctrine of *respondeat superior* does not apply in the case of charitable institutions whose funds are held in trust for special purposes.

The general rule has been to exempt charitable institutions from liability for the torts of their agents and servants. *Overholser v. National Home for Disabled Soldiers* (1903) 68 Oh. St. 236; *McDonald v. Massachusetts General Hospital* (1876) 120 Mass 432. Some courts have given as their reason for so holding that the funds should not be dissipated in giving damages since the object of the institution is a charitable one. *Jensen v. Maine Eye and Ear Infirmary* (1912) 107 Me. 408. This reason does not prevail in actions for breach of contract, as a charitable institution is liable in damages in such case. Another reason given for refusing to apply the doctrine of *respondeat superior* is that the work is not for the benefit of the institution, but for the benefit of its inmates. *Farrigan v. Pevear* (1906) 193 Mass. 147. This seems to be an inadequate reason; for in most cases it is not necessary that a principal be benefited by the servant's acts to be held liable. If the act is in the course of the servant's employment, the principal is answerable. Huffcut, *Agency,* p. 158. Still another reason given by some courts is that in cases where the person injured was seeking to obtain a benefit from the charitable institution he impliedly assumed the risk of injury due to negligence.

This of course is a fiction. These courts really hold that the plaintiff cannot recover whether he assumed the risk or not. It is submitted that the better rule is to allow the plaintiff to recover, so as to induce the defendant to use greater care in the management of its servants and in the carrying out the purposes of the trust. A recent tendency of some courts has been to give relief at the expense of charitable institutions. *Hordern v. Salvation Army* (1910) 199 N. Y. 233 (defective runway); *McInerny v. St. Luke's Hospital Association of Duluth* (1913) 122 Minn. 10 (dangerous machinery); *St. Paul's Sanitorium v. Williamson* (1914) 164 S. W. (Tex.) 36 (hiring unskilful nurse); *Tucker v. Mobile Infirmary Association* (1915) 191 Ala. 572.

F. L. McC.

CHOSES IN ACTION—NATURE OF PARTIAL ASSIGNEE'S INTEREST—EFFECT ON ASSIGNOR'S INTEREST OF JUDGMENT IN FAVOR OF PARTIAL ASSIGNEE.—CARVILL V. MIRROR FILMS, INC. (1917) 163 N. Y. S. 268.—An employee discharged in breach of his contract assigned his claim for damages accruing up to a certain date, reserving to himself all damages accruing after that period. The partial assignee sued alone, and recovered against the employer. The assignor now sues the latter who sets up as a defense the partial assignee's previous recovery. *Held,* that the assignor is entitled to recover.

It may not be inappropriate to notice that the word interest is used here to designate the aggregate of one's rights, privileges, powers and immunities. See Professor Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16. The interest of the partial assignee was not protected at common law, but only in equity, as the device of the power of attorney was not applicable to the partial alienation of a chose in action. See Ames, *Cases on Trusts,* (2d ed.) pp. 63, 64. In many code states, however, a court of law will now enforce the partial assignee's claim against the debtor. The result is that the partial assignee's interest is no longer exclusively equitable, but concurrently legal and equitable. See Professor Cook, Alienability of Choses in Action (1917) 30 HARV. L. REV. 449, 455; *Dickinson v. Tysen* (1913) 209 N. Y. 395, 397; *School District v. Edwards* (1879) 46 Wis. 150; *Guagler v. Chicago, Maud P. S. Ry. Co.* (1912) 197 Fed. 79. Most jurisdictions require that the assignor be joined as a party to the suit against the debtor. This rule is merely one of procedure to be complied with in order to protect the defendant against a multiplicity of suits. *O'Dougherty v. Remington Paper Co.* (1880) 81 N. Y. 496; *United States v. Throckmorton* (1878) 98 U. S. 61; *Hughes v. Dundee Co.* (1886) 26 Fed. 831. It may be waived by consent of the parties. *The Fourth National Bank v. Noonan* (1884) 14 Mo. App. 243; aff'd. (1885) 88 Mo. 372; *Flanders v. Canada, etc., Co.* (1908) 161 Fed. 378; aff'd. (1908) 165 Fed. 321. The partial assignee will thus be allowed to sue alone. *Risley v. Phenix Bank* (1881) 83 N. Y. 318; *Caledonia Ins. Co. v. Northern Pacific Ry. Co.* (1904) 32 Mont. 46. Non-joinder of the assignor being demurrable, it seems perfectly justifiable to interpret the defendant's silence on the point as a waiver of his privilege and power to object to

the splitting of the cause of action. See the principal case. Judgment in favor of the partial assignee is then no bar to a later action brought by the assignor. In states where the partial assignee's only standing is in equity, the assignor has, in the part which he did not assign, an interest concurrently legal and equitable; he has, in addition, in the part which he did assign, an interest exclusively legal which conflicts with his assignee's paramount equitable interest. In states where the partial assignee's interest is concurrently legal and equitable, the assignor's interest is also concurrently legal and equitable, but strictly limited to the part of the chose in action which he did not assign. In the part which he did assign, he has no interest, either at law or in equity. See Professor Cook, Alienability of Choses in Action (1917) 30 HARV. L. REV. 449, 455-460.

R. P.

CONFLICT OF LAWS—DUE PROCESS—SERVICE ON ABSENT DEFENDANT BY PUBLICATION.—McDONALD V. MABEE (1917) 37 SUP. CT. REP. 343.—The defendant, domiciled in Texas, but having gone to Missouri with the intention of permanently residing there, was served by publication and a personal judgment rendered against him on a promissory note. In error to the U. S. Supreme Court, he contended this was a denial of due process. *Held,* that there was such a denial.

The decisions as to the validity of personal judgments against absent domiciled citizens by publication of service have hitherto been in irreconcilable conflict. *Henderson v. Staniford* (1870) 105 Mass. 504; *Raher v. Raher* (1911) 150 Ia. 511. The latter case held that no personal judgment could be rendered against a citizen and resident of a state temporarily absent therefrom, even though personally served, the service being required to be within the limits of the state. The majority opinion relied on *Pennoyer v. Neff* (1877) 95 U. S. 714, but anything in the *Pennoyer v. Neff* case favorable to this view is dictum. *Henderson v. Staniford, supra,* decided that the contractual obligation made in California was well discharged by a California judgment, though rendered after service by publication on the defendant, who was a domiciled citizen of California temporarily absent. The Massachusetts court was thus consistent with the weight of authority, which holds that the law governing the primary obligation of a contract governs in like manner the secondary obligation: that is, the Massachusetts court was merely incorporating the *lex loci contractus* (here California) and deciding that it would adopt and incorporate such law throughout all the obligations which might arise as a result of the contract. See Professor Hohfeld in (1909) 9 COL. L. REV.; comment in (1917) 26 YALE LAW JOURNAL, 771. The important case of *De la Montanya v. De la Montanya* (1896) 112 Cal. 101, held that a decree of alimony, operating as a judgment in personam against a domiciled citizen of California, temporarily without the state, there being notice by publication, was void because of lack of due process. A parallel situation to that in the principal case, in which the defendant never intended to return to Texas, was presented in the recent New York case of *Grubel v. Nassauer* (1913) 210 N. Y. 149, in which the court refused

recognition to a German judgment rendered against the defendant by publication during his residence in America with the declared intention of assuming American citizenship. The principal case contains a very important intimation to the effect that perhaps a summons left at the defendant's last and usual place of abode would have been sufficient to give the judgment validity. It is to be regretted that the court did not render a decision squarely on this important point, as it is fairly involved in the case. However, its direct holding as to the invalidity of the Texas judgment would seem in accord with the authorities, though conceivably a strong argument might be made for a contrary conclusion. See the vigorous dissenting opinion of Mr. Justice Deemer in *Raher v. Raher* (1911) 150 Ia. 511, 533.

A. N. H.

CONSTITUTIONAL LAW—SERVICE OF A FOREIGN CORPORATION—CAUSE OF ACTION ARISING OUTSIDE OF STATE.—PENNSYLVANIA FIRE INS. CO. v. GOLD ISSUE MIN. & MILL. CO. (1917) 37 SUP. CT. REP. 344.—A policy insuring certain buildings in Arizona was issued in Colorado by the plaintiff in error, an Arizona corporation. The insurance company had obtained a license to do business in Missouri, and in compliance with the statutes of that state filed with the superintendent of the insurance department a power of attorney to accept service of process on behalf of the company, "so long as it should have any liabilities outstanding in the state." The present suit to recover money alleged to be due on the policy was begun by service upon the superintendent. The insurance company contended that such service of process was not due process of law and was insufficient, claiming that the statute referred only to suits arising from Missouri contracts. *Held,* that the service of process was sufficient as it was in compliance with the statute.

Although a corporation has no corporate existence outside the state of its creation, as a general rule, on the grounds of comity, the corporation may exercise many of its powers within another state. *Kirvin v. Virginia-Carolina Chemical Co.* (1906) 145 Fed. 288; *Oriental Ins. Co. v. Daggs* (1898) 172 U. S. 557. In other words, a corporation of one state cannot do business in another without the latter's consent; and this consent may be accompanied by such conditions as the state may think proper to impose. *St. Clair v. Cox* (1882) 106 U. S. 356. As one of these conditions; the state may provide for service of process upon a foreign corporation acting in the state, by requiring such corporation to name some agent upon whom service may be made. *State v. Petroleum Co.* (1905) 58 W. Va. 108; *Mutual Reserve Ass'n v. Phelps* (1902) 190 U. S. 147. The weight of modern authorities seems to support the proposition that when a corporation has an agent for such service and is doing business in the foreign jurisdiction, the corporation may be sued upon any transitory cause of action. *Reeves v. Southern Rev. Co.* (1904) 121 Ga. 565; *Bogdon v. Phila. & Reading C. & I. Co.* (1916) 217 N. Y. 439; *Johnston v. Trade Ins. Co.* (1882) 132 Mass. 432. And this without regard to the residence of the plaintiff or the place at which the cause of action arose. *Hawkens v. Fidelity & Cas. Co.* (1905) 123

Ga. 722. For if a resident of the state be allowed to bring suit, every citizen of the United States would have a similar right. *Chambers v. B. & O. R. R. Co.*, (1907) 207 U. S. 142; *Blake v. McClung* (1898) 172 U. S. 239; *Cole v. Cunningham* (1889) 133 U. S. 107, 114. The above action on a contract was such a transitory action and should be enforcible wherever the defendant could be found.

A. S. B.

CONTRACTS—OFFER AND ACCEPTANCE.—THE GLEANER—(1917) 240 FED. 163.—The owner of the defendant ship agreed that his vessel "should stay and receive at ports mentioned all cargoes that may be ready for shipment to any amount of logs." The charterers were to furnish, at certain stipulated loading places, whatever logs they wished to ship, and they were to be cut to certain length. Plaintiff did thereafter place some logs at several of the loading places, but the defendant failed in one instance to stay and receive them. *Held*, that the contract was void for want of mutuality.

In this case the court considered that the written agreement represented all of the operative facts in the dispute, and upon that ground decided the "contract was not binding for want of mutuality." The written agreement, as it seems, being no more than a mere offer, the court was undoubtedly correct in stating that by it there was no contract. See *Great Northern R. R. Co. v. Witham* (1883) 9 C. P. D. 16; *Morrow v. So. Express Co.* (1897) 101 Ga. 810; *Rehm-Zeiher Co. v. Walker* (1913) 156 Ky. 6. When it was urged that the placing of the logs at the stipulated loading place constituted an acceptance of the offer, the court could not see how a contract void for want of mutuality could be made valid by the demand of the party not bound. The answer is, clearly that any offer lacks mutuality, but when accepted becomes a binding contract. If the resulting contract is bilateral the obligations are then mutual. A reasonable interpretation of the offer was that it was an offer to make a series of bilateral contracts, an offer of a promise to transport logs to be made in return for a promise to pay, acceptances to be made by placing the logs cut to the agreed lengths at the loading places. There was to be a separate contract for each lot of logs. Though generally speaking it was an offer of a promise for an act, it was not an offer to make unilateral contracts. The act was not to be the agreed equivalent for the promise, but only a means of acceptance which would express a promise by the other party to pay the freight. The plaintiff having put a certain number of logs at one of the wharves, he thereby bound himself to pay the price charged for carrying them, he had made a bilateral contract concerning that many logs. *Thayer v. Burchard* (1868) 99 Mass. 508; *Keller v. Ybarru* (1853) 3 Cal. 147. *Great Northern Ry. Co. v. Witham* (1883) 9 C. P. D. 16. The written statement was an offer to make a series of bilateral contracts, for acceptance as above did not bind him to furnish logs at other agreed ports nor until they were furnished at such ports was the defendant bound beyond the one contract to transport. From this point of view the court was probably right in saying that the fact that the defendant did receive logs at the other ports did not bind him

to stay and receive them at this port. The furnishing of the logs in each instance was the acceptance of an offer to carry those very logs. Until they were ready for loading the defendant was not bound to receive them—when they were ready he was bound. While the court in the principal case followed the precedent established by *American Cotton Oil Co. v. Kirk* (1895) 68 Fed. 791, and *Walker Mfg. Co. v. Swift & Co.* (1912) 200 Fed. 529, it is believed that the foregoing discussion presents a view more in accord with sound reasoning. In addition, authorities are not wanting to the effect that the defendant's offer became irrevocable after the offeree had performed some of the contemplated acts in reliance thereon. *Los Angeles Traction Co. v. Wilshire* (1902) 135 Cal. 654; *Zwolanek v. Baker Mfg. Co.* (1912) 150 Wis. 517. See Professor Arthur L. Corbin, Offer and Acceptance (1916) 26 YALE LAW JOURNAL, 169, 191.

C. M.

DOMICILE—LIABILITY TO PAY NEW YORK TRANSFER TAX.—IN RE TRANSFER TAX ON ESTATE OF HETTY H. R. GREEN (1917) 57 N. Y. L. J. 213.—Mrs. Hetty H. R. Green was born in Massachusetts and married a man who was domiciled in Vermont. During their married life the matrimonial domicile continued to be in Vermont; their only "home," or permanent abiding place, being the "Tucker House" in Bellows Falls, Vermont. After the death of her husband in 1902, and until her death in 1916, Mrs. Green spent the greater part of her time away from Vermont, returning to the "Tucker House" for six weeks during each summer, except the last. While she conducted her large business interests in New York she lived part of the time in lodging-houses or hotels in New York City, or at apartments or lodging houses in Hoboken, New Jersey. *Held,* that the last residence of Mrs. Green was not within the state of New York for the purposes of the Transfer Tax Law.

While the legal intendment of the terms "residence" and "domicile" is not generally the same, the New York Transfer Tax Law has been construed to make them convertible terms. *In re Martin's Estate* (1916) 158 N. Y. S. 915; *In re Norton* (1916) 159 N. Y. S. 619. For a similar construction of the Ohio Statute, cf. *Rockfeller v. O'Brien* (1915) 224 Fed. 54. Domicile has been regarded in the generic use of the term as the *relation* which the law creates between an individual and a particular locality or country. *Bell v. Kennedy* (1868) L. R. 1 H. L. (Sc.) 307. Domicile is said to determine the *status* in all common-law countries. Beale, *Conflict of Laws,* Pt. 1, p. 174. A more satisfactory, although not complete definition, holds that the domicile of a person is where he has his true fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning. Story, *Conflict of Laws,* sec. 44; Woolsey, *Introd. to International Law,* sec. 67. The domicile, or legal residence, of a person when it is acquired through the choice of the individual involves a miscellaneous aggregate of facts concerning his relation to a place. Professor Hohfeld (1913) 23 YALE LAW JOURNAL, 16, 28. For a variety of purposes, including succession, every person must have a domicile and but one; and this domicile of origin will be presumed to continue until a new one is obtained. *Borland*

v. Boston (1882) 132 Mass. 89; *Dupuy v. Wurtz* (1873) 53 N. Y. 556. As generally stated, in order to acquire a new domicile there must be a union of intention and residence, *animo et facto. In re Newcomb* (1908) 192 N. Y. 238; Westlake, *Conflict of Laws* (5th ed.) p. 363. A new domicile is not acquired until there is not only an abandonment of the old residence, but a fixed intention to establish a new residence, followed by execution of the intent. *Boyd's Exr. v. Commonwealth* (1912) 149 Ky. 764; *De la Montanya v. De la Montanya* (1896) 112 Cal. 101. The domicile of origin or the previous domicile will prevail unless there has been effected that aggregate of physical and mental facts which are necessary to constitute a change of domicile. *Gilman v. Gilman* (1863) 52 Me. 165. The principal case, as many previous cases, involved fundamentally the problem of an accurate analysis of that complex aggregate of fact and intention, i. e., physical facts and mental facts, which go to make up the legal concept of domicile. *Abington v. North Bridgewater* (1840) 23 Pick. (Mass.) 70; *Mather v. Cunningham* (1909) 105 Me. 326. A woman through the additional fact of marriage, acquires the domicile of her husband. *Barber v. Barber* (1858) 21 How. (U. S.) 582; Jacobs, *Law of Domicile,* sec. 222. The matrimonial domicile which was acquired in Vermont by Mrs. Green, and which continued to be in Vermont upon the death of her husband, does not appear to have been terminated. Her annual return to the "Tucker House" which she maintained as her only fixed home, her migratory existence in lodging-houses and hotels, alternating between New York City and Hoboken, New Jersey, and her fixed intention not to establish a true home in New York, constitute that aggregate of physical and mental facts which determined her domicile to be in Vermont at the time of her death.

B. L.

DOWER—METHOD OF ASSIGNMENT—MINERAL LAND.—SHUPE v. RAINEY (1917) 100 ATL. (PA.) 138.—The widow of the deceased was found to be dowable in certain mineral veins which the deceased had previously conveyed. The assignees contended that the court erred in allowing the widow one-third of the rents and profits of such vein rather than setting her dower apart by metes and bounds. *Held,* that where the value of a mineral vein is not uniform, the widow should be assigned one-third of the rents and profits.

Equity, in view of the disadvantages of a common-law proceeding, is generally availed of to afford complete relief in dower proceedings. Pomeroy, *Equity Jurisprudence,* sec. 1381. The rule that a widow is not dowable in mines not opened during the lifetime of her husband is general. *Staughton v. Leigh* (1814) 1 Taunt. 402; *Leufers v. Henke* (1874) 73 Ill. 405. It has been held, however, that where the lands are available for no other purpose, the widow is dowable in unopened mines. *Seager v. McCabe* (1892) 92 Mich. 186. No question of waste is raised where the mine has already been operated. *Coates v. Cheever* (1823) 1 Cow. (N. Y.) 460. When the assignment of dower by metes and bounds presents a practical difficulty some other method is employed. A gross sum has been awarded the widow. *Howells et al. v. McGraw et al.* (1904)

90 N. Y. S. 1. The assessment of a yearly value by the jury, to be paid over annually to the widow, has been approved. *Walker v. Walker* (1878) 2 Ill. App. 418. But almost without exception in the case of mineral lands the practical difficulties of setting out dower by metes and bounds has been met by assigning the widow one-third of the rents and profits. *Stoughton v. Leigh, supra; Williams v. Thomas* [1909] 1 Ch. 713; *Ware v. Owens* (1868) 42 Ala. 212; *Clift v. Clift* (1888) 87 Tenn. 17; *Strickler v. Tracy* (1877) 66 Mo. 465. In most of the cases on the subject a solution of the problem by alternative occupation or operation of the mine has been suggested, but none actually employing such a method has been found.

R. L. S.

EVIDENCE—DECLARATION BY DECEASED OF INTENTION TO ACT.—GREENACRE V. FILBY ET AL. (1916) 276 ILL. 294.—In a suit against a saloon keeper for loss of support by the death of the plaintiff's husband resulting from his intoxication, evidence was offered by the defendant that the deceased had, over a period of two years and as recently as the day of his death, made threats to take his life. *Held,* that such declarations were inadmissible because not a part of the *res gestae* nor accompanied by any relevant act which they served to explain. STATE V. FARNAM (1916) 161 PAC. (OR.) 417.—At a trial for murder the declaration of the deceased was offered in evidence to the effect that she could not go home that afternoon with the witness because she thought the prisoner was coming to see her in the evening. *Held,* that under an exception to the hearsay rule, the declaration was admissible as showing an intention to meet the prisoner, though it was not evidence of any intention on the latter's part.

Two views are taken in general by American courts as to the admission or exclusion of declarations of intention. The principal cases are representatives of them. Some courts admit such statements if they are a part of the *res gestae. State v. Smith* (1881) 49 Conn. 376, 381; *State v. Jones* (1884) 64 Ia. 349, 353; *U. S. v. Nardello* (1886) 4 Mackey (D. C.) 503, 515; *State v. Hayward* (1895) 62 Minn. 474, 484; *Balto. & Ohio R. R. v. State* (1895) 81 Md. 371, 383; *Nordgren v. People* (1904) 211 Ill. 425, 433; *People v. Atwood* (1915) 188 Mich. 36. Such a rule must of necessity bar statements, even very close in point of time, when they fail to accompany an act which is itself receivable in evidence. *State v. Wood* (1873) 53 N. H. 484, 494; *Com. v. Felch* (1882) 132 Mass. 22; *Siebert v. People* (1892) 143 Ill. 571, 584; *State v. Fitzgerald* (1895) 130 Mo. 407, 434; *Chi. & En. Ill. R. R. v. Chancellor* (1897) 165 Ill. 438, 441; *Foster v. Shephard* (1913) 258 Ill. 164, 179. On the other hand, many courts receive evidence of declarations of intention as being independently relevant, that is, either as being verbal acts or as coming within an exception to the hearsay rule, analogous to the exception of declarations concerning bodily condition. Where this view is taken, nearby statements of intention come in whether regarded as part of the *res gestae* or not. *Conn. Mut. Life Ins. Co. v. Hillmon* (1891) 145 U. S. 285, 294; *Commonwealth v. Trefethen* (1892) 157 Mass. 180, 185; *State v. Hayward* (1895) 62 Minn. 474, 497; *State v. Mortensen* (1903) 26

Utah, 312, 333; *The San Rafael* (1905) 72 C. C. A. 388, 397; *Commonwealth v. Howard* (1910) 205 Mass. 128, 152; *Ickes v. Ickes* (1912) 237 Pa. St. 582, 590. Remote declarations may be excluded where the court considers time the test of admissibility. *Hale v. Life Indem. & Inv. Co.* (1896) 65 Minn. 548, 550. Some courts, however, receive even very remote declarations, ruling that age goes to the weight of such evidence and not to its admissibility. *Blackburn v. State* (1873) 23 Oh. St. 146, 165; cf. *Redd v. State* (1881) 68 Ala. 492, 496. Of the two general views exemplified by the principal cases, the latter, recognizing independent relevancy, would appear to be superior. The former, which operates to exclude much relevant and enlightening evidence, has been charged with producing undesirable results and otherwise vigorously criticised. See Professor Wigmore (1917) 11 ILL. L. REV. 573.

M. B.

EVIDENCE—RES GESTAE—STATEMENT BY ATTORNEY.—SCHANZENBACH V. STOLLER (1917) 161 N. W. (S. D.) 329.—In a suit for breach of contract to save himself harmless from the effects of a mortgage, the plaintiff sought to put in evidence a statement by his attorney to the offeror that the plaintiff would accept the terms of the offer, only if the appellants should act as co-guarantors with the offeror in saving him harmless. *Held,* that the testimony was admissible because it was not hearsay, but part of the *res gestae.* Whiting, J., *dissenting.*

The testimony clearly seems to be hearsay in that it was an extra-judicial statement, and the hearsay rule excluding it applies, since the evidence is for the purpose of proving testimonially the truth of the statement. Greenleaf, *Evidence* (16th ed.) sec. 100. The court cites a single authority to explain the admissibility of the evidence; namely, Wigmore, *Evidence,* secs. 1770, 1772, and 1777. The sections referred to are concerned with utterances constituting a verbal part of the act. As shown by Whiting, J., these sections are not in the least applicable to the present case, nor do they uphold the view advanced by the court. The statement in the instant case was not made by the plaintiff nor did it accompany any act of his. This is essential to its admission on the grounds set forth by the court. *Ford v. Haskell* (1865) 32 Conn. 489. Nor does the evidence meet another requirement necessary to admit it as an utterance constituting a verbal part of the act; namely, that it must be independently material to the issues of the case. *Patten v. Ferguson* (1847) 18 N. H. 528.

F. L. McC.

GIFTS—DONATIO CAUSA MORTIS—NECESSITY OF PROVING THE CAUSE OF DEATH.—STEVENS V. PROVIDENT INST. FOR SAVINGS (1917) 115 N. E. (MASS.) 404.—The test of the validity of gifts *causa mortis* is not the resultant death from the apprehended disease, but rather the fact that there had been no recovery from that disease, whether or not death was actually caused thereby.

A *donatio causa mortis* is a gift, absolute in form, made by the donor in anticipation of his speedy death. To make such a gift effective it is

essential that it should be made in reasonable expectation of death. *Barstow v. Tetlow* (1916) 115 Me. 96; *Northrip v. Burge* (1914) 255 Mo. 641. Story declares that the validity of the gift is conditional upon the death of the donor as a result of his existing illness. Story, *Equity Jurisprudence,* Vol. I, sec. 607a. After this follow dicta in numerous cases that death must result from that very illness. *Robson v. Robson Adm'r* (1866) 3 Del. Ch. 51; *Dickeschied v. Bank* (1886) 28 W. Va. 340; *In re Elliott's Estate* (1913) 159 Ia. 107. In one case where the party was taken to a hospital suffering from a disease, and death resulted three months later, recovery was denied on the ground that it was not proved that the same disorder caused the death. *Conser. v. Snowden* (1880) 54 Md. 175. On the other hand, a man who successfully underwent an operation for a hernia, but who finally died some weeks later of heart failure was held to have made a valid *donatio causa mortis. Ridden v. Thrall* (1891) 125 N. Y. 572. This court declares that it is not necessary that the patient should have died of the same disease, and that it is sufficient if the donor does not recover from the disease from which he then apprehended death. In the principal case, the decision is not rested upon this ground alone, but the court found evidence from which to infer that the woman died as a result of the disease from which she was suffering four months previously.

J. E. H.

LANDLORD AND TENANT—OPTION TO PURCHASE—CONDITION PRECEDENT TO LESSOR'S DUTY TO CONVEY.—COOK V. HOUGHTON (1917) 100 ATL. (VT.) 115.—The defendant leased land to the plaintiff and covenanted that the plaintiff should be entitled to a deed of the premises at the expiration of the term, provided he should at that time pay to the defendant a stipulated amount. Before the expiration of the term the defendant brought an action of ejectment against the plaintiff, and pending trial the plaintiff had to give a bond for bail. This prevented him from tendering payment at the expiration of the lease. The plaintiff later won the ejectment suit, and now brings a bill for the enforcement of his option. *Held,* that the plaintiff's failure to tender payment at the time specified did not deprive him of his rights under the option agreement.

Inequitable or fraudulent conduct by which one party to a contract makes it impossible for the other to perform a condition precedent to the first party's liability is usually treated as a waiver of the condition. *Batterbury v. Vyse* (1863) 2 H. & C. 42. Upon this ground the conclusion reached in the principal case was undoubtedly correct. But the court went further and endeavored to justify their decision upon other grounds, saying: "Equity does not consider the mere fixing of a definite date for performance as making time of the essence of the contract"; and intimated that even apart from the inequitable conduct of the defendant, the plaintiff would have prevailed. In many cases the courts have applied this doctrine with the result that they have disregarded the nonfulfilment of an express condition precedent consisting of payment or notice, to be made or given at a particular date. *Barnard v. Lee* (1868) 97 Mass. 94; *Jones v. Robbins* (1849) 29 Me. 351; *Parlin v. Thorald*

(1852) 16 Beav. 59; *McLean v. Windam* (1912) 85 Vt. 167. In all of these cases the courts preferred to look for the real "intention" of the parties or to consider "substantial" performance as a substitute. Obviously, when the courts have done this they have in fact refused to enforce the legal relations arising out of the agreement of the parties, and have imposed legal relations created by the court. A court of equity, no more than a court of law, has power to change the terms of a contract, and it is believed that no search for the "intention" of the parties on the part of the court should ever justify a refusal to enforce the express words of the agreement. An express condition precedent whether considered to be reasonable or unreasonable should always be enforced, for after all, in the long run, the best test of what the contracting parties meant is what they said. The other line is represented by the following cases: *Brooke v. Garrod* (1857) 2 DeG. & J. 62; *Dibbins v. Dibbins* [1896] 2 Ch. 348; *Kemp v. Humphreys* (1852) 13 Ill. 573. In all of those cases time conditions were rightly and strictly enforced. There is a difference between a contract in which A and B mutually promise to pay and convey on a day named, and a contract in which B agrees to convey to A upon condition that payment is made on a specified date. *Ranelagh v. Melton* (1864) 2 Dr. & Sm. 278. In the latter case tender of payment on the day set is an express condition precedent and should be enforced. In the former it may not be, and in such a case it may often be proper and even necessary for the court to search out the real intention of the parties. Cf. *Bettini v. Gye* (1876) 1 Q.B.D. 183. The court in discussing the nature of the option said: "This privilege of purchase is not a mere offer but is a part of the consideration for the stipulations of the lessee, and any performance of his stipulations was the payment of some consideration towards the acquisition of the deed." If the court meant by this statement that performance of the covenants of the lease by the lessee was also part performance of the agreed equivalent to be given for the conveyance, it was probably error. The promise of the plaintiff to perform the stipulations of the lease was the consideration given for his lease-hold interest. That promise was also given in return for the option privilege. But it was not "consideration towards the acquisition of the deed." For a detailed treatment of the above points and others collaterally involved, see Professor Arthur L. Corbin, Option Contracts (1914) 23 YALE LAW JOURNAL, 641. C. M.

MARRIAGE—PROOF—SUFFICIENCY TO ESTABLISH.—GREEN v. NEW ORLEANS, S. & G. I. R. Co. (1917) 74 So. (LA.) 717.—The plaintiff sought to establish a contract of marriage by an indirect mode of inference; the marriage license which by statute was made the direct mode not being offered. *Held*, that it must be shown by evidence of a "convincing character" that the parties entered into their relations with the *bona fide* intention of permanently assuming the obligations and responsibilities of marriage; and that they carried their intentions into effect.

For a discussion of this question with special reference to the subsequent validation of a marriage illegal in its origin, see (1916) 26 YALE LAW JOURNAL, 145. S. F. D.

MASTER AND SERVANT—LIABILITY OF CARRIER FOR ACT OF PULLMAN CONDUCTOR.—LOUISVILLE AND NASHVILLE R. R. Co. v. MARLIN (1916) 186 S. W. (TENN.) 595.—The plaintiff's husband was stealing a ride on the defendant's train when a Pullman conductor wantonly forced him to leave the train as it was passing over a trestle. The husband died as a result of the injuries sustained by his fall. *Held,* that a railroad company was not liable for the wanton act of a Pullman conductor in forcing a trespasser from a train, where his act was not necessary to protect passengers.

A railroad company is charged with the highest degree of care as to its passengers. *Railroad v. Kuhn* (1901) 107 Tenn. 106; *Pennsylvania Co. v. Roy* (1880) 102 U. S. 456. As to trespassers a railroad company owes them no duty other than not to injure them wantonly or wilfully. *Railroad v. Bogle* (1898) 101 Tenn. 40. However proper an ejection may be, the carrier is liable for harm caused by the ejection at a dangerous place. *Tilbury v. Northern Cent. R. R. Co.* (1907) 217 Pa. St. 618; *Brown v. Louisville and N. R. R. Co.* (1898) 103 Ky. 211. In these cases the carrier was liable not for putting a trespasser off, but for the manner in which it was done. The general test of the liability of a master for the acts of a servant toward a stranger is usually applied in determining the carrier's liability, i. e., the servant must have been at the time acting for the master and within the scope of his employment. *Daley v. Chicago and N. W. R. R. Co.* (1911) 145 Wis. 249; *Harrington v. Boston, etc., R. R. Co.* (1914) 213 Mass. 338; *Ill. Cent. R. R. Co. v. King* (1899) 179 Ill. 91. A Pullman conductor is not a servant of the railroad company. *Robinson v. Baltimore and Ohio R. R. Co.* (1914) 237 U. S. 84. But he will be regarded in law as the servant of the company so far as his mistreatment of a passenger is concerned. Accordingly, the railroad company is held responsible for the negligence of persons in charge of a Pullman car and for their wilful acts against passengers. *Railroad v. Ray* (1898) 101 Tenn. 1; *Penn. Co. v. Ray, supra; Airey v. Pullman Palace Car Co.* (1898) 50 La. Ann. 648. It seems, however, that as regards the acts of Pullman employees toward a trespasser, this is not true. Such employees are not servants of the railroad company, except in so far as their acts are necessary to protect passengers. *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417. The principal case is in accord with *Blake v. Kansas City Southern R. R. Co.* (1905) 38 Tex. Civ. App. 337 on a similar state of facts.

S. J. T.

OPTION CONTRACTS—SPECIFIC PERFORMANCE—UNILATERAL CONTRACT.—DITTENFASS v. HORSLEY (1917) 56 N. Y. L. J. 2195.—The defendant in consideration of one dollar agreed to sell to the plaintiff's assignor certain stocks upon condition that payment be made at a designated time. Later, the parties agreed that payment be made at a certain place. The money was ready, but the defendant failed to appear to receive it. The assignment to the plaintiff was made subsequent to the attempted payment, and he has ever since been ready and willing to perform. *Held,* that the plaintiff was not entitled to a decree for the specific transfer of the shares because there was no mutuality of obligation, the original purchaser being under no duty to perform.

If the option set out in the evidence was a mere offer to sell, then in accordance with its terms acceptance by paying money to the defendant was necessary in order to complete a binding contract. In that view of the case the payment never having been made there was no acceptance of the offer, and therefore no contract. But the option in this case amounted to something more than an offer to sell; in fact, the option agreement was from the first a unilateral contract to sell and transfer stock upon condition that payment be made at a certain time. The subsequent agreement as to place of payment was an ordinary bilateral agreement consisting of mutual promises. The court's opinion that this latter agreement was without consideration was, therefore, probably erroneous. By these agreements the defendant placed himself under a liability to the promisee which because of the consideration paid him he could not extinguish by revocation. There was also created in the other party a power which if exercised would operate to put the defendant under a legal duty to deliver the shares of stock. The performance of such a condition in the case of land options of a similar nature has been held in innumerable cases to create not only a legal duty in the defendant but also an equitable duty. *Ross v. Parks* (1890) 93 Ala. 153; cf. *Johnston v. Trippe* (1887) 33 Fed. 530; *Smith v. Bangham* (1909) 156 Cal. 359. The court in the principal case thought that, as there was no mutuality of remedies, there could be no decree for specific performance. In each of the cases cited the same rule was presented to the court and dismissed as not being applicable. Obviously, it always must be so held if the courts are to enforce unilateral contracts, for in such contracts the duties being all on one side, there can be but one party entitled to a remedy. Because of their peculiar nature when not obtainable in the open market, shares of stock of a private corporation have always been considered to be proper subject matter for equitable relief, and it is not easy to understand why option contracts that are specifically enforceable as regards land are not enforceable in cases like the one under discussion. It is submitted that the decision is contrary to precedent and sound legal reasoning. Two other considerations are necessary in this case to show that the plaintiff was entitled to recover. The defendant having made it impossible for the other party to perform the condition, and the tender remaining good, the defendant's duty to transfer was absolute and should have been enforced. *Rockland-R. Lime Co. v. Leary* (1911) 203 N. Y. 469. Of course an assignee by performing in like manner should be granted the same relief. Cf. *House v. Jackson* (1893) 24 Or. 89. See Professor Arthur L. Corbin, Option Contracts (1914) 23 YALE LAW JOURNAL, 641. C. M.

SALES—FRAUD ON SELLER BY IMPERSONATION.—PHELPS v. MCQUADE (1917) 115 N. E. (N. Y.) 441.—A person, for value and without notice of the defect in title, bought personal property from one who had obtained it by falsely representing himself to be another. *Held*, that his title was paramount to that of the original vendor; also that if the owner intended to sell the property to the person with whom he dealt, the title passed, though he may have been deceived as to his identity, or responsibility, and an innocent purchaser from the fraudulent vendee was protected.

There are three types of cases that have arisen, involving the effect of fraud by impersonation on the passing of title. In the last analysis it is a question of the intention of the parties. The principal case follows the doctrine laid down in the Massachusetts courts, where it has been held that the fraudulent vendee gets a voidable title, the dominant intention of vendor being to pass title to the person who stands before him, and with whom he is dealing. *Edmunds v. Merchants' Despatch Co.* (1883) 135 Mass. 283; *Hickey v. McDonald* (1907) 151 Ala. 497; Williston, *Sales,* sec. 635; see also 13 L. R. A. (N. S.) 413. A Missouri case is opposed to the above in reasoning, if not in actual decision. *Loeffel v. Pohlman* (1892) 47 Mo. App. 574. In another class of cases, goods have been ordered by mail by a defrauder, who writes in the name of some other person in good credit, thereby inducing the vendor to ship the goods to the writer of the letter. It has been held that a *bona fide* purchaser for value and without notice is not protected, on the ground that the fraudulent vendee has not obtained title. *Cundy v. Lindsay* (1878) 3 App. Cas. 459; *Newberry v. Norfolk Ry. Co.* (1903) 133 N. C. 45. The fact that the vendor deals with the vendee personally rather than by letter is material in determining the question of intent. The third class of cases arises where a person fraudulently represents that he is the agent of another, and thereby obtains possession of the goods. In such a case the weight of authority is that no title passes, inasmuch as the vendor intends the title to pass to a principal, who in fact has not ordered the goods, and the agent gets no title, since the seller does not intend to transfer the property in the goods to him. *Kingsford v. Merry* (1856) 1 H. & N. 503; *Rodliff v. Dallinger* (1886) 141 Mass. 1; *Hentz v. Miller* (1883) 94 N. Y. 64; *contra, Hawkins v. Davis & Baxter* (1875) Tenn. 506; *Sword v. Young* (1890) 89 Tenn. 126.

J. I. S.