RECENT CASE NOTES

ADMIRALTY—JURISDICTION—HYDRO-AEROPLANE A VESSEL.—The State Industrial Commission awarded compensation to the claimant for an injury caused him by the propeller of a hydro-aeroplane which he attempted to save from being wrecked after she had begun to drift from her mooring. The defendant denied the jurisdiction of the commission. *Held,* that a hydro-aeroplane upon the water is a vessel and within admiralty jurisdiction; and consequently the award of the Commission should be reversed. Matter of *Reinhardt v. Newport Flying Service Corporation* (1921) 232 N. Y. 115.

In a case where a libellant sought to enforce a lien for repairs upon an aeroplane, an intervening libellant who had salvaged the aeroplane after it had fallen into certain waters defeated the cause of the libellant for repairs upon the ground that an admiralty court had no jurisdiction in his case. *The Crawford Bros. No. 2* (1914, W. D. Wash.) 215 Fed. 269. In does not appear in the report of that case whether the repairs were made prior to, or after the time of, the wreck. Were the repairs made prior to the time of the wreck, it would seem that that decision held that an aeroplane was not a vessel. Were the repairs made after the wreck, the decision would at the very least stand for the doctrine that a plane during the moment of a crash did not suffer transformation from aeroplane to vessel. The instant case says that *The Crawford Bros. No. 2* stands for the rule that "a hydro-aeroplane, while in the air, is not subject to the admiralty." The present decision lays down the practically applicable rule that a hydro-aeroplane when travelling through the water is a vessel. At least one secondary purpose for which a hydro-aeroplane is designed is navigation upon the water. While so navigating it is essentially a vessel,—certainly as much as is a hopper barge for dredging or a floating bath-house. *The Mudlark* [1911] P. 116; *The Public Bath No. 13* (1894, S. D. N. Y.) 61 Fed. 692. A plane is "within the jurisdiction of the admiralty," the instant case decides, "when it is in the fulfillment of its function as a traveller through water and has put aside its functions and capacities as a traveller through air." But the moment when collision with a ship is most likely to occur is when it is on its step, four-fifths supported by the air, barely held by the water, and moving at a speed certainly over thirty knots. The test is then indeed questionable. And what court has jurisdiction when the plane is taking off in a rough sea, bounding from wave to wave and certainly not in flight? The amphibious character of the "vessel" invites unlimited speculation, not without humor. "Riding at anchor is a new craft," observes the court, "which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the Courts of Common Law." The craft's mystifying nature may well require a federal statute giving federal jurisdiction over hydro-aeroplanes, whether "on the water" or in the air above it.

BANKS AND BANKING—AUTHORITY OF A BANK AS COLLECTING AGENT TO ACCEPT A CHECK DRAWN ON ITSELF AS PAYMENT OF A DEBT.—The plaintiff sent a draft on the defendant to a bank for collection, with specific instructions that the bank should receive in payment cash only, or its equivalent. The bank, however, accepted from the defendant a check drawn on itself, at a time when the bank knew itself to be insolvent. The next day the bank passed into bankruptcy. The plaintiff then sued the defendant for the amount of the draft. *Held,* that the plaintiff should recover as acceptance by the bank of the check did not constitute payment of the draft. *Sanitary Can Co. v. National Pickle & Canning Co.* (1921, Iowa) 184 N. W. 354.

In the absence of specific authority, an agent to collect has no implied authority to receive anything but money in payment of his principal's debt. *Ormsby v. Graham* (1904) 123 Iowa, 202, 98 N. W. 724; *Everts v. Lawther* (1897) 165 Ill. 487, 46 N. E. 233. A bank acting as a collecting agent is no exception to this rule. *Bank of Shaw v. Ransom* (1916) 112 Miss. 440, 73 So. 280. But if an agent has good reason to believe that a check will be paid, he can accept it as a conditional payment of the debt. *Bellevue Bank v. Security Nat. Bank* (1915) 168 Iowa, 707, 150 N. W. 1076. Such acceptance is payment only when the check is honored by the drawee. *Born v. First Nat. Bank* (1889) 123 Ind. 78, 24 N. E. 173. But there are conflicting theories as to the effect of acceptance, by a collecting bank, of a check drawn on itself in payment of the principal's debt. The majority opinion is that the acceptance of such a check would be payment of the debt, since it would be absurd to require the debtor to obtain cash for his check and then replace the cash in the bank in order to change a conditional into an absolute payment; that it being the custom of a bank to so accept checks drawn on itself, the principal would be presumed to know and to consent to this custom. *British & American Mortgage Co. v. Tibballs* (1884) 63 Iowa, 468, 19 N. W. 319; *Shafer v. Olson* (1912) 24 N. D. 542, 139 N. W. 983; *Bartley v. State* (1898) 53 Neb. 310, 73 N. W. 744; 2 Bolles, *Modern Law of Banking* (1907) 602. The minority view is that such a transaction would not be payment, as it would only be an attempt by the drawer of the check to substitute his bank for himself as debtor, and would no more relieve him than if the check were drawn on another bank. *State Bank v. Byrne* (1893) 97 Mich. 178, 56 N. W. 355. See dissenting opinions *British & American Mortgage Co. v. Tibballs, supra; Schafer v. Olson, supra.* Such a conflict of opinion might be expected to arise when courts are called upon to decide which of two equally innocent parties must suffer. In the instant case the bank had not passed into a receiver's hands when the collection was made, nor does it appear that the bank was bankrupt when it accepted the paper for collection. But as the bank knew that it was insolvent when it made the collection, the decision of the Court was correct, since the bank had no implied authority to accept a check which it knew would not be paid. *Bellevue Bank v. Security Nat. Bank, supra.* Had, however, the bank accepted the draft for collection while insolvent, or made the collection after it had made a general assignment, then the funds would have been held in trust for the plaintiff, instead of his coming in merely as a creditor of the bankrupt bank. 2 Michie, *Banks and Banking* (1913) sec. 166. Under such a state of facts, it is submitted that the majority view would be more just in that the plaintiff could recover from another, not an innocent party.

CONFLICT OF LAWS—CONSTRUCTION OF DEEDS GOVERNED BY LAW OF GRANTOR'S DOMICIL.—A grantor domiciled in Massachusetts executed a trust deed disposing of land situated in New York and directed that the heirs at law of the beneficiaries under the deed should take on the death of the last surviving beneficiary. *Held,* that the law of Massachusetts should be applied in determining who were the heirs at law of such beneficiary. *Cary v. Carman* (1921, Sup. Ct.) 190 N. Y. Supp. 193.

In the interpretation of ambiguous language in a deed the courts are guided primarily by the presumed intention of the grantor. *Kearney v. Kirkland* (1917) 279 Ill. 516, 117 N. E. 100. A peculiar difficulty arises where the language has been construed to have one meaning in the jurisdiction where the person executing the instrument is domiciled and another in the jurisdiction where the land is situated. Under the general rule that the devolution of real estate is governed by the *lex loci rei sitae,* a few courts have held that they are bound by the interpretation of the courts where the land is located. *Peet v. Peet* (1907) 229 Ill. 341, 82 N. E. 376; *Shaws v. Grimes* (1919) 187 Ky. 250, 218 S. W. 447. The weight of authority however is that the interpretation which prevails in the courts of the

domicil of the grantor governs. *Ford v. Ford* (1888) 70 Wis. 19, 33 N. W. 188; *Jones v. Park* (1920) 282 Mo. 610, 222 S. W. 1018. This seems on reason and principle to be correct. A grantor is presumably more familiar with the law of his domicil than with the law of other jurisdictions and it would normally be present to his mind in the drafting of an instrument disposing of his property. This rule does not militate against the doctrine that the disposition of real estate by deed or will is governed by the *lex rei sitae*. The law of the situs of the land does not give extra-territorial effect to the laws of a foreign jurisdiction; it gives effect only to the intention of the grantor, reference being made to the laws of a foreign jurisdiction to ascertain that intent. *Keith v. Eaton* (1897) 58 Kan. 732, 51 Pac. 271. When a devise is made to a wife by her husband without an express provision as to whether she is to take it in addition to dower or in lieu thereof, or when subsequent to the making of a will, a child is born for whom no provision is made in the will, other considerations should be kept in mind which cannot here be discussed. See Hening, *Rules Governing Construction of Wills* (1902) 50 AM. L. REG. 623.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF STATUTE PROVIDING IMPRISONMENT FOR USE OF OWN MONEY FOR OTHER PURPOSES THAN PAYING DEBTS.—The defendant contracted to erect certain buildings and to pay all claims for labor and material. Several sums being paid him, he orally agreed to use them in the payment of such claims. He appropriated them, instead, to other uses. He was convicted under a statute (Calif. Pen. Code, 1915, ch. 6, sec. 506, as amended by Calif. Sts. and Amend. to Codes, 1919, ch. 518, sec. 1.) providing that "any contractor who appropriates money paid to him for any use or purpose, other than that for which he received it, is guilty of embezzlement, and the payment of laborers and materialmen .... is hereby declared to be the use and purpose to which the contract price .... received by the contractor shall be applied." *Held,* that the Statute by making the use of one's own money, for any purpose other than the payment of his debts, a felony, violated the constitutional provision (*Calif. Const.* art 1, sec. 15) inhibiting imprisonment for debt in civil actions, except in cases of fraud; and that this provision could not be evaded by making the non-payment of a debt a crime. *People v. Holder* (1921, Calif.) 199 Pac. 832.

The immunity from imprisonment for debt in civil actions, guaranteed by state constitutions, destroyed the old fiction that a defaulting debtor trespassed against the peace and dignity of the Crown, and was liable to imprisonment for such a crime. *Meyer v. Berlandi* (1888) 39 Minn. 438, 40 N. W. 513. Being for the protection of the honest but unfortunate debtor, it has generally been interpreted to apply only to debts arising *ex contractu* and not to those based on tort. *Ex parte Hollman* (1908) 79 S. C. 9, 60 S. E. 19. This distinction is founded on the quasi-criminal nature of torts, and the imprisonment is regarded as a punishment for a wrong and not for a failure to pay a debt. *United States v. Walsh* (1867, U. S. D. Or.) 1 Abb. 66. Thus, by the great weight of authority, judgment in tort actions, decrees for alimony, taxes and fines, all sounding in tort, have not been considered as debts within the constitutional inhibition. *Carr v. State* (1895) 106 Ala. 35, 17 So. 350; see also 34 L. R. A. 634, note. A minority have held a tort action to be purely compensatory in nature, and a judgment in such action a debt within the constitutional protection. *Bronson v. Syverson* (1915) 88 Wash. 264, 152 Pac. 1039. The divergence is due to a difference in the conception of a debt. See COMMENTS (1916) 4 CALIF. L. REV. 331. The constitutional provision, specifying debts in civil actions, cannot be evaded by making the failure to pay a debt a crime. *Bailey v. Alabama* (1910) 219 U. S. 219, 31 Sup. Ct. 145. Although a legislature may make an act criminal which is not fraudulent, or recognized as morally wrong, yet it cannot deprive one of a constitutional

immunity by so doing. *Carr v. State, supra; Ex parte Hollman, supra.* The advisability of imprisonment even for some forms of tort debts has been questioned, and imprisonment for contempt in failing to pay alimony referred to as a "relic of barbarism." (1921) 65 Sol. Jour. 844. While not going so far, the instant case falls clearly within the general rule. The wording of the Statute was sufficiently broad to include a debtor innocent of fraud.

Contracts—Act of God—Intervening Human Agency.—Because of a landslide in the Panama Canal the defendants were unable to deliver a vessel according to the terms of a charter-party containing mutual exceptions for "acts of God." In an admiralty action the defendants claimed excuse under the exceptions. *Held,* that judgment for the plaintiffs should be affirmed, since the landslide was not an act of God. *Gans S. S. Line v. Wilhelmsen* (1921, C. C. A. 2d) 275 Fed. 254.

The courts rather deftly evade giving the phrase "act of God" a judicial definition. Without attempting finality the Court in the instant case considered it as "due to natural causes without human intervention." The term has been applied to the damage itself. See *Charleston Ry. v. Nixon* (1914) 142 Ga. 343, 82 S. E. 893. A more accurate application is to the cause of the damage. *Michaels v. New York Central Ry.* (1864) 30 N. Y. 564, 576. Practically all the cases hold that an act of God, in legal contemplation, must be a manifestation of natural forces, unusual, according to the ordinary experience of man, and unforeseeable or unavoidable. Abbott, *Law of Merchant Ships and Seamen* (14th ed. 1901) 584. There is much *dicta* to the effect that there must be an entire exclusion of human agency from the cause of the injury. See *Michaels v. N. Y. Central Ry., supra; The Majestic* (1897) 166 U. S. 375, 17 Sup. Ct. 597. Nearly all of such cases are explainable on the ground of negligence, or on the ground that one or more of the agreed elements of an act of God are missing. See *Gleeson v. Va. Ry.* (1891) 140 U. S. 435, 11 Sup. Ct. 859. Whether there is or is not *human intervention* may depend upon the particular violence considered the *cause,* and its remoteness from the damage. An illustration is furnished in the Johnstown flood, which was caused by the breaking of a dam by an unusual storm. *Long v. Penn. Ry.* (1892) 147 Pa. 343, 23 Atl. 459. If the breaking of the dam be considered the act of God, there was no human intervention between the act and the damage; if the unusual storm, clearly an act of God, be considered the cause of the ultimate damage, there was an intervening human agency. In either view there was human contribution. In holding the Black Tom explosion not an act of God, the Court said that the explosives were "inherently unstable compounds not combined by spontaneous processes of nature, but under human direction." *Lysaght v. Lehigh Valley Ry.* (1918, S. D. N. Y.) 254 Fed. 351. Very probably if lightning had occasioned the discharge the explosion would have been an act of God. The phrase "without human intervention" in a definition of act of God seems misleading because it does not take into account the cases where violent natural forces produce disastrous results through man-made instrumentalities. The true test would consider whether the proximate cause of the injury was human in origin, acting through any agency whatever, or whether it was natural, non-human, and unforeseeable. And if applied to the facts of the instant case, the conclusion seems correct.

Criminal Law—Procedure under Habitual Offender Statutes.—The defendant was charged with having burglar's tools in his possession in violation of Conn. Gen. Sts. 1918, sec. 6238, punishable by five years in prison. The indictment also charged him with, and, on the trial, evidence was given of, two prior prison terms, in order to raise the sentence, if convicted of the third offence, to a maximum of thirty years. *Ibid.* sec. 6660. *Held,* that prior convictions must be alleged in the indictment for the defendant's information, but that neither the allegation of

such prior convictions, nor the issue of the defendant's identity should be submitted to the jury until they return a verdict of guilty on the principal issue of the specific crime charged. *State v. Ferrone* (1921) 96 Conn. 160, 113 Atl. 452.

The decision is the first in the United States to reach this most desirable result without an express statute. Such a statute exists in only one state. Wash. Rem. & Bal. Code, 1903, ch. 2179; *State v. Driscoll* (1915) 86 Wash. 245, 150 Pac. 2. The great majority of jurisdictions however, in applying the universal habitual offender statutes (similar to that of the instant case and providing for an increased sentence if the defendant has been imprisoned before) accept the apparently settled doctrine that the jury tries both issues at the same time. Most of the cases which follow this rule do so protestingly and because of a supposed inability to do otherwise. *State v. Findling* (1913) 123 Minn. 413, 144 N. W. 142. They point to the English Statute which specifies the procedure as adopted in the instant case as proof of the necessity of legislative action. *People v. Sickles* (1898) 156 N. Y. 541, 51 N. E. 288. But this belief is based on a lack of knowledge of the history of the Statute. In 1834, under the usual habitual offender statute, Lord Justice Park said that the previous custom had been not to let the jury know of the previous convictions until after a verdict of guilty on the subsequent offence, but at a meeting of the judges, his brothers decided that both issues must be proved before the witness was called on for his defence. (1827) 7 & 8 Geo. IV, c. 28, sec. 11; *Rex v. Jones* (1834, K. B.) 6 Car. & P. 391. Two years later, to rectify this incorrect practice, a statute was passed deferring the reading of the charge of the previous offences in the indictment and the offering of the supporting evidence until after a verdict of guilty. (1836) 6 & 7 Will. IV, c. 110; *Reg. v. Martin* (1869 Q. B.) L. R. 1 C. C. R. 214. And it is important to notice that even in offences where it was necessary to allege the previous convictions in the indictment, not covered by this later statute, its rule was applied. *Reg. v. Woodfield* (1887) 16 Cox C. C. 314; (1828) 9 Geo. IV, c. 69, secs. 1, 5. Our courts have also seemed to confuse the necessity of giving the defendant a jury trial on the issue of the prior convictions with the order in which it should be done, which was probably the error into which the English judges fell in the advice they gave Lord Justice Park. Courts are practically unanimous in holding that in order to validate the sentence of increased punishment the defendant must be told in the indictment of the entire charge against him, i. e., the subsequent offence and prior convictions, and he must be given a jury trial to show his identity with the accused in the prior convictions. *State v. Compagno* (1910) 125 La. 659, 51 So. 681; *Commonwealth v. O'Reilly* (1920) 94 Conn. 698, 110 Atl. 550. A statute permitting an increased sentence without allegation of prior convictions in the indictment has been held unconstitutional. *Commonwealth v. Harrington* (1880) 130 Mass. 35. But three jurisdictions, in order not to make necessary, as they think, the simultaneous trial of the two issues, permit this obvious irregularity, and the judge, after a verdict of guilty on the subsequent offence, hears evidence or inspects the record to impose the greater sentence, without allegation in the indictment, or a jury verdict on the previous convictions. *McWhorter v. State* (1903) 118 Ga. 55, 44 S. E. 873; *State v. Parris* (1911) 89 S. C. 140, 71 S. E. 808; Okla. Gen. Sts. 1903, ch. 5574. There is no reason, because of any rule of procedure, for making the charge of the previous convictions in the indictment, expressly intended for the defendant's protection, the instrument of his conviction, when that conviction has the more serious consequences. The courageous and thoroughly satisfactory solution of the instant case should lead to a new line of decisions.

DAMAGES—CONTRACTS—WRONGFUL DISCHARGE AS BREACH OF CONTRACT OF SERVICE.—The defendant had contracted to employ the plaintiff as its agent for the period of one year beginning the first of December. On the thirty-first of July the plaintiff was dismissed without cause. The plaintiff brought suit for wages from

the first of August to the first of December. *Held*, that the plaintiff could not recover. *Harrington v. Empire Cream Separator Co.* (1921, Me.) 115 Atl. 89.

The fiction of constructive service is everywhere losing ground. There is a sharp distinction between an action for wages accruing after the wrongful discharge of an employee and an action for damages for breach of the contract of employment. *Viall v. Lionel Manufacturing Co.* (1917) 92 Conn. 341, 102 Atl. 709. Lord Ellenborough first evolved the theory that a servant who had performed part of his contract of service and was ready, willing, and able to serve the balance should in contemplation of law be regarded as having served the whole. *Gandall v. Pontigny* (1816, N. P.) 1 Starkie, 198. But the doctrine has been repudiated in England and most American states. *Emmens v. Elderton* (1853) 4 H. L. Cas. 624; *Hayes v. Harshaw* (1913) 30 Ont. L. R. 157; *Saunders v. Stern Bros.* (1916, Sup. Ct.) 158 N. Y. Supp. 878; *Viall v. Lionel Manufacturing Co.* (1916) 90 Conn. 694, 98 Atl. 329; *Jameson v. Board of Education* (1916) 78 W. Va. 612, 89 S. E. 255. That the doctrine does not operate successfully in practice is not remarkable. It requires a discharged servant to remain idle and wait until the end of the term to recover, since he cannot accept other employment and still be ready and willing to offer his contractual service. It is inconsistent with the universal rule that diligence must be used to mitigate damages. The employee must either wait until the end of the term or bring successive actions at the end of each divisible period for each instalment of wages, thus creating unnecessary litigation. An action for damages brought at any time after the breach of the contract has found more favor and is more expeditious and fair. *Davis v. Dodge* (1908) 126 App. Div. 469, 110 N. Y. Supp. 787; *Pierce v. Tenn. etc. Ry.* (1898) 173 U. S. 1, 19 Sup. Ct. 335. It has been criticized on the ground that the damages are speculative and difficult of ascertainment. See *Hicks v. National Surety Co.* (1915) 185 Mo. App. 500, 172 S. W. 489. Their measure is broadly stated to be the amount which the employee would have earned under the contract, after deducting the sum he might reasonably earn in similar employment between the time of discharge and the end of the term fixed by the contract. But the jury may take into consideration any other elements, such as the uncertainty of the working ability of the employee, his age, and the multitude of factors which enter into the assessment of damages for personal injuries. *Stearns v. Lake Shore & M. S. Ry.* (1897) 112 Mich. 651, 71 N. W. 148; *Moore v. Central Foundry Co.* (1902) 68 N. J. L. 14, 52 Atl. 292.

EVIDENCE—ADMISSIBILITY OF SPECIFIC INSTANCES OF CONDUCT TO SHOW NEGLIGENCE.—The plaintiff, while a passenger in an automobile approaching a reservoir, was shot by one Matri, a guard hired by the defendant. The plaintiff introduced evidence of a third party that the latter drove to the reservoir shortly after the shooting, was stopped by Matri, who, appearing very much excited, raised his gun and told him he had a good mind to blow his brains out. *Held*, that the evidence of the third party was a species of character evidence and improperly received. Burpee, J., *dissenting*. *Richmond v. City of Norwich* (1921, Conn.) 115 Atl. 11.

Since character is actually evidenced by conduct, an opinion by a witness intimately acquainted with the individuality of the person in question, derived from innumerable manifestations, seems to be more accurate evidence of character than reputation. *Mathewson v. Mathewson* (1908) 81 Vt. 173, 69 Atl. 646. There is a strong dictum to this effect in the instant case. However, the courts almost universally admit only reputation to prove character. *Negociacion Agricola y Ganadera de San Enrique v. Love* (1920, Tex. Civ. App.), 220 S. W. 224; 3 Wigmore, *Evidence* (1904) secs. 1985, 1986. A third method of proving character is by specific instances of conduct. They are rarely admitted in civil cases when offered as evidence of the doing of an act because they raise collateral issues and may result in unfair surprise. *Veit v. Class & Nachod Brewing Co.* (1906) 216

Pa. 29, 64 Atl. 871; *Schmidt v. Schmidt* (1914) 216 Mass. 572, 104 N. E. 474. But when character is in issue in civil cases, specific instances of conduct are admissible under a variety of circumstances. 1 Wigmore, *op. cit.* 202-213; 22 C. J. 472 *et seq.* In the instant case, the court treated character as properly in issue and one specific instance of conduct subsequent to the wounding of the plaintiff was offered to show character upon two questions of fact. First, Was Matri negligent at the time in question? Where a specific act is used as evidence of the doing of an act, a double inference is necessary: from the specific act to incompetence (or character), from incompetence to the act in question. Besides the little probative value of such an indirect method of proof, unfair surprise and undue prejudice are cogent objections to its use, and almost all the courts reject it. *Lowry v. Missouri, K. & T. Ry.* (1913) 90 Kan. 180, 133 Pac. 719; 1 Wigmore, *op. cit.* 199. Second, Was the defendant negligent in hiring Matri? Proof of this by specific instances involves several steps. (1) That Matri was in fact incompetent. While specific instances are relevant to show incompetence, one specific instance is insufficient to prove a general trait. *Baulec v. Ry.* (1874) 59 N. Y. 356; 24 Ann. Cas. 101, note. (2) That the defendant employed Matri knowing of his incompetence. A specific instance subsequent to the act in question is always irrelevant to prove knowledge of incompetence on the part of the employer. *Couch v. Watson Coal Co.* (1877) 46 Iowa, 17. A careful analysis shows that the specific instance in the instant case was inadmissible, either because it was inferential and not probative, or where probative, it was not sufficiently so.

INTERNATIONAL LAW—EXTRADITION—TREATY RIGHTS AS DEFENCE TO TRIAL FOR OTHER CRIMES.—The prisoner, a Mexican citizen, was mistaken for a bandit and captured in Mexico by a United States army patrol acting under orders which authorized following a "hot trail" into Mexican territory. He was turned over to the Texas Rangers, indicted for a murder previously committed, and convicted. He pleaded the Extradition Treaty with Mexico of April 24, 1899 (31 Stat. at L. 1818), which required demand and surrender for specified offences, and want of jurisdiction. *Held,* that as the capture must be presumed to have been made with the consent of the Mexican Government, the prisoner was not wrongfully brought within the jurisdiction of Texas, but could only be held for the offence for which he had been captured and not for another. *Dominguez v. State* (1921, Tex. Cr. App.) 234 S. W. 79.

The privilege of asylum has been recognized since time immemorial. See Kohler, *Right of Asylum* (1917) 51 AM. L. REV. 381. There is, however, no absolute *right* as such and on the other hand no international *duty* on a nation to deliver up a criminal fugitive to another nation. See 4 Moore, *International Law Digest* (1906) 245-258. Hence, as it is only by courtesy or treaty that extradition is possible, it has been held that a nation surrenders its sovereignty over a person only for trial on the particular charge on which he is demanded, and that good faith requires that opportunity be given the prisoner to return to his asylum if conviction fails. *United States v. Rauscher* (1886) 119 U. S. 407, 7 Sup. Ct. 234; 13 Rose's Notes, 695; cf. *Smith v. Government of Canal Zone* (1918, C. C. A. 5th) 249 Fed. 273; see 10 Ann. Cas. 639, note. Likewise a prisoner cannot be imprisoned for any other reason than that given for extradition. *Johnson v. Browne* (1907) 205 U. S. 309, 27 Sup. Ct. 539; see 47 L. R. A. (N. S.) 807, note. But if brought illegally within the jurisdiction, the prisoner cannot set up the irregularity as a defence or claim treaty rights, and can be tried for any offence. It rests exclusively with the country from which he is taken to complain. *Ker v. Illinois* (1886) 119 U. S. 436, 7 Sup. Ct. 225; see 4 Moore, *op. cit.* 328-332; see 14 Ann. Cas. 523, note. If, then, in the instant case, under the presumed agreement with Mexico, the army had authority to capture those whom it honestly

believed to be bandits, the prisoner was lawfully brought within Texas jurisdiction. But, even so, to entitle him to set up the extradition treaty and claim the privilege thereunder, it is necessary to place the "hot trail" agreement on a par with the extradition treaty and consider it part thereof, a large assumption, for clearly the prisoner was not extradited in the manner indicated by the Treaty of April 24th, 1899. Mexico's right to demand his return is beyond dispute, but the question involved is the prisoner's rights, which depend solely on the Treaty. It would seem a more logical and accurate conclusion to assume that the agreement only gave the privilege to capture bandits, that the prisoner was illegally taken into Texas, and consequently could not *himself* set up the Treaty; Mexico alone had cause to complain of the infringement of her national sovereignty. Cf. *Ship Richmond v. United States* (1815, U. S.) 9 Cranch, 102, 104.

LANDLORD AND TENANT—EMERGENCY RENT LAWS—WHAT CONSTITUTES A "REASONABLE" RENT.—The New York Emergency Rent Law of September 27, 1920, makes it a defence to an action for rent that the amount demanded is unreasonable. Laws, 1920, ch. 944. A court is then required to determine what is "fair and reasonable" and to give judgment accordingly. In the present action the running expenses, taxes, and allowance for depreciation were not disputed, the sole question being as to the amount of profit. *Held,* that a return of 8% on the market value of the property as of the date of the law's first enactment (April 1, 1920) was reasonable. *Stephens v. American Real Estate Co.* (1921, S. D. N. Y.) 66 N. Y. L. JOUR. 715 (Nov. 30, 1921).

Under ordinary circumstances, a fair rent must necessarily be calculated upon the market value of the property. Since this depends entirely upon the prospective earnings, the exorbitant rents obtaining during the housing shortage are reflected in equally high values. But it seems anomalous to hold that a moderate return on an unreasonable value constitutes a reasonable rent. The New York cases are in hopeless confusion. In one, the court calculated the return on the owner's investment, refusing to consider the increase in values. *Hall Realty Co. v. Moos* (1921, Sup. Ct.) 115 Misc. 506, 188 N. Y. Supp. 858. Under this rule the proper rental would change with every resale. In another case, it was said that it was impossible to lay down any general rule that could be followed in all cases. *Schwartz v. Deutsch* (1921, Sup. Ct.) 187 N. Y. Supp. 521. While in a third, it was recognized that the owner's real investment was the amount for which the property could presently be sold. *Hirsch v. Weiner* (1921, Sup. Ct.) 116 Misc. 312, 190 N. Y. Supp. 111. But such a holding renders practically nugatory the efforts of the legislature. The decision in the instant case eliminates profits on increases subsequent to the passing of the law, but it accepts as a necessary evil the exorbitant profits then prevailing. An amendment fixing an arbitrary rule of valuation seems necessary, its objective being an equal rental for similar accommodations. An analogous problem arises in the regulation of public utility rates, where, due to lack of competition, a fair market value cannot be established. The United States Supreme Court apparently approves of estimating value on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. *Denver v. Denver Union Water Co.* (1918) 246 U. S. 178, 191, 38 Sup. Ct. 278, 283. This is open to serious objections in the case of public utilities. See Hale, *The "Physical Value" Fallacy in Rate Cases* (1921) 30 YALE LAW JOURNAL, 710; Henderson, *Railway Valuation and the Courts* (1920) 33 HARV. L. REV. 902. But in a *competitive* business the earnings obtainable depend upon the cost of reproduction. And it is submitted that this is the basis upon which the legislature should act. The vice in the housing situation is the lack of competition, and a rule that would give as nearly as possible the results of competition would be most desirable.

LANDLORD AND TENANT—PROVISION AGAINST ASSIGNMENT WITHOUT CONSENT—CONSENT CANNOT BE UNREASONABLY WITHHELD.—The plaintiff leased a house under an agreement which contained a provision that he was not to assign, underlet, or part with the possession of the house without the landlord's consent, which was "not to be unreasonably withheld in case of a respectable and responsible person." The defendant purchased the landlord's reversion and offered to purchase what remained of the plaintiff's term in order to have the house for personal occupation. The exact nature of the negotiations did not appear. The plaintiff later assigned her interest to a respectable and responsible person but the defendant refused to consent to the assignment because she wanted the premises herself. *Held,* that the refusal was unreasonable and that the plaintiff was entitled to assign without consent. *In re Winfrey & Chatterton's Agreement* [1921] 2 Ch. 7.

In England, covenants not to assign or sublet often provide that the lessee will not do so without the consent of the lessor, such consent "not to be unreasonably withheld." It is generally held that a covenant in this form does not give the lessee a right of action for an arbitrary refusal but merely allows him to assign without consent. *Treloar v. Bigge* (1874) L. R. 9 Exch. 151; *Sear v. House Property & Investment Society* (1880) L. R. 16 Ch. Div. 387; *Goodwin v. Saturley* (1900, Q. B.) 16 T. L. R. 437. Where, however, there is an express covenant by the lessor not to withhold consent unreasonably, not only may the lessee assign without consent in case of an arbitrary refusal, but he may also bring an action for breach of the lessor's covenant. *Ideal Film Renting Co. v. Nielsen* [1921] 1 Ch. 575. However inoperative an arbitrary refusal may be, still where covenants of this kind exist, permission to assign *must* be asked even if only to be refused. *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Lepla v. Rogers* [1893] 1 Q. B. 31; *Eastern Telegraph Co. v. Dent* (1898, Q. B.) 78 L. T. R. 713; see (1898) 105 LAW TIMES, 288. On facts similar to the instant case, a refusal because the lessor desired possession himself was held to be unreasonable. *Bates v. Donaldson* [1896] 2 Q. B. 241; see (1896) 30 IRISH LAW TIMES, 389. An objection based solely upon the nationality of the proposed assignee has been held to be unreasonable. *Mills v. Cannon Brewery Co.* [1920] 2 Ch. 38; *Lempriere v. Burghes* [1921, Sup. Ct.] New Zealand L. R. 307; *Wing v. Kensit* [1921] N. So. Wales R. 464. Where the lessor refused to permit a tenant, an assignee of the original lease, to assign to his wife except on the condition that he covenant to pay the rent and perform all covenants in the lease, it was held that the refusal was unreasonable. *Evans v. Levy* [1910] 1 Ch. 452. See Woodfall, *Landlord and Tenant* (20th ed. 1921) 807-809. There have been *dicta* to the effect that if the lessor offered the same terms as the proposed assignee, to refuse to consent to an assignment would not be unreasonable. *Lehmann v. McArthur* (1868) L. R. 3 Ch. App. 496, 501, 504; *Bates v. Donaldson, supra,* at p. 245. The present decision expressly disapproves of this suggestion, declaring that even though the same terms were offered by the lessor, his refusal would be arbitrary, a perhaps more reasonable construction. The clause was not intended to give the lessor a preference. It was inserted only to secure the lessor from having an undesirable assignee thrust upon him. There are apparently no American decisions on the exact point of the instant case.

PARENT AND CHILD—CUSTODY OF INFANTS.—During the mother's absence from home and without her consent, the father placed their children in a Roman Catholic academy. The mother applied for a writ of habeas corpus to have the children returned to their home and the joint custody of herself and her husband. *Held,* that the children should be returned to their home. *People, ex rel. Delaney, v. Mt. St. Joseph's Academy* (1921) 198 App. Div. 75, 189 N. Y. Supp. 775.

Early American cases gave the father the custody and control of the minor children in preference to the mother. *Johnson v. Terry* (1867) 34 Conn. 259. This was the early common-law rule; but it has been considerably modified by

statute and judicial decision, both in England and the United States. *Commonwealth v. Walsh* (1905) 14 Pa. Dist. 644; *The Custody of Infants* (1918) 52 IRISH LAW TIMES, 295. What was formerly the father's paramount right is now sometimes considered as only a *prima facie* right, yielding to the mother if best for the child. *Jensen v. Jensen* (1919) 168 Wis. 502, 170 N. W. 735. The trend of the latest decisions is to attach equal weight to the claims of each parent. The child will be confided, at the discretion of the court, to the custody of the parent considered the more suitable. *In re Pinnell* (1921, Calif.) 198 Pac. 215; *Turner v. Turner* (1920) 150 Ga. 191, 103 S. E. 413. But the mother of an illegitimate child has a claim to its custody superior to that of the putative father or any other person. *Garrett v. Mahaley* (1917) 199 Ala. 606, 75 So. 10. As between parents and strangers, some courts place the welfare of the child entirely above any sentimental family considerations. *Thompson v. Arnold* (1921, Mo.) 230 S. W. 322. But all are rightly reluctant to deprive parents of their children. *Jendell v. Dupree* (1921, Kan.) 195 Pac. 861. Such assumption of judicial control over family life is indeed paternalistic. Some objection to such a tendency is evidenced by declarations that no court should thwart or disregard the parental right of custody, even though it conduces to the best interests of the child. *Ex parte Kirchner* (1920, N. J.) 111 Atl. 737. The courts have not yet reached the point where they feel themselves in *loco parentis*. *In re Mead* (1920, Wash.) 194 Pac. 807.

PATENTS—GENERIC INVENTION—DOCTRINE OF EQUIVALENTS.—The complainant, patentee of the first mechanical candy-pulling device, sought to enjoin the defendant from manufacturing a new candy-pulling machine embodying the same general "in-and-out" movement patented in the original invention. The defences were that the new machine operated through an improved arrangement of the moving parts with the elimination of a certain "candy trough" alleged to be essential in the original, and that the complainant's device had not been a success. *Held*, that the patent of the complainant was a primary or generic one and was infringed by the subsequent device of the defendant employing the same general principle. *Hildreth v. Mastoras* (1921) 42 Sup. Ct. 20.

Whether the substitution of different but equivalent parts or arrangement in a patented device infringes the patent rights depends upon the nature of the invention patented. *McCormick v. Aultman* (1895, C. C. A. 6th) 69 Fed. 371; Macomber, *The Fixed Law of Patents* (2d ed. 1913) par. 373-380. Where the device is a pioneer in its field, the range of equivalent substitutes which are considered infringements will be proportionately broad. Macomber, *op. cit.* par. 375; *Reece Machine Co. v. Globe Machine Co.* (1894, C. C. A. 1st) 61 Fed. 958. Although the definition of an "equivalent" can be determined only from the particular facts, it is now well settled that a device may be such though it performs more functions than the device it replaces or performs them better. *Powell v. Leicester Mills Co.* (1901, C. C. A. 3d) 108 Fed. 386; 22 Cyc. 456. But the equivalent must be distinguished from a new invention and must have been known to "ordinarily skillful" mechanics at the date of patent. *Magic Light Co. v. Economy Gas Lamp Co.* (1899, C. C. A. 7th) 97 Fed. 87; *Read & Sons v. Schultze-Berge* (1896, C. C. S. D. N. Y.) 78 Fed. 493. The general rule, as applicable to the instant case, is that a transposition of parts or motion will not obviate infringement of a generic patent when substantially the same result is obtained. Macomber, *op. cit.* par. 457; *International Co. v. Bundy Recording Co.* (1908, C. C. A. 2d) 159 Fed. 464; *Letson v. Alaska Packers Assoc.* (1904, C. C. A. 9th) 130 Fed. 129. The defence that the original invention was never a success and consequently not entitled to a broad range of equivalents was correctly overruled. The patented device need not be commercially successful or perfect in its operation. It is enough if it actually works and performs the new function. *People's Telephone Co. v. Am. Bell Tele-*

phone Co. (1887) 126 U. S. 535, 8 Sup. Ct. 778; *Mergenthaler Linotype Co. v. Press Publishing Co.* (1893, C. C. S. D. N. Y.) 57 Fed. 502.

PRACTICE—FEDERAL CONFORMITY ACT—SALE ON FEDERAL EXECUTION.—The Conformity Act provides that the practice in federal courts in civil causes, other than in equity and admiralty, "shall conform, as near as may be," to the practice of the state in which the federal court is sitting; and that a party recovering a judgment in common-law causes in the federal courts "shall be entitled to similar remedies upon the same" to those given in the state courts. Act of June 1, 1872 (17 Stat. at L. 197) ch. 255, secs. 5, 6. On an execution issued by a federal circuit court personal property was sold by the marshal at the United States court house. The state statutes required such sales to be made at the county court house. *Held,* that the sale was valid. *Yazoo & Miss. Valley Ry. v. City of Clarksdale* (1921) 42 Sup. Ct. 27.

The Conformity Act does not permit state statutes or decisions to limit or enlarge the *jurisdiction* of the federal courts. *Mechanical Appliance Co. v. Castleman* (1910) 215 U. S. 437, 30 Sup. Ct. 125; *Southern Photo Co. v. Eastman Kodak Co.* (1915, N. D. Ga.) 224 Fed. 523. Nor will the state practice be followed when Congress has legislated in regard to any matter of practice, or when the state practice is inadequate to enforce the substantive law of a given federal statute. *Southern Pacific Co. v. Denton* (1892) 146 U. S. 202, 13 Sup. Ct. 44; *Berry v. Mobile Ry.* (1915, W. D. Ky.) 228 Fed. 395; *Hills & Co. v. Hoover* (1911) 220 U. S. 329, 31 Sup. Ct. 402; *Buckeye Powder Co. v. Dupont Powder Co.* (1912, D. D. N. J.) 196 Fed. 514. Thus, had the sale in the instant case been under a decree of court requiring confirmation for its validity, it would have been covered by federal statutes. Act of March 3, 1893 (27 Stat. at L. 751) ch. 225; *Cumberland Lumber Co. v. Tunis Lumber Co.* (1909, C. C. A. 4th) 171 Fed. 352. In cases not covered by federal legislation the Conformity Act was intended to create uniformity between the federal and state practice; but the policy, as the qualifying words indicate, was to leave a certain amount of discretion to the federal courts. *Mexican Cent. Ry. v. Pinkney* (1893) 149 U. S. 194, 13 Sup. Ct. 859; *Shepard v. Adams* (1898) 168 U. S. 618, 18 Sup. Ct. 214; *Elk Garden Co. v. Thayer Co.* (1913, W. D. Va.) 206 Fed. 212. The Court in the instant case, by way of dictum, says that, in cases involving realty, the state practice must be literally followed. This distinction was also made in discussing other cases. *Smith v. Cockrill* (1867, U. S.) 6 Wall. 756; *Bornemann v. Norris* (1891, C. C. N. D. Fla.) 47 Fed. 438. While these cases are properly distinguished on other facts, it is believed that a distinction should not be made between realty and personalty except, perhaps, in determining whether the officers of the federal courts have exercised a proper discretion. But, after the sale is consummated, the purchaser's title should not be upset even where there has been abuse of discretion. Cf. *Faulds v. Tilton* (1911, C. C. A. 7th) 192 Fed. 297.

STATUTE OF FRAUDS—RECOVERY ALLOWED ON QUANTUM MERUIT WHERE BROKERAGE CONTRACT WAS VOID.—The plaintiff, a licensed real estate broker, sued on quantum meruit to recover the reasonable value of services performed in connection with the exchange of the defendant's land. An oral contract authorizing an agent to sell real estate was void by statute. Wis. Laws, 1917, ch. 221, sec. 2305m. *Held,* (three judges *dissenting*) that the plaintiff could recover. *Seifert v. Dirk* (1921, Wis.) 184 N. W. 698.

The provisions in the American statutes of frauds concerning the appointment of agents to deal with real estate are not uniform. In some states, the statute provides that the agent's authority must be in writing. Calif. Civ. Code, 1899, sec. 1624; *Platt v. Butcher* (1896) 112 Calif. 634, 44 Pac. 1060. In others, oral

authority is sufficient. Mass. Rev. Laws, 1902, ch. 74, sec. 1; *Tobin v. Larkin* (1903) 183 Mass. 389, 67 N. E. 340. As this provision of the statute may affect not only the validity of the contract made by the agent, but also his right to recover compensation from his principal, it has frequently been before the courts for interpretation. If an oral contract is void under the statute, it is uniformly held that the agent cannot recover upon the contract. *Keith v. Smith* (1907) 46 Wash. 131, 89 Pac. 473; 13 Ann. Cas. 977, note. Nor has he, by the great weight of authority, a right to recover upon quantum meruit. *Case v. Ralph* (1920, Utah) 188 Pac. 640; *Paul v. Graham* (1916) 193 Mich. 447, 160 N. W. 616; *Jamison v. Hyde* (1903) 141 Calif. 109, 74 Pac. 695; 9 C. J. 558; 1 Williston, *Contracts* (1920) sec. 450, note 11. The reason usually given as the basis of this rule is that the statute would in effect be nullified if a quasi-contractual recovery were allowed. *Keith v. Smith, supra.* This reasoning seems unanswerable. In view of the result reached in the principal case, compliance with the terms of the statute would be a matter of indifference to a real estate agent. Here the amount recovered was exactly the same as that contracted for, and the broker would in every case receive the reasonable value of his services. The Wisconsin Court seems to have overlooked the cardinal principle that the legislative intent should govern in construing a statute; it seems clear that the purpose of the legislature in enacting this Statute was to prohibit real estate brokers from recovering commissions unless the right thereto should be evidenced by a written contract. The probability that the community would suffer as a result of unfounded claims on the part of real estate agents seemed great enough to justify this safeguard.

SURETYSHIP AND GUARANTY—ASSIGNMENT BY OBLIGEE BEFORE BREACH DOES NOT DISCHARGE GUARANTOR.—A, a lessee, subleased to B. The defendant guaranteed to A and his "legal representatives" payment of rent and performance of covenants of the lease by B. A assigned his lease to the plaintiff, before breach by B, and the plaintiff now sues the defendant on his guaranty, B having defaulted. *Held,* that "legal representatives" included successors in interest and that therefore the guarantor was liable on the guaranty, even though the assignment was before breach. *Lindenburg Corp'n. v. Howland* (1921, Mun. Ct. N. Y.) 115 Misc. 244, 187 N. Y. Supp. 917.

The assignability of a right of action against a surety or guarantor, after default by the principal, is now well recognized. *Everson v. Gere* (1890) 122 N. Y. 290, 25 N. E. 492; *Evansville Nat. Bk. v. Kaufmann* (1883) 93 N. Y. 273. Such an assignment, it seems, after the cause of action has accrued, cannot be restricted even by the express terms of the contract. Spencer, *Suretyship* (1913) 152, note 13. A real difficulty, however, arises where a guaranty, not negotiable in its terms, is assigned by the obligee, before breach by the principal. By the weight of authority a guaranty is assignable even before breach, if the contract guaranteed is itself assignable, and the guaranty can be enforced by the same person who can enforce the principal obligation. *Everson v. Gere, supra; Higgins v Hocking Valley Ry.* (1919) 188 App. Div. 684, 177 N. Y. Supp. 444; *Metzger v. Hubbard* (1899) 153 Ind. 189, 54 N. E. 761. Where, however, the guarantor has entered the agreement because of personal reliance on the obligee, and the intention is clear to restrict liability to the original obligee, the latter alone can recover on the guaranty. *Evansville Nat. Bk. v. Kaufmann, supra.* In arriving at that intention, a contract of suretyship or guaranty should receive the same liberal interpretation accorded to any other contract, and once the intention of the parties has been ascertained, the rule of strict construction applies and the surety or guarantor may then stand on the precise terms of the contract. *Davis v. Wells* (1881) 104 U. S. 159; *London & S. F. Bk. v. Parrott* (1899) 125 Calif. 472, 58 Pac. 164; *Ulster City Saving Inst. v. Young* (1899) 161 N. Y. 23, 55 N. E. 483; *Citizens'*

Trust & Surety Co. v. Howell (1902) 49 Pa. Super. Ct. 255. It seems that whatever operates as an assignment of a debt, operates *prima facie* at least, as an assignment of the guaranty, on the theory that it is, like a mortgage, an incident of the debt, and that whoever may enforce the debt may enforce the guaranty. *Stillman v. Northrup* (1888) 109 N. Y. 473, 17 N. E. 379; *Longfellow v. McGregor* (1895) 61 Minn. 494, 63 N. W. 1032. Reading the stipulation of the lease in the instant case to the effect that its provisions "would bind and run in favor of the landlord and tenant and their respective successors in interest" in connection with the guaranty which refers to the lease, it was clearly reasonable to conclude that the guaranty was not intended to be a personal one and that the term "legal representatives" included assignees. After all, the right of the obligee against the defendant, though a conditional one, arose immediately upon execution of the lease from A to B, and not upon default by B, and there seems to be no valid reason why that conditional right should not be assignable along with the principal obligation, in the absence of an express or clearly implied provision to the contrary.

WORKMEN'S COMPENSATION—AMOUNT RECOVERABLE—EFFECT OF SERVANT'S SETTLEMENT WITH TORT-FEASOR.—The Iowa Workmen's Compensation Act provides that where an employee receives an injury for which compensation is payable and which was caused "under circumstances creating a legal liability in some person other than the employer to pay damages," he may proceed against both the employer for compensation and the third party for damages, but the amount of compensation received under the Act is to be "reduced by the amount of damages recovered" from such third party. Iowa Ann. Code, 1913, ch. 8A sec. 2477-m6. The plaintiff's intestate had been injured by a trolley company while in the defendant's employ. The trolley company, before any claim had been made, paid the plaintiff's intestate $750 for his covenanting never to sue. The defendant declined to pay full compensation on the ground that the $750 should be deducted. *Held,* that the plaintiff was entitled to full compensation, since the $750 received was not a recovery of damages within the meaning of the Statute. *Renner v. Model Laundry* (1921, Iowa) 184 N. W. 611.

The trend of recent decisions is towards a liberal construction of Workmen's Compensation Acts in favor of the employee. *Strasmas v. State Industrial Com.* (1921, Okla.) 195 Pac. 762; *Industrial Com. v. Weigandt* (1921, Ohio) 130 N. E. 38; *Town of Stephenson v. Industrial Com.* (1921, Wis.) 180 N. W. 842. Perhaps the instant case reflects this tendency to a rather extraordinary degree, although the "scope of employment" cases have gone even further. See *Starr Piano Co. v. Industrial Com.* (1919) 181 Calif. 433, 184 Pac. 860; COMMENTS (1920) 29 YALE LAW JOURNAL, 669. The Court would have been justified in finding that there was in substance a "recovery of damages" by a less technical construction of the Statute. See *Cripps Case* (1914) 216 Mass. 586, 104 N. E. 565; *Rosenbaum v. Hartford News Co.* (1918) 92 Conn. 398, 103 Atl. 120. If the Court could find no obligation resting upon the trolley company, the resulting conclusion that the legal relations of those not a party to the arrangement were unaffected is not without authority. See *Hornburg v. Morris* (1916) 163 Wis. 31, 157 N. W. 556; *Kelly v. No. British Ry. Co.* (1915) 53 Scot. L. R. 53. The Court's refusal to treat the defendant and the trolley company as joint tort-feasors because of the difference between a statutory and common-law liability is a desirable result. See (1918) 18 COL. L. REV. 599. But had the Court seen fit to hold otherwise, it might well have found that the defendant was not released by the deceased's covenant with the trolley company. See *Adams Express Co. v. Beckwith* (1919) 100 Ohio St. 348, 126 N. E. 300; COMMENTS (1920) 29 YALE LAW JOURNAL, 909. The case seems to interpret the Iowa Statute narrowly, but is sustainable in that it follows the general tendency in workmen's compensation cases of favoring the employee.