RECENT CASE NOTES

ASSIGNMENT—DUTY OF ASSIGNOR TO ASSIGNEE.—The defendant entered into a contract with the Dominion Sugar Company of Ontario, Canada, for the purchase of 2,000 tons of sugar at 9.5 cents per pound. The sugar was to be delivered in New York. Later he contracted to sell to the plaintiff, an agent for a foreign corporation, 1,750 tons of the same sugar at 10.5 cents per pound. The Dominion Sugar Company had no knowledge of this agreement. The Canadian Goverment placed an embargo on sugar and the Dominion Company applied to the defendant for a release from its contract. This was granted upon the payment of a large consideration. The defendant refused either to deliver the sugar to the plaintiff or to indemnify him. The plaintiff sued for the difference between the contract price and the market price at the time fixed for delivery. *Held,* that, viewing the original transaction between the plaintiff and the defendant as an assignment *pro tanto,* the plaintiff could recover. *Gray & Co. v. Cavalliotis* (1921, E. D. N. Y.) 276 Fed. 565.

It would be a breach of good faith for an assignor to destroy a contract right already assigned. *In re Ellington Planting Co.* (1912) 131 La. 654, 60 So. 25. Hence an assignor who collects a debt which he has previously assigned is a constructive trustee for his assignee. *MacDonald & Graham v. Kneeland & Luddington* (1861) 5 Minn. 352. Especially is this true in the case of partial assignments. *Hinkle Iron Co. v. Cohen* (1920) 229 N. Y. 179, 128 N. E. 113; see COMMENTS (1919) 28 YALE LAW JOURNAL, 395. An unwarranted interference with the contractual relations existing between an assignee and the original obligor might be considered a tort. See *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216; *Temperton v. Russell* [1893, C. A.] 1 Q. B. 715. So also a quasi-contractual recovery might be had on the ground of unjust enrichment if the assignor releases for a consideration, as in the instant case. The court based its decision, however, on the ground that the defendant had broken an implied contract not to release the original obligor. Some courts have reached the same result in similar cases without indicating the specific theory upon which the recovery was allowed. *Hubbard v. Prather* (1808, Ky.) 1 Bibb. 178; *Executors of Willson v. Winn* (1804, S. C.) 2 Bay, 517. In one case the court did not refer to an implied contract, but apparently allowed a recovery on that ground. *Alston v. Gillespie* (1887) 78 Ga. 665, 3 S. E. 562. The more fully considered decisions, however, definitely recognize that any act of the assignor destructive of the assignee's rights is a breach of an implied contract. *Ward v. Audland* (1847, Exch.) 16 M. & W. 862; *Aulton v. Atkins* (1856, C. P.) 18 C. B. 249; *Gerard v. Lewis* (1867) L. R. 2 C. P. 305; see also *Sanders v. Aldrich* (1857, N. Y.) 25 Barb. 63. Implied contracts are "obligations arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words." 1 Williston, *Contracts* (1920) sec. 3. To hold that an assignor must not interfere with the rights of his assignee seems to be a legitimate application of this definition. The cause of action being for breach of contract, the damages would be measured by the injury suffered by the assignee. A similar result would be reached if the plaintiff sued in tort, but in quasi-contract he would recover the amount of the consideration of the release. In so far as the decision in the principal case relates to the point here discussed, it appears to be the first direct American authority.

CONFLICT OF LAWS—BILLS AND NOTES—APPLICABILITY OF FOREIGN REVENUE LAWS.—Suit was brought in New York on an unstamped negotiable promissory note executed in London and made payable in New York. The defendant denied

liability on the ground that the lack of a stamp rendered the note void under English law. *Held,* that the validity of the note depended upon the law of the place where it was payable. *Beadall v. Moore* (1922) 199 App. Div. 531, 191 N. Y. Supp. 826.

It is generally held that the formal requirements of bills and notes which are payable at the place of execution are governed by the law of the place where they are made. *Conner v. Elliot* (1920) 79 Fla. 513, 85 So. 164; Lorenzen, *Conflict of Laws as to Bills and Notes* (1917) 35. Applying this theory, some courts have held that if the absence of a stamp renders a note void at the place where it is made, it is void everywhere. *Satterthwaite v. Doughty* (1853) 44 N. C. 314; *Fant v. Miller* (1866, Va.) 17 Gratt. 47. Notes which are payable at a place other than the place where they are made have been considered as not within the rule of the *lex loci contractus.* Their validity is controlled by the law of the place of payment. *McCabe v. Williams* (1920, N. D.) 177 N. W. 378; *Brown v. Gates* (1904) 120 Wis. 349, 98 N. W. 205; see Story, *Bills of Exchange* (4th ed. 1860) 144. It seems that the rule of the *lex loci solutionis* should apply also to bills and notes in which the place of execution and payment coincide, since the term "place of payment" includes the place of making. The rules laid down in the above cases and the instant decision appear to be based upon the theory that the validity of the instrument depends upon the law of the place with reference to which the parties intended to contract. See *Zimmerman v. Brown* (1917) 30 Idaho, 640, 166 Pac. 924. Inasmuch as modern commercial conditions require a definite, consistent rule, it would probably be more desirable to hold a negotiable instrument valid, in so far as form is concerned, if it complies with the law of any state with which the contract has a substantial relation, than to make its validity depend upon the presumed intention of the parties. This rule should be applied if the lack of a stamp renders the note invalid at its inception. If the absence of a stamp, however, has no effect upon the substance of the instrument, but merely affects its admissibility in evidence, the defect is generally disregarded by the court of the forum as a mere procedural requirement of another jurisdiction. Westlake, *Private International Law* (5th ed. 1912) sec. 209; Hibbert, *International Private Law* (1918) 132, 133. The court based its decision in the instant case partly upon the ground that no territorial effect should be allowed to foreign revenue laws, a principle which seems open to criticism. Lorenzen, *op. cit.* 44; but see Foote, *Private International Jurisprudence* (4th ed. 1914) 358.

CONSTITUTIONAL LAW—REVOCATION OF LICENSE OF FOREIGN CORPORATION FOR REMOVING SUIT TO FEDERAL COURTS—UNCONSTITUTIONAL CONDITIONS.—The plaintiff, a Missouri corporation, licensed to do business in Arkansas, brought an original suit in the federal court of Arkansas and also removed to the same court a suit brought against it. A statute required the Secretary of State of Arkansas, the defendant, to revoke the license of a foreign corporation that invoked the federal jurisdiction. The plaintiff sought to enjoin the revocation. *Held,* that an injunction should be granted. *Terral v. Burke Construction Co.* (1922) 42 Sup. Ct. 188.

The instant case, expressly overruling two previous decisions, and definitely establishing the rule that a state cannot compel a foreign corporation to refrain from removing suits to the federal jurisdiction, should settle a controversy of long standing, which had its origin in the case of *Paul v. Virginia* (1869, U. S.) 8 Wall. 168, and which has given rise to considerable uncertainty. The broad language of that case allowed complete freedom to the states in their treatment of foreign corporations not within the scope of the commerce clause. A state could exclude such corporations entirely and thus could impose any conditions

whatever upon their admission. To prohibit a foreign corporation from bringing suit in a federal court was a familiar condition. The court soon realized that the doctrine as expressed in the Virginia case was too broad, and hence gave effect to an earlier statement to the effect that qualifications for the admission of foreign corporations must not be "repugnant to the constitution or laws of the United States." *Lafayette Ins. Co. v. French* (1856, U. S.) 18 How. 404, 407. Consequently it was held that an agreement not to remove to the federal courts was a violation of the corporation's constitutional privilege and that the corporation could repudiate such an agreement. *Insurance Co. v. Morse* (1874, U. S.) 20 Wall. 445. When the question was raised again, however, the court wished to avoid the *Morse* case, and yet not overrule it. The result reached was that a state could not enforce a contract not to remove a suit, but could punish the corporation by expulsion if it availed itself of this constitutional privilege. *Doyle v. Continental Ins. Co.* (1877) 94 U. S. 535. To overcome this dilemma, the court later held that a law imposing such a condition was void and of no effect. *Barron v. Burnside* (1887) 121 U. S. 186, 7 Sup. Ct. 931. This should have ended the controversy, but in the case of *Security Mutual Ins. Co. v. Prewitt* (1906) 200 U. S. 446, 26 Sup. Ct. 314, aff'd (1906) 202 U. S. 246, 26 Sup. Ct. 619, the court reverted to its previous decision in the *Doyle* case and held that a state could expel a corporation for not complying with the condition. This decision was again unsatisfactory and was gradually broken down. *Harrison v. St. Louis & San Francisco Ry.* (1914) 232 U. S. 318, 34 Sup. Ct. 333; Henderson, *Position of Foreign Corporations in American Constitutional Law* (1918) chs. 6, 8. It was not until the instant case that the *Doyle* and *Prewitt* cases, subjected to much criticism, were expressly overruled with no attempt made to distinguish them. It may be hoped that the rule is finally settled.

CORPORATIONS—NEGLIGENCE—STOCK CERTIFICATE SIGNED IN BLANK BY OFFICERS AND STOLEN BY EMPLOYEE.—Stock certificates signed in blank by the president and treasurer of the defendant corporation were left in the custody of its transfer agent. A clerk who assisted the transfer agent and had access to the certificates, abstracted one, filled it out in his own name, forged the name of the registrar of the corporation, and pledged it to the plaintiff as security for a loan. The loan not having been paid and the corporation having refused to transfer the stock on its books, the plaintiff sued to recover damages for the loss sustained. *Held,* (two judges *dissenting*) that the plaintiff could not recover. *Hudson Trust Co. v. American Linseed Co.* (1922) 232 N. Y. 350, 134 N. E. 178.

The doctrine that a corporation is liable for fraudulent issues of certificates of stock made by its transfer agent is well established in this country. *N. Y., N. H. & H. Ry. v. Schuyler* (1865) 34 N. Y. 30; *Allen v. South Boston Ry.* (1889) 150 Mass. 200, 22 N. E. 917; but see *Moores v. Citizen's Nat. Bank* (1884) 111 U. S. 156, 4 Sup. Ct. 345. It has no application to the instant case, however, since the particular clerk was not clothed with general authority to issue stock. The liability of the corporation was invoked on the ground that it was negligent in making the issuance of the certificate possible. Certificates of stock are quasi-negotiable instruments, and where the owner entrusts them to an agent for a prescribed purpose and the agent pledges them as security for a loan to himself, the owner is estopped to assert his ownership. *National Safe Deposit Co. v. Hibbs* (1913) 229 U. S. 391, 33 Sup. Ct. 818; *Union Trust Co. v. Oliver* (1915) 214 N. Y. 517, 108 N. E. 809 On the other hand, where a servant simply has access to a certificate in the possession of the owner and steals it, the owner may reclaim the certificate from innocent purchasers. *Knox v. Eden Musée Americain Co.* (1896) 148 N. Y. 441, 42 N. E. 988. The instant case falls within the latter principle. Possession of the certificates was entrusted to the

transfer agent and not to the clerk who assisted him and who merely had access to the certificates. See *Schumacher v. Greene Cananea Copper Co.* (1912) 117 Minn. 124, 134 N. W. 510. The fact that the name of the registrar on the face of the certificate was forged is another reason for the result. The certificate was not genuine and the corporation could not be liable even if negligent. *Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co.* (1906) 213 Pa. 307, 62 Atl. 916.

COVENANTS—COVENANTS RUNNING WITH THE LAND—PRIVILEGE TO TERMINATE A LEASE.—The defendant was the lessee of certain premises under a fifteen-year lease commencing May 1, 1913. The lessor had reserved the privilege and power of terminating the lease at any time subsequent to May 1, 1920, provided the land should be sold in good faith and $5,000 paid to the tenant. No reference was made to heirs or assigns. The lessor was seventy-three years of age when the lease was executed. The plaintiff, an assignee of an assignee of the lessor, sued to eject the defendant under this provision of the lease. *Held,* that the plaintiff should have judgment. 507 *Madison Ave. Realty Co. v. Martin* (1922, App. Div.) 192 N. Y. Supp. 762.

A covenant is said to run with the land when it is of such a kind that the duty to perform it or the right to enforce it will pass to an assignee of an interest in the land by mere force of the conveyance and without express assignment of the covenant. *Gerling v. Lain* (1915) 269 Ill. 337, 109 N. E. 972; *Miller v. Clary* (1913) 210 N. Y. 127, 103 N. E. 1114. But a covenant can run only if the parties so intend, and if it is of such a nature that the law will permit it to run. 1 Tiffany, *Real Property* (1920 ed.) 179. If it appears from the lease that the parties intend the covenant to run, assigns need not be mentioned, at least when the covenant concerns something *in esse. Hadley v. Bernero* (1902) 97 Mo. App. 314, 71 S. W. 451; 15 C. J. 1244. The leading case held that covenants run with leasehold estates only when they touch and concern the land. *Spencer's Case* (1583, K. B.) 5 Co. Rep. 16a. In order to touch and concern the land a covenant must affect the mode of enjoying the thing demised, its nature, quality, or value, independent of collateral circumstances. *Congleton v. Pattison* (1808, K. B.) 10 East, 130; *Ventnor Investment & Realty Co. v. Record Development Co.* (1911) 79 N. J. Eq. 103, 80 Atl. 952. Or it must be beneficial to the owner of the estate in his capacity as owner. *Vernon v. Smith* (1821, K. B.) 5 Barn. & Ald. 1; *Dyson v. Forster* [1909, H. L.] A. C. 98. Collateral covenants are those which are beneficial to the lessor or the lessee irrespective of his relation to the premsies, and do not pass to assignees. *Vyvyan v. Arthur* (1823, K. B.) 1 Barn & Cress. 410; *California Packing Corp. v. Grove* (1921, Calif.) 196 Pac. 891. Usually a covenant will not comply with one requirement unless it complies with the other also, and if it successfully does this, it is reasonably safe to assume that it touches and concerns the land. Abbot, *Covenants in a Lease which Run with the Land* (1921) 31 YALE LAW JOURNAL, 127, 135. Covenants have been further classified according to the legal relations created between the parties. Under this classification, those which beneficially affect the reversionary interest of the lessor by making more valuable or increasing his powers as reversioner touch and concern the land. *Mason v. Smith* (1881) 131 Mass. 510 (covenant to pay taxes on the demised premises); *Standard Oil Co. v. Slye* (1913) 164 Calif. 435, 129 Pac. 589 (covenant giving lessee power to renew the lease); see also Abbot, *Leases and the Rule Against Perpetuities* (1918) 27 YALE LAW JOURNAL, 878, 885; cf. *Hollander v. Central Metal & Supply Co.* (1908) 109 Md. 131, 71 Atl. 442; and *contra, Woodall v. Clifton* [1905, C. A.] 2 Ch. 257 (covenant to purchase the reversion); *Purvis v. Sherman* (1916) 273 Ill. 286, 112 N. E. 679 (covenant to purchase improvements); *Garelik v. Rennard* (1921, Sup. Ct.) 116 Misc.

352, 190 N. Y. Supp. 371 (covenant giving the tenant a privilege of pre-emption). See in general Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, 645. In the principal case the court easily found from the attending circumstances, including especially the lessor's age, that the parties intended the covenant to run. Furthermore, the covenant seems to have been of the kind that the law will permit to run.

CRIMINAL LAW—MANSLAUGHTER BY MEANS OF WOOD ALCOHOL COGNIZABLE IN JURISDICTION WHERE ORIGINAL PURCHASE OCCURRED.—The defendant purchased wood alcohol in Kings County, New York, with the intention of selling it for beverage purposes. He transported it to New York County where he bottled and sold it to a customer through whom it found its way to Massachusetts, where some of it was purchased and used as a beverage by the deceased. The New York Code defines manslaughter as a homicide committed without a design to effect death by a person committing a misdemeanor. N. Y. Cons. Laws, 1909, ch. 88, sec. 1050. Committing a public nuisance—the unlawful doing of an act which endangers the health or safety of a considerable number of persons—is a misdemeanor. *Ibid.* ch. 88, sec. 1530. The Code provides further that a crime perpetrated partly in one county and partly in another shall be subject to the jurisdiction of either. The defendant, convicted of manslaughter in Kings County, contended on appeal that no part of the crime of manslaughter had been committed in Kings County. *Held,* that the conviction was proper. *People v. Licenziater* (1921, N. Y.) 199 App. Div. 106.

At common law a homicide, the component parts of which take place in different jurisdictions, is cognizable only in the jurisdiction where it is consummated. *State v. Hall* (1894) 114 N. C. 909, 19 S. E. 602; Larremore, *Interstate Crime and Interstate Extradition* (1899) 12 HARV. L. REV. 532. In New York, however, the Code removes this seeming conflict of claim to jurisdiction as between counties. N. Y. Laws, 1881, ch. 442, sec. 134; Code of Crim. Pro. sec. 134. Moreover no difficulty would arise from the fact that the death occurred outside of the state, for under the code crimes partly committed within the State are punishable. N. Y. Cons. Laws, 1909, ch. 88, sec. 1930; see also *People v. Botkin* (1908) 9 Calif. App. 244, 98 Pac. 861. The instant case presents the difficulty of determining where the crime of manslaughter occurred. Obviously the homicide was an offence in Massachusetts and could have been punished there if extradition had been possible. *Hyatt v. Corkran* (1903) 188 U. S. 691, 23 Sup. Ct. 456. New York County, moreover, could have assumed jurisdiction, since the defendant, by his sale of a beverage which he knew to be dangerous, committed an unlawful act that proximately caused death. Cf. *Thiede v. State* (1921, Neb.) 182 N. W. 570. Was there, however, sufficient causal connection between the defendant's act in Kings County and the death in Massachusetts to justify the conclusion that a part of the crime of manslaughter was committed within the jurisdiction of the Kings County court? If the acts of the defendant in Kings County and New York County were parts of one transaction, if the diversion of the poison from an industrial use, harmless to life, to use as a beverage dangerous to life, was one continuing public nuisance under the broad statutory definition the decision is clearly sound. But the defendant was guilty only of a misdemeanor in Kings County if the purchase and transportation were separate and distinct from the sale, that is, if they were conditions precedent to, rather than causes of, the sale. Cf. *People v. Rockwell* (1878) 39 Mich. 503. This, it is submitted, is the logical view, but the question is so fine that the instant case may be supported upon the ground that no sufficiently valid doubt can be raised to justify a denial of jurisdiction to a court that obviously carried out manifest justice.

DAMAGES—MITIGATION—BENEFIT RECEIVED FROM THIRD PARTIES.—In an action to recover damages for personal injuries, the trial court refused to allow the defendant to show, in mitigation of damages, that the plaintiff's medical expenses had been paid by his employer, and that the plaintiff was insured against loss from the payment of hospital bills. *Held,* that there was no error. *Roth v. Chatlos* (1922) 97 Conn. 282, 116 Atl. 332.

Where the plaintiff has had to undergo the expense of nursing and medical attendance, it is well settled that he can recover the reasonable value of such service from the defendant. *Vicksburg & Meridian Ry. v. Putnam* (1886) 118 U. S. 545, 7 Sup. Ct. 1. But there is a decided difference of opinion on the question of whether there can be any recovery when the plaintiff has not been obliged to pay for these services. Thus, if the plaintiff has been attended by members of his household without compensation, some jurisdictions make no allowance therefor in damages, the theory being that he has suffered no damage and therefore has no basis for a claim against the defendant. *Gibney v. St. Louis Transit Co.* (1907) 204 Mo. 704, 103 S. W. 43; *Goodhart v. Pennsylvania Ry.* (1896) 177 Pa. 1, 35 Atl. 191. Other courts, however, following what seems to be a better rule, permit a recovery; they refuse to allow the defendant, a wrongdoer, to be benefited by the generosity of members of the plaintiff's household. *Varnham v. The City of Council Bluffs* (1879) 52 Iowa, 698, 3 N. W. 792. The same rule should apply when a third person, in a spirit of benevolence, has borne this expense for the injured party. *Denver & R. G. Ry. v. Lorentzen* (1897, C. C. A. 8th) 79 Fed. 291; *contra, Peppercorn v. The City of Black River Falls* (1894) 89 Wis. 38, 61 N. W. 79. Where the plaintiff had previously insured himself against the consequences of a future accident the defendant should not be entitled to have the insurance considered in mitigation of damages. The insurance "came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was *res inter alios acta.*" *Regan v. New York & N. E. Ry.* (1891) 60 Conn. 124, 22 Atl. 503. Apparently the existing conflict in the authorities is due to the failure on the part of some courts to recognize the fact that the defendant is under a duty to furnish the plaintiff with such medical service as is necessary to effect a cure; and that the defendant has no interest whatever in any sum that the plaintiff may receive from some third person. See 1 Sedgwick, *Damages* (9th ed. 1912) sec. 67; 67 L. R. A. 87, note.

GIFTS—BANK ACCOUNTS—EVIDENCE NECESSARY TO INDICATE DONATIVE INTENTION.—Miss Fell, a depositor in the defendant bank, caused her account to be changed from her own name to "Fell or Jordan, pay either or survivor." Miss Fell died, and Jordan, claiming as donee, sued through the bank to recover the balance of the account. *Held,* that the plaintiff could not recover. *Maine Savings Bank v. Welch* (1921, Me.) 115 Atl. 545.

The question of what constitutes sufficient evidence of an intention to make a gift of a bank account has been the cause of considerable confusion. By the weight of authority the fact that the deposit is in form in the name of the donor and the alleged donee raises no presumption of a donative intention. *Barstow v. Tetlow* (1916) 115 Me. 96, 97 Atl. 829; *Colmary v. Fanning* (1915) 124 Md. 548, 92 Atl. 1045; *contra, Blick v. Cockins* (1916) 252 Pa. 56, 97 Atl. 125. The reason usually advanced is that the transfer should be considered as having been made merely for the convenience of the donor unless another purpose is clearly indicated. *Hayes v. Claessens* (1919) 189 App. Div. 449, 179 N. Y. Supp. 153. The courts are almost evenly divided on the question of whether a donative intention may be indicated without a delivery of the bank book. Apparently the better view is that it may. *Marston v. Industrial Trust Co.* (1919, R. I.) 107 Atl. 88;

Kennedy v. McMurray (1915) 169 Calif. 287, 146 Pac. 647; *contra, Matthias v. Fowler* (1915) 124 Md. 655, 93 Atl. 298. As suggested by the cases adopting this view, the argument that the donor, by retaining the bank book, may withdraw the money and thus nullify the gift seems untenable, since, if there has in fact been a valid gift, the donee would have the same power. *Industrial Co. v. Scanlon* (1904) 26 R. I. 228, 58 Atl. 786. Another view is that the depositor, by thus changing the form of the account has, upon the theory of a novation, made a new contract with the bank whereby the donor and donee become joint tenants and the bank undertakes to pay either. *Deal's Adm'r. v. Merchants' Savings Bank* (1917) 120 Va. 297, 91 S. E. 135; *Chippendale v. North Adams Savings Bank* (1916) 222 Mass. 499, 111 N. E. 371. If the parties have agreed in writing as to the conditions upon which the bank is to hold the money, it is easy to ascertain whether there has been a gift. *Chippendale v. North Adams Savings Bank, supra.* The confusion in the decisions seems to result from a failure to distinguish between acts necessary to constitute a delivery under the technical requirements of gifts *inter vivos,* and acts indicative of a donative intention. In many states statutes provide that if a deposit is made in form payable to "either or survivor," there is a presumption of a joint tenancy. Conn. Gen. Sts. 1918, ch. 204, sec. 3999; N. Y. Laws, 1914, ch. 369, sec. 249; *Matter of Delmore* (1916) 174 App. Div. 99, 160 N. Y. Supp. 62. This result seems desirable. The instant case seems sound, inasmuch as the evidence indicated an attempt to make a testamentary disposition and not a gift. *McCullough v. Forrest* (1914) 84 N. J. Eq. 101, 92 Atl. 595.

INFANTS—CONTRACTS—REPUDIATION OF CONTRACT BENEFICIAL TO INFANT.—By misconduct an infant apprentice forced his master to discharge him and then sued to recover damages for wrongful dismissal. The lower court found that the apprentice, by his misconduct, had repudiated the contract, and that the master had accepted the repudiation. *Held,* that if the repudiation was not for the benefit of the infant, judgment should be for the plaintiff. *Waterman v. Fryer* (1921, K. B.) 38 L. T. R. 87.

It is settled in England that an infant is bound by a contract for service if, as a whole, it is beneficial to him. *King v. Inhabitants* (1824, K. B.) 3 Barn. & Cress. 484; *Bromley v. Smith* [1909] 2 K. B. 235; see *De Francesco v. Barnum* (1890) L. R. 45 Ch. Div. 430. The American rule is that infants are bound in quasi-contract for necessaries; specific contracts are voidable. See (1915) 24 YALE LAW JOURNAL, 344; 1 Williston, *Contracts* (1920) sec. 240; Anson, *Contract* (Corbin's ed. 1919) 171, note 1. From the rule that an infant is bound by a service contract beneficial to him, the English courts have arrived at the conclusion that he cannot repudiate such a contract unless the repudiation is for his benefit. *King v. Inhabitants, supra.* Upon the formation of the contract of apprenticeship, the infant incurred the duty to serve and obtained the right to be taught, the master obtaining the correlative right to service and incurring the duty to teach. The master may enforce his rights against the infant. *Gadd v. Thompson* [1911] 1 K. B. 304; see also *Clements v. London N. W. Ry.* [1894] 2 Q. B. 482, 491. The reason for holding an infant bound by a beneficial contract of service is the desirability that he be employed. Had he the power to destroy his duty by disaffirmance, masters would not employ him as an apprentice. *Clements v. London N. W. Ry.* [1894] 2 Q. B. 482, 495; Coke, *Littleton,* *172a. But this does not apply to repudiation or rescission. There the infant yields the right and is relieved of the duty. The master being willing, there seems to be no reason why the infant may not, by agreement, surrender the right. He may lose it by leaving the master. *Hughes v. Humphryes* (1827, K. B.) 6 Barn. & Cress. 680. He may forfeit it by criminal conduct. *Learoyd v. Brook* [1891] 1 Q. B. 431. The instant case, holding a benefit essential to an infant's repudiation, represents an unneces-

sary step in the zeal of the law to protect infants, and incidentally reveals the variance between the common-law rule of America and that of England with reference to such contracts.

INSURANCE—WAIVER AND ESTOPPEL—MILITARY CLAUSE.—An agent of the defendant insurance company represented to the insured that the clause in the policy which provided for the payment of a higher premium by persons in military service would not be enforced. A policy was taken out in reliance upon this representation, and the defendant company, in an action on the policy, set up the failure to pay the higher premium as a forfeiture. *Held,* (two judges *dissenting*) that the defendant was estopped to set up such a defence. *Sovereign Camp, W. O. W. v. Richardson* (1921, Ark.) 236 S. W. 278.

The instant case offers an excellent example of how courts become confused in the application of the doctrines of waiver and estoppel. Although the distinction is recognized by most courts there is a tendency to misapply and disregard it. As the right of the insured to recover may depend upon whether the facts constitute a waiver or an estoppel, it often becomes vital to determine which doctrine is applicable in a particular case, as, for example, where there is a provision in the policy limiting the power of an agent to waive a condition. Vance, *Insurance* (1904) 343; *Jones v. Savin* (1916, Del.) 96 Atl. 756; *Redstrake v. Cumberland, etc. Ins. Co.* (1882) 44 N. J. L. 294. In most state courts, if the agent of the insurer misrepresents existing or past facts, or if the insurer knows of facts which it may plead as a forfeiture, but nevertheless issues to the insured a policy which is represented as valid, the insurer is estopped from setting up the forfeiture. *Andrus v. Md. Ins. Co.* (1904) 91 Minn. 358, 98 N. W. 200; *Welch v. Fire Assoc.* (1904) 120 Wis. 456, 98 N. W. 227; see *Grand View Bldg. Assoc. v. Northern Ass. Co.* (1905) 73 Neb. 149, 102 N. W. 246. Estoppel, therefore, involves the element of deceit and is tortious in its basis. In order to be effective, the misrepresentation must relate to a present or past fact and must have the effect of inducing the insured to act in reliance upon it to his prejudice. The parol evidence rule is not involved and the result does not depend upon considerations of waiver or contract law but upon the simple equitable principle of estoppel *in pais. Ins. Co. v. Mowry* (1877) 96 U. S. 544; *Home Ins. Co. v. Wilson* (1913) 109 Ark. 324, 159 S. W. 1113; *contra, Northern Ass. Co. v. Grand View Bldg. Assoc.* (1902) 183 U. S. 308, 22 Sup. Ct. 133; *Md. Cas. Co. v. Campbell* (1920, C. C. A. 5th) 255 Fed. 437. Waiver is the "voluntary relinquishment of a known right." Vance, *op. cit.* 343. It is contractual in its nature in that the insurer consents to relinquish the right in question and the insured assents to such relinquishment. It is generally held that parol evidence is not admissible to prove a waiver prior to, or contemporaneous with, the completion of the contract. Such would clearly be obnoxious to the parol evidence rule. *Lasch v. N. Y. Life Ins. Co.* (1915, Sup. Ct.) 92 Misc. 190, 155 N. Y. Supp. 255. Where, however, the alleged waiver occurs after the issuance of the policy, parol evidence is admissible to establish a subsequent parol modification of the existing contract. *Ins. Co. v. Norton* (1877) 96 U. S. 234; *Caledonian Ins. Co. v. Smith* (1913) 65 Fla. 429, 62 So. 595. In the instant case there was no estoppel because there was no misrepresentation of an existing or past fact. There was a mere promissory statement that the military clause would not be enforced. There was, in effect, an attempt to waive by parol a condition in the policy before it was issued, and, in view of the parol evidence rule, the plaintiff should not have been allowed to introduce evidence of such alleged waiver. It is submitted, therefore, that the doctrine of estoppel was not applicable to the instant case. However keen the disappointment of the insured may have been, nevertheless he was neither deceived nor misled.

LANDLORD AND TENANT—COVENANT TO REPAIR—DUTY TO REMEDY PRIOR EXISTING OPEN STAIRWAY.—The defendant leased a basement to be used as a pool room, covenanting to "keep the building in repair during the term of the lease." The lessee was damaged by the entrance of snow and sleet through an open stairway which had been constructed prior to the lease. *Held,* that the plaintiff could recover. *Midkiff v. Benson* (1921, Tex. Civ. App.) 235 S. W. 292.

It is well settled that there is no implied warranty of the condition of the premises by the lessor. Therefore the lessee, under ordinary conditions, cannot complain that at the beginning of the tenancy the premises were not in a tenantable condition, or that they were not adapted to the business for which they had been leased. *Kutchera v. Graft* (1921, Iowa) 184 N. W. 297; *Little Rock Ice Co. v. Consumers' Ice Co.* (1914) 114 Ark. 532, 170 S. W. 241; *Valin v. Jewell* (1914) 88 Conn. 151, 90 Atl. 36; 1 Tiffany, *Real Property* (1920 ed.) 136. Consequently, in the absence of an express covenant, the lessee cannot demand that the lessor make any repairs in the premises which are necessitated by the peculiar nature of the lessee's business. The obligation of the landlord to repair always rests upon a covenant to that effect, and without such a covenant the landlord is neither under a duty to make repairs, nor to pay for such repairs as may be made by the tenant. *Daggett v. Panebianco* (1921, Neb.) 184 N. W. 177. When such a covenant exists, notice of the want of repair is a condition precedent to the landlord's duty. *Marr v. Dieter* (1921, Ga.) 109 S. E. 532. It is essential, however, that a distinction be made between cases where the lessee demands improvements of a constructive nature, and where he merely wishes the premises to be kept wind and water tight. *Lovejoy v. Townsend* (1901) 25 Tex. Civ. App. 385, 61 S. W. 331. Thus a lessor has been held to have been under no duty to strengthen the floors and construct new girders because of the use to which the tenant had put the demised building. *Gregory v. Manhattan Briar Pipe Co.* (1916) 174 App. Div. 106, 160 N. Y. Supp. 916. From the facts given in the principal case, it seems that the basement entrance was not sufficiently well built to exclude the water which was accustomed to accumulate in the area-way. Therefore, the lessor was clearly under a duty to repair this entrance, and was liable for the loss suffered by the plaintiff.

MUNICIPAL CORPORATIONS—INVALID CONTRACTS—RECOVERY IN QUASI-CONTRACT.—During a conflagration which endangered the city of Atlanta, the fire chief, at the instance of citizens, wrote out an order to the plaintiff company for Pyrene fire extinguishers, which he then used in fighting the fire. The city later refusing to pay, the plaintiff sued in alternate counts of contract or quasi-contract for the value of the extinguishers. *Held,* that the plaintiff could not recover. *Pyrene Manufacturing Company v. City of Atlanta* (1922, Ga. App.) 110 S. E. 408.

Three types of invalid contracts may result when dealing with a municipal corporation. See NOTES (1904) 4 COL. L. REV. 67; (1910) 9 MICH. L. REV. 671. The first is the truly *ultra vires* contract, where either the subject matter is "beyond the power" of the city, or where the manner of making it is specifically limited (as for example by bid). *Gamewell Fire Alarm Co. v. City of Los Angeles* (1919, Calif.) 187 Pac. 163. The second is within the power of the city to make in a specified way, which has not been complied with in some *detail,* not the essence of the regulation. *McGovern v. City of Chicago* (1917) 281 Ill. 264, 118 N. E. 3. The third is where a municipality which may contract in general, with no manner specified, has done so irregularly (as, for example, by the mayor alone, rather than by the city council). *Cade v. Belington* (1918) 82 W. Va. 613, 96 S. E. 1053. In the three classes, the courts are uniform in refusing a right of action on the contract (except in the third, if later ratified), and they are equally uniform in recognizing a right of "restitution in specie." *Staebler v. Town* (1919)

186 Ky. 124, 216 S. W. 348; *Floyd County v. Allen* (1910) 137 Ky. 575, 126 S. W. 124; 27 L. R. A. (N. S.) 1125, note. But as the latter generally does not fully compensate the plaintiff, an action in quasi-contract is often attempted. Here unanimity of judicial opinion ceases. Municipal corporations were early subject to the same duties for benefits received as were individuals, so that recoveries in quasi-contract were permitted in any of the three classes. *Argenti v. City of San Francisco* (1860) 16 Calif. 256. Perhaps due to the nefarious character of certain types of agreements, the courts changed their position, so that today in the first class of cases a recovery in quasi-contract is seldom permitted. *Reams v. Cooley* (1915) 171 Calif. 150, 152 Pac. 293; Ann. Cas. 1917 A 1260, note; (1920) 34 HARV. L. REV. 439. In the second class of cases there is a growing minority which grants a recovery in quasi-contract, for the reason that the policy of controlling the city's contract power is obviously less endangered. For the same reason, in the third class the greatest proportion of recoveries against the city in quasi-contract is allowed. The plaintiff in the instant case ought to be able to recover in quasi-contract from the individual citizens who used the extinguishers to save their homes, arguing from the analogy of cases where goods have been furnished a defendant at his request, in the mistaken belief of the existence of a valid contract with him—here with a third person, the municipal corporation. *Vickery v. Ritchie* (1909) 202 Mass. 247, 88 N. E. 835; 26 L. R. A. (N. S.) 810, note. But the plaintiff would have to sue innumerable defendants—if he could find them—and to recover in specie from the city would be to receive some empty extinguishers, or their value when emptied. It is submitted that the policy reflected in the increasing responsibility of a municipality for its torts should permit a recovery in quasi-contract, on the usual principles of equity and good conscience, where, as here, none of the elements which should bar recovery in any one of the three classes exists. COMMENTS (1919) 29 YALE LAW JOURNAL, 911; NOTES (1920) 20 COL. L. REV. 772. It should certainly be permitted if the case is of the second or third type, and perhaps it should be so even if it is of the first, where the facts as here, show good faith, no attempt to overburden the municipality, a serious emergency which made the fire chief an agent by necessity, and undoubted benefits received by the municipality through its citizens. See *Frank v. Board of Education* (1917) 90 N. J. 273, 100 Atl. 211; *Sheehan v. City* (1902, Sup. Ct.) 37 Misc. 432, 75 N. Y. Supp. 802.

RAILROADS—ADVERSE POSSESSION—USE OF PART OF PUBLIC HIGHWAY.—Under a statute authorizing railroad companies to cross highways but imposing the duty of restoring the highway "as near as may be to its former state so as not unnecessarily to impair its usefulness . . . . and as may be satisfactory to the Commissioners of highways of the town" in which the crossing was desired (N. Y. Laws, 1848, ch. 195, sec. 5), the defendant, sixty years before, when the community was rural, had built abutments for an overhead crossing and had continuously paid taxes upon the land covered. The district became incorporated in the plaintiff city, which brought an action to compel the company to remove the abutments. *Held*, that the defendant must remove the abutments. *City of Mount Vernon v. N. Y., N. H., & H. Ry.* (1922) 232 N. Y. 309, 133 N. E. 900.

By the weight of authority an individual or corporation cannot gain rights in a public highway or street by adverse user or possession; and, as a corollary, public officers cannot without legislative authority confer such rights upon an individual or corporation. *Driggs v. Phillips* (1886) 103 N. Y. 77, 8 N. E. 514; *Delaware, L. & W. Ry. v. City of Buffalo* (1899) 158 N. Y. 266, 53 N. E. 44. In many jurisdictions, however, including some which follow the above rule, it is held that a municipal corporation may be estopped from asserting its rights in a portion of a street where permanent improvements have been made or money

expended in reliance upon the acquiescence of municipal officers. *City of Los Angeles v. Cohn* (1894) 101 Calif. 373, 35 Pac. 1002; see 3 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1194. This inconsistency of position has been justly criticised. *Ralston v. Weston* (1899) 46 W. Va. 544, 33 S. E. 326. New York has avoided such an anomaly. The decision in the instant case thus depended upon whether the company was authorized under the statute to erect and maintain abutments within the limits of the highway. The language of the statute perhaps implies that a railroad crossing may to some extent impair the usefulness of a highway, and if the public necessities did not require a greater width of roadway between the abutments than was left, the defendant seems to have complied with the law. *People v. N. Y., N. H. & H. Ry.* (1882) 89 N. Y. 266; see 3 Elliott, *Railroads* (3d ed. 1921) sec. 1577, note 88. The court held, however, first that the statute did not authorize the company to appropriate permanently any part of the highway for abutments; secondly, that the consent of the highway commissioners was therefore immaterial; and thirdly, that even if the abutments were lawfully erected in the first instance the duty of preserving the highway "in its former state of usefulness" is a continuous one and a railroad, therefore, must make such changes as are reasonably necessary for the increased needs of the public. Although it is perhaps rather strained to hold that under this statute a railroad's duty in regard to the character of crossing is enlarged *pari passu* with the public necessity, the result accords with that reached by other courts in interpreting similar, though more explicit, statutory or charter provisions. See 3 Elliott, *op. cit.* secs. 1579, 1580.

WASTE—AMELIORATING WASTE—EFFECT OF SHORT-TERM LEASE.—Without the consent of the plaintiff, the owner of the building, the defendant, an assignee of a lease expiring in January, 1932, made substantial alterations on the premises which enhanced the value of the property. The plaintiff sought an injunction to restrain waste and a mandatory injunction directing the defendant to restore the premises to their original condition. *Held,* that the injunctions should issue. *McDonald v. O'Hara* (1921, Sup. Ct.) 117 Misc. 517, 192 N. Y. Supp. 545.

Waste is the destruction or material alteration or deterioration of the freehold or of the improvements forming a material part thereof, by any person rightfully in possession but who has not the fee title or the full estate. Coke, *Littleton*, sec. 53a; *Bee Bldg. Co. v. Peters Trust Co.* (1921, Neb.) 183 N. W. 302. It was the rule at early common law that any material alteration of buildings on leased premises by a tenant was waste even though the value of the property was increased by the alterations. *Cole v. Green* (1682, K. B.) 1 Lev. 309. There are dicta in many modern cases to the same effect. See *Hamburger & Dreyling v. Settegast* (1910) 62 Tex. Civ. App. 446, 131 S. W. 639; *F. W. Woolworth Co. v. Nelson* (1920, Ala.) 85 So. 449. It has been held that a provision in the lease allowing the lessee to make alterations in the building did not privilege him to tear down and destroy the building even though he proposed to substitute a better one. *Davenport v. Magoon* (1884) 13 Or. 3, 4 Pac. 299. Where a life tenant began to tear down a dwelling house with the professed object of replacing it with a better building, alleging the dwelling as unfit for use, it was held that he would be restrained from so doing since, as the court said, it was beyond its province to inquire whether the tenant would ever replace it with a better, or as good a building, or any building. A further reason assigned was that it might become an impossibility for him to perform no matter how willing he might be. *Dooly v. Stringham* (1885) 4 Utah, 107, 7 Pac. 405. The removal of a valueless building by a life tenant has been held not to be an act of waste where owing to changed conditions such removal was necessary for the profitable use of the property, but it appears from the same case that a different view would be taken in the case

of a tenant holding under a short-term lease. *Melms v. Pabst Brewing Co.* (1899) 104 Wis. 7, 79 N. W. 738. In England, the House of Lords refused to grant an injunction restraining a tenant under a lease for 999 years from converting store buildings into dwelling houses, the neighborhood having changed so as to do away with any demand for store buildings. *Doherty v. Allman* (1878, H. L.) L. R. 3 App. Cas. 709. But where, as in the instant case, there has been no permanent change of conditions, or where the occupation of the premises is to be for a short term only, it seems only proper to enjoin even ameliorating waste. The lease merely gives the privilege to use the building and the landlord has the right to receive back, at the end of the term, the very thing which he has leased. *Agate v. Lowenbein* (1874) 57 N. Y. 604; *Hamburger & Dreyling v. Settegast, supra; Melms v. Pabst Brewing Co., supra.*

WILLS—EFFECT OF A LAPSE OF PART OF THE RESIDUARY ESTATE.—The testatrix directed that all the residue of her estate "including lapsed legacies" should be divided among certain legatees in specified proportions. One of the legatees died during the testatrix's lifetime. *Held,* that the legacy continued as part of the residue and should be distributed to the survivors. *Aitken v. Sharp* (1922, N. J.) 115 Atl. 912.

It is well settled that a lapse of any portion of the residuary estate itself does not inure to the benefit of the remaining residuary legatees but passes as if there had been an intestacy. Gardner, *Wills* (1903) 419; *Skrymsher v. Northcote* (1818, Ch.) 1 Swanst. 566; *Lyman v. Coolidge* (1900) 176 Mass. 7, 56 N. E. 831. This rule seems to have developed on account of a desire to effectuate the testator's unexpressed intentions. 2 Jarman, *Wills* (6th ed. 1910) 1056. The rule has been severely criticised, however, and the theory upon which it is based seems fallacious. *In re Gray's Estate* (1892) 147 Pa. 67, 23 Atl. 205; 2 Redfield, *Wills* (3d ed. 1876) 119; see *In re Dunster* [1909] 1 Ch. 103. Some courts, although advancing no reasons, do not recognize it. *Gray v. Bailey* (1873) 42 Ind. 349; *West v. West* (1883) 89 Ind. 529. And in at least one jurisdiction the rule has been changed by statute. *Woodward v. Congdon* (1912) 34 R. I. 316, 83 Atl. 433. In general it has been considerably restricted by holding it applicable only where the legatees take as tenants in common, and not as joint tenants or as members of a class. *In re Dunster, supra;* I Underhill, *Wills* (1900) sec. 336. No jurisdiction applies the rule if the testator's intention is expressed with sufficient certainty. *Swallow v. Swallow* (1896) 166 Mass. 241, 44 N. E. 132; *In re Palmer* [1893, C. A.] 3 Ch. 369. The general rule was considered in the instant case, but the court considered that the phrase "including lapsed legacies" showed the testatrix's intention that all lapsed legacies, whether in the residue or not, should continue as part of the residue and inure to the benefit of the surviving residuary legatees. Although this phrase alone is a meagre basis for an inference that the testatrix actually intended the result reached by the court's interpretation, nevertheless the decision seems sound in that it limits the application of a rule which is technical in its nature and of doubtful value.