RECENT CASE NOTES

ASSIGNMENTS—GARNISHMENT—PRIORITY OF ASSIGNEE OVER CREDITOR ATTACHING SUBSEQUENTLY WITHOUT NOTICE OF ASSIGNMENT.—A was indebted to B in the sum of $332.86 for merchandise purchased. B assigned the claim to C. Subsequent to the assignment D, a creditor of B, garnished the claim of B in the hands of A and secured a judgment of condemnation. C, who had failed to notify A of the assignment until after entry of the judgment, filed a petition asking that the judgment be stricken out and that he be allowed to intervene as claimant. The lower court denied the petition. *Held,* that the judgment be reversed. *McDowell v. Hopfield* (1925, Md.) 128 Atl. 742.

The claims of an assignee who gives the debtor notice of the assignment before service of garnishment will be preferred over those of an attaching creditor. *Kitzinger v. Beck* (1894) 4 Colo. App. 206, 35 Pac. 278. In case notice of the assignment is given to the debtor after service of garnishment, but in time to enable the debtor to set up the assignment as a defense to the garnishment process, the assignee generally prevails over the garnishor. *Newman v. Manning* (1881) 79 Ind. 218; *McIntyre v. Hauser* (1900) 131 Calif. 11, 63 Pac. 69; *Horne v. Stevens & L. Steam Mill Co.* (1887) 79 Me. 262, 9 Atl. 616; *contra*: *Woodbridge v. Perkins* (1809, Conn.) 3 Day, 364; *Dillingham v. Traders' Ins. Co.* (1907) 120 Tenn. 302, 108 S. W. 1148. After judgment in garnishment, however, many courts hold, contrary to the principal case, that the garnishor will be preferred over the assignee. *Walters v. Washington Ins. Co.* (1855, Iowa) 1 Clark, 404; *Coburn v. Currens* (1866, Ky.) 1 Bush, 242; *contra*: *MacDonald v. Kneeland* (1861) 5 Minn. 352; *cf. Bellingham Boom Co. v. Brisbois* (1896) 14 Wash. 173, 44 Pac. 153. This position seems to be based on the reluctance of courts to invalidate a judgment already entered, and on the ground that the attaching creditor has gone to some expense in securing the judgment and that his ability to resort to other means of collecting the claim may have been prejudiced. The holding of the principal case, however, seems to be more in line with the prevailing view of the nature of an assignment. As between assignor and assignee, an assignment of a chose in action is complete without notice to the debtor. *In re Cincinnati Iron Stove Co.* (1909, C. C. A. 6th) 167 Fed. 486. An assignment passes the whole right of the assignor to the assignee, and the assignor has no further interest in the subject matter of the assignment. *Collier v. Alexander* (1905) 142 Ala. 422, 38 So. 244. An attaching creditor should not stand on a better footing than his debtor. Upon this theory the garnishee owes nothing to the assignor which can be reached by the garnishing creditor, the requirement of notice to the debtor being for the debtor's protection, and not to complete the assignment. As a practical matter also, the result reached by the principal case seems sound, as the assignee paid for the particular claim assigned, and, in the absence of unusual circumstances, it does not seem equitable to defeat the assignment merely to satisfy the claim of a general creditor of the assignor. For an analagous problem relative to whether the requirement of notice should determine priority between two assignees of a chose in action, see COMMENTS (1924) 33 YALE LAW JOURNAL, 767.

ATTACHMENT—JOINDER OF DEFENDANTS IN THE ALTERNATIVE—EVIDENCE SUFFICIENT FOR WARRANT OF ATTACHMENT.—In an action for damages for leaving a ship-hull on his land the plaintiff attached the property of four non-resident defendants because of doubt as to which was responsible. The lower court allowed an attachment against each one to stand. *Held,* that the attachments as to three of the defendants be vacated, since each attach-

ment must be supported by as much evidence as would be necessary had each defendant been separately sued. *Zenith Bathing Pavilion, Inc. v. Fair Oaks S. S. Corp.* (1925) 240 N. Y. 307, 148 N. E. 532.

A few jurisdictions (Eng., Conn., R. I., N. Y.) permit joinder of defendants in the alternative. *Jamison v. Lamborn* (1923, 1st Dept.) 207 App. Div. 375, 202 N. Y. Supp. 113; (1914) 51 L. R. A. (N. S.) 640, note; see also (1924) 33 YALE LAW JOURNAL, 328. But before the plaintiff is entitled to secure a warrant of attachment under the statute, it is necessary for him to show that "a cause of action" exists against the defendant. N. Y. C. P. A., 1921, sec. 902, 903. In the instant case the court probably confused "a cause of action" in sec. 903 with a *right of action;* that is, a suit wherein the plaintiff will be successful, and the court accordingly granted the warrant against *one* defendant only. See Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. But "cause of action" is apparently used in the statute to mean that proper grounds of suit exist for the plaintiff to bring the defendants to trial, and sections 211 and 213 of the Practice Act appear definitely to grant the plaintiff such cause of action against *all* the defendants. Under these sections a "cause of action" exists where there is the certainty that some one or more of several parties is responsible, coupled with the doubt as to which. *Eames v. Mayo* (1919) 93 Conn. 479, 106 Atl. 825. This limitation of the remedy of attachment in the case of alternative defendants seems undesirable, since it may often prevent the joinder of parties in the alternative in such cases. In the instant case, however, the responsibility of the three defendants against whom the attachments were vacated was so doubtful on the facts that the decision would seem sound, but the dicta going beyond the actual decision seem unjustified.

CONFLICT OF LAWS—EQUITY—JURISDICTION OVER EXTERRITORIAL ACTS.—The plaintiff leased to the defendant, a Canadian corporation, the privilege of running its trains over the Niagara Bridge. Subsequently, the plaintiff brought an action to enjoin the use of the Canadian side for switching purposes, on the ground that the bridge was being damaged thereby and that such use was a violation of the contract. Process was personally served on the defendant. The injunction was denied in the Supreme Court. The Appellate Division reversed this judgment and the defendant appealed. *Held,* that the judgment be modified, and, as modified, affirmed, although to carry out the decree the defendant might be required to reconstruct its tracks on the Canadian side. *Niagara Falls International Bridge Co. v. Grand Trunk Ry. of Canada* (1925, N. Y.) 148 N. E. 797.

It is often asserted "that a court of equity cannot order the doing of an act outside the territory of its sovereign". Beale, *Equity in America* (1921) 1 CAMB. L. JOUR. 21, 27; *Port Royal R. R. v. Hammond* (1877) 58 Ga. 523; NOTES (1908) 21 HARV. L. REV. 354, 355. Yet where the defendant is before it on personal service, a court of equity may enter a decree indirectly affecting foreign lands by ordering the defendant to perform acts within the forum which will accomplish such a purpose. *Penn v. Lord Baltimore* (1750, Ch.) 1 Ves. Sr. 444 (specific performance of contract to convey foreign land). In so doing the court is said to act only *in personam. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.* (1917, C. C. A. 9th) 245 Fed. 9; 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) secs. 135, 428; 4 Pomeroy, *op. cit.* sec. 1318; COMMENTS (1918) 27 YALE LAW JOURNAL, 946. Through the exercise of this power a court may order the parties before it to desist from committing wrongful acts in foreign territory to the injury of a *res* within the state of the forum. *Great Falls Mfg. Co. v. Worster* (1851) 23 N. H. 462; *City of Jamestown v. Pennsylvania Gas Co.* (1924, C. C. A. 2d) 1 Fed. (2d) 871. In order

to carry out this negative decree it may be necessary for the defendant to perform certain affirmative acts on foreign soil, as in the instant case. *Salton Sea Cases* (1909, C. C. A. 9th) 172 Fed. 792. But courts have even gone a step further and *directly* ordered the defendant to do such positive acts beyond their territorial limits. *Kempson v. Kempson* (1902) 63 N. J. Eq. 783, 52 Atl. 360 (defendant ordered to set true facts before a foreign court in an effort to secure revocation of a former decree); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., supra* (court in Idaho ordered defendant to place water meters on its land in Nevada, and to allow plaintiff to go upon such land for purpose of inspection); *Madden v. Rosseter* (1921, Sup. Ct. Spec. T.) 114 Misc. 416, 187 N. Y. Supp. 462 (mandatory injunction granted and receiver appointed to procure a horse in California and to ship it to Oklahoma). But see 1 Beale, *Conflict of Laws* (1916) sec. 106; NOTES (1918) 31 HARV. L. REV. 646, 648. The objection that such an order is unenforceable is met by requiring the defendant to post a bond, or by delegating an agent to perform the act. See (1921) 30 YALE LAW JOURNAL, 865, 866. The latter method was successfully adopted in *Madden v. Rosseter, supra.* The statement "that a court of equity cannot order the doing of an act outside the territory of its sovereign" seems, therefore, to need considerable qualification. Where the tort does not affect a local *res*, however, it is often deemed expedient to refuse to exercise such power. *Northern Ind. R. R. v. Michigan Central R. R.* (1853) 56 U. S. 233.

CONSTITUTIONAL LAW—ASSOCIATION—STATUTE REQUIRING CERTAIN ASSOCIATIONS TO DISCLOSE MEMBERSHIP, OATH AND ROSTER.—A New York statute required secret organizations, except those specifically enumerated, to file with the secretary of state certain information as to the membership, laws and oath of the society, making it a misdemeanor to attend a meeting with knowledge that the association had failed to do so. The defendant attended a Ku Klux Klan meeting, was arrested, and after conviction appealed on the ground that the statute was unconstitutional. *Held*, that the statute did not violate the personal liberty and equal protection clauses of the Fourteenth Amendment. *People v. Zimmerman* (1925, 4th Dept.) 213 App. Div. 414, 210 N. Y. Supp. 269.

Laws affecting certain classes only are not violations of the Fourteenth Amendment provided that the classification is based upon a "reasonable" ground. *Lawton v. Steele* (1894) 152 U. S. 133, 14 Sup. Ct. 499; *People v. Klinck Packing Co.* (1915) 214 N. Y. 121, 108 N. E. 278. After taking judicial notice of the prejudicial influences of the Ku Klux Klan ("common knowledge") the court in the instant case reached the satisfactory conclusion that the law in question was a proper exercise of the state's police power. See *Otis v. Parker* (1902) 187 U. S. 606, 609, 23 Sup. Ct. 168, 169; La. Acts, 1924, Act. No. 2, sec. 1; Fry, *The Ku Klux Klan* (1922) 213.

CONSTITUTIONAL LAW—JUDICIAL REVIEW OF ADMINISTRATIVE FINDINGS AS A REQUIREMENT OF DUE PROCESS.—A workman, in the course of his employment, was injured by a street car of the defendant company. In a common law action for damages, to the defence that the plaintiff had already recovered under the Workmen's Compensation Act, the plaintiff pleaded that the Workmen's Compensation Act was unconstitutional because it permitted review on questions of law only. The lower court held for the plaintiff on the ground that the statute was unconstitutional as denying due process. The defendant appealed. *Held*, that the judgment be reversed. *Nega v. Chicago Rys.* (1925, Ill.) 148 N. E. 250.

State decisions have held findings of fact by Workmen's Compensation tribunals conclusive, but do not appear to have passed upon the constitu-

tionality of such provisions under the "due process" clause. See (1922) 35 HARV. L. REV. 761; *Hughes v. Cudahy Packing Co.* (1921) 192 Iowa, 947, 185 N. W. 614. The instant case follows the tendency of the Supreme Court to recognize as due process similar provisions regarding administrative tribunals. *Hawkins v. Bleakly* (1916) 243 U. S. 210, 37 Sup. Ct. 255; *Interstate Commerce Commission v. Union Pacific Railroad* (1912) 222 U. S. 541, 32 Sup. Ct. 108; Albertsworth, *Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 127; Hardman, *Judicial Review as a Requirement of Due Process* (1921) 30 YALE LAW JOURNAL, 681; Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE LAW JOURNAL, 781.

CONTRACTS—MODIFICATION OF CONTRACT UNDER SEAL BY SUBSEQUENT INFORMAL AGREEMENT.—The parties to a sealed contract modified its terms by a subsequent informal agreement. The plaintiff sued for a breach of the contract and was awarded judgment on the original contract rather than on the contract as modified. *Held,* (two judges *dissenting*) that this was proper, for the reason that a sealed contract cannot be modified by an executory unsealed agreement. *Cammack v. Slattery & Bro., Inc.* (1925) 241 N. Y. 39.

At common law a contract under seal could not be modified by a subsequent informal agreement. *Sherwin & Salpaugh v. Rutland & Burlington Ry.* (1852) 24 Vt. 347; *Tischler v. Kurtz Bros.* (1895) 35 Fla. 323, 17 So. 661. This reliance on mere formality has been severely criticized. *McCreery v. Day* (1890) 119 N. Y. 1, 23 N. E. 198; *Harris v. Shoral* (1921) 230 N. Y. 343, 130 N. E. 572; COMMENTS (1925) 34 YALE LAW JOURNAL, 782. In many jurisdictions statutes have been adopted to abolish the significance of seals. *Efta v. Swanson* (1911) 115 Minn. 373, 132 N. W. 335; *Donner v. Whitecotton* (1919) 201 Mo. App. 443, 212 S. W. 378. Their importance has been greatly diminished in New York by judicial decisions. *Weeks v. Esler* (1894) 143 N. Y. 374, 38 N. E. 377; *Chase Nat. Bank v. Faurot* (1896) 149 N. Y. 532, 44 N. E. 164. And also by statute. COMMENTS (1925) 34 YALE LAW JOURNAL, 783, note 7. Even those jurisdictions adhering to the common law rule, permit the time fixed for the performance of a contract under seal to be extended by an informal agreement. *Esmond v. Van Benschoten* (1852, N. Y.) 12 Barb. 366; *Barker v. Troy & Rutland R. R.* (1855) 27 Vt. 766. Where the informal agreement modifying a contract under seal has been executed by one of the parties, many jurisdictions, including New York, enforce the modified contract. *McCreery v. Day, supra; Jones & Dommersnas Co. v. Crary* (1908) 234 Ill. 26, 84 N. E. 651; *Lion Brewery v. Fricke* (1923, 1st Dept.) 204 App. Div. 470, 198 N. Y. Supp. 491. The reason given for this rule is that after one of the parties to the contract has fully performed in accordance with the terms of the modified agreement, it would be inequitable to enforce the original contract under seal. *American Food Co. v. Halstead* (1905) 165 Ind. 633, 76 N. E. 251. It would seem that the non-enforcement of the contract as modified might be equally inequitable in cases of *partial* performance in reliance thereon. The same might well be true where the informal agreement remains *entirely* executory. The Court in the instant case has suggested that any further relaxation must be accomplished by legislative enactment. But the relaxation in the *McCreery* case and in other cases was accomplished by the court without legislative aid; and it is difficult to see why the limit of judicial power should be placed at this particular point.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF WITHDRAWN PLEA OF "GUILTY" AS CONFESSION.—The defendant pleaded "not guilty" to an indictment for larceny. This plea was subsequently withdrawn and a plea of

"guilty" entered. Later this plea was withdrawn with the permission of the court and the plea of "not guilty" reinstated. During cross examination of the accused he admitted having previously pleaded "guilty". The trial court admitted the fact of the guilty plea as evidence of a confession. The defendant was convicted and appealed. *Held,* (two judges *dissenting*) that there was no error, such evidence being admissible. *People v. Steinmetz* (1925) 240 N. Y. 411, 148 N. E. 597.

A plea of "guilty" before a magistrate or justice of the peace is almost universally admitted in evidence as a confession where the accused pleads "not guilty" on trial. *Commonwealth v. Brown* (1889) 150 Mass. 330, 23 N. E. 49; *State v. Blay* (1904) 77 Vt. 56, 58 Atl. 794; *Loman v. State* (1924) 19 Ala. App. 611, 99 So. 769. Such evidence is not conclusive, but has the same effect as a confession proved in any other way. See *State v. Bowe* (1873) 61 Me. 171, 176. And the accused may show the circumstances under which it was made. *State v. Hand* (1904) 71 N. J. L. 137, 58 Atl 641. The weight to be given such evidence is for the jury to determine. *State v. Bowe, supra.* Nevertheless, where a plea of "guilty" has been withdrawn with the court's permission, some courts refuse to admit such plea in evidence. *People v. Ryan* (1890) 82 Calif. 617, 23 Pac. 121; *Heim v. United States* (1918) 47 App. D. C. 485; *Heath v. State* (1923, Okla.) 214 Pac. 1091; see *dissent* in *State v. Carta* (1916) 90 Conn. 79, 87, 96 Atl. 411, 414; NOTES (1916) 3 VA. L. REV. 622. But other courts refuse to bar such a confession merely because it is made in court, since, if made outside of court, it would be admitted without question. *State v. Bringgold* (1905) 40 Wash. 12, 82 Pac. 132; *People v. Boyd* (1924, Calif.) 227 Pac. 783; *State v. Carta, supra;* COMMENTS (1916) 25 YALE LAW JOURNAL, 587; (1916) 29 HARV. L. REV. 782; (1916) 16 COL. L. REV. 421. It has been suggested that since courts ordinarily permit the withdrawal of only those pleas which have been entered mistakenly or unintentionally, the withdrawn plea does not tend to establish guilt, and hence should be rejected as evidence. See *dissent* in *State v. Carta, supra,* at 88, 96 Atl. at 414. While this might be true in a particular case, it is believed that in many cases it is granted where the mistake is not clearly established, and the court in its discretion merely deems it desirable to give the accused a jury trial. As a rule, therefore, it seems better to admit the evidence, leaving it to the jury to determine the weight to be given it.

CRIMINAL LAW—INTOXICATING LIQUORS—PERMITTING JURY TO SMELL OR TASTE LIQUOR IN EVIDENCE.—During trial of the accused charged with the sale of intoxicating liquor, the court permitted the liquor in evidence to be given to the jury in open court to taste, smell and handle. *Held,* that this was reversible error. *Peru v. United States* (1925, C. C. A. 8th) 4 Fed. (2d) 881.

This problem has been treated by our courts in a variety of ways. In some jurisdictions the jury is allowed to smell liquor in open court on the theory that in so doing they can determine the probative value of the evidence introduced, and that since they are allowed to use other senses they should also be allowed to use that of smell. *State v. Dascenzo* (1924, N. M.) 226 Pac. 1099; *Enyart v. People* (1921) 70 Colo. 362, 201 Pac. 564. And for similar reasons the jury has been allowed to taste. *People v. Kinney* (1900) 124 Mich. 486, 83 N. W. 147; *Schulenberg v. State* (1907) 79 Neb. 65, 112 N. W. 304; *State v. Simmons* (1922) 183 N. C. 684, 110 S. E. 591. Courts have even permitted the jury to take liquor to the jury room and to sample it during deliberations. *State v. Baker* (1912) 67 Wash. 595, 122 Pac. 335; *State v. Elmers* (1924, Iowa) 200 N. W. 723. This procedure, though held permissible, has been disapproved. *State v. Burcham* (1920) 109 Wash. 625, 187 Pac. 352; *Galloway v. State* (1900)

42 Tex. Cr. App. 180, 56 S. W. 236. Many jurisdictions, however, hold it error to allow the jury to smell or taste the liquor in open court, since such procedure is incompatible with the court's dignity. *Jianole v. United States* (1924, C. C. A. 8th) 299 Fed. 496. Since it allows a juror to give a verdict founded on his own knowledge. *State v. Lindgrove* (1895) 1 Kan. 51, 41 Pac. 688. And since it makes witnesses of the jurors. *Gallaghan v. United States* (1924, C. C. A. 8th) 299 Fed. 172; *cf.* 2 Wigmore, *Evidence* (2d ed. 1923) secs. 1151, 1159. Liquor has been excluded from the jury room because of its intoxicating qualities and the danger of the jury abusing its privilege while in retirement. *Troutner v. Commonwealth* (1923) 135 Va. 750, 115 S. E. 693. The instant case, in not permitting the jury either to smell, taste or handle the liquor in open court, expresses the strictest view.

DOMESTIC RELATIONS—EFFECT OF A SEPARATION AGREEMENT ON THE HUSBAND'S DUTY TO SUPPORT HIS WIFE.—The plaintiff entered into a postnuptial separation agreement with his wife, each relinquishing all interest in the other's property, and the wife, her legal right to support by her husband. Two days later they separated. After her death, he filed a bill for partition of her real estate. The chancellor decreed that the separation agreement was a bar to the action. The plaintiff appealed. *Held*, that the decree be reversed on the ground that the agreement was void because a material part of the consideration, the waiving of the husband's duty to support his wife, was illegal. *Lyons v. Schanbacher* (1925, Ill.) 147 N. E. 440.

Separation agreements between husband and wife after separation, or in contemplation of immediate separation, are not *per se* invalid. *Sherman v. Sherman* (1922) 65 Mont. 227, 211 Pac. 321; *Daniels v. Benedict* (1899, C. C. A. 8th) 97 Fed. 367. This is recognized in the jurisdiction of the principal case. *Luttrell v. Boggs* (1897) 168 Ill. 361, 48 N. E. 171. It is otherwise, however, with agreements for future separation. *Day v. Chamberlain* (1923) 223 Mich. 278, 193 N. W. 824. But the effect of separation agreements on the husband's duty to support his wife is not settled. At common law the duty was rigidly enforced, lest the wife become a public charge. *Wood v. Wood* (1887, C. A.) 57 L. T. R. 746; (1923) 32 YALE LAW JOURNAL, 626. It was said to rest on the marriage status. *Ryan v. Dockery* (1908) 134 Wis. 431, 114 N. W. 820; COMMENTS (1923) 32 YALE LAW JOURNAL, 478, notes 11, 22, 32. And mere separation could not dissolve it. *Barefoot v. Barefoot* (1914) 83 N. J. Eq. 635, 93 Atl. 192; *Stevenson v. Stevenson* (1920) 56 Utah, 289, 190 Pac. 776. Nor would the fact that the wife had an independent income affect the husband's duty. *Ott v. Hendall* (1900) 70 N. H. 231, 47 Atl. 80; *State v. English* (1915) 101 S. C. 304, 85 S. E. 721. The husband was released, however, if the separation was the fault of the wife. *Friend v. Friend* (1886) 65 Wis. 412, 27 N. W. 34. Consequently cases still hold, as in the present case, that the duty to support the wife is unchanged by a separation agreement. *Boehm v. Boehm* (1917) 88 N. J. Eq. 74, 101 Atl. 423; *Rearden v. Rearden* (1923) 210 Ala. 129, 97 So. 138. In New York a statute incorporates the common law rule. 2 Birdseye's N. Y. Cons. Laws (2d ed. 1917) 1877, sec. 51; *Tirrell v. Tirrell* (1921) 232 N. Y. 224, 133 N. E. 569. *Cf. Winter v. Winter* (1908) 191 N. Y. 462, 84 N. E. 382 (where an agreement to pay the wife a weekly sum was held valid as a recognition of the duty). But with the steadily growing independence of woman, such a view of public policy seems less necessary. *Cf. Westerfield v. Westerfield* (1882) 36 N. J. Eq. 195; also, *Daniel v. Benedict, supra;* (1902) 55 CENT. L. JOUR. 383. And many cases, therefore, hold that the duty is strictly to be limited to the terms of the agreement. *East-*

land v. Burchell (1878) L. R. 3 Q. B. 432 (where the agreement barred the wife from pledging the husband's credit); *Parsons v. Tracy* (1923) 127 Wash. 218, 220 Pac. 813 (where the wife's estate was held responsible to reimburse husband). Similarly in California it is provided by statute that the husband's duty is to be measured only by the agreement. Calif. Civil Code, 1923, sec. 175. *In re Bose* (1910) 158 Calif. 428, 111 Pac. 258. But even if the traditional common law view is accepted, its application in the present case, as an aid to the husband, who, as a matter of fact, had not fulfilled his duty, seems inconsistent with its purpose.

EASEMENTS—TERMINATION UPON CESSATION OF USE OF DOMINANT ESTATE FOR PURPOSE STIPULATED IN GRANT.—A right of way was granted upon condition that it should cease if the premises used "as a stable and yard for horses and wagons" should cease to be "used . . . in the [carting] business". The grantees conveyed to a laundry company, whereupon the grantor brought his action to extinguish the right of way. *Held*, that it be extinguished. *Hohman v. Rochester Swiss Laundry Co.* (1925, Sup. Ct.) 125 Misc. 584.

Easements are normally acquired by prescription or by grant. In the former case the user by which the easement originated determines its nature and extent. *Koenigs v. Jung* (1888) 73 Wis. 178, 40 N. W. 801. In the latter these depend upon the terms of the deed. An easement may be granted for a definite period. Goddard, *Easements* (8th ed. 1921) 134. Or, on the analogy of a fee on special limitation, for a period to be determined on the happening of a certain event. *Ardley v. St. Pancras Guardians* (1870, Ch.) 39 L. J. 871. Such event in the instant case was the cessation of use of the dominant premises in the carting business. A fee granted on a similar limitation would revert to the grantor when use for the specified purpose ceased. *Cf. Irby v. Smith* (1917) 147 Ga. 329, 93 S. E. 877. Easements are deemed to be of a more ephemeral character than corporeal estates. The latter, as between the parties, can be extinguished only by deed or will. The former are destructible by mere abandonment, even though created by grant. *Louisville Trust Co. v. Cincinnati* (1896, C. C. A. 6th) 76 Fed. 296. *A fortiori* where by stipulation in the deed of grant the easement ceases upon termination of the use for which it was granted, such easement would not survive.

EMINENT DOMAIN—APPROPRIATION OF LAND BY STATE—COMPENSATION FOR GOOD WILL OF BUSINESS.—Pursuant to a statute, the state appropriated for barge canal purposes property of appellant used for a flour mill since 1887. The Court of Claims granted compensation for the taking of the land, the structures thereon, and the power plant, and for the damage to the machinery and fixtures, but allowed nothing for the good will of the business. *Held*, that the judgment be affirmed. *Banner Milling Co. v. State of New York* (1925) 240 N. Y. 533.

The instant case is in accord with the accepted doctrine in this country. *Sawyer v. Commonwealth* (1902) 182 Mass. 245, 65 N. E. 52; *Becker v. Phila. R. R.* (1896) 177 Pa. 252, 35 Atl. 617; *City of Oakland v. Pacific Lumber & M. Co.* (1915) 171 Calif. 392, 153 Pac. 705; 1 Nichols, *Eminent Domain* (2d ed. 1917) sec. 124. The reasons generally given for this view are that there is no "taking" of "property", and that the damages are too speculative. A taking may be any destruction, restriction, or interruption of the common necessary use and enjoyment of property. (1916) 25 YALE LAW JOURNAL, 245; *Peabody v. United States* (1913) 231 U. S. 530, 34 Sup. Ct. 159; *In re Saratoga Ave.* (1919) 226 N. Y. 128, 123 N. E. 197. Good will is recognized and protected as "property" in matters of private law.

People v. Dederick (1900) 161 N. Y. 195, 55 N. E. 927. Thus it is a proper subject matter for a sale. *Howard v. Taylor* (1890) 90 Ala. 241, 8 So. 36. And it may be disposed of by will. *Bradbury v. Wells* (1908) 138 Iowa, 673, 115 N. W. 880. There seems to be nothing inherent in the nature of good will which prevents it from being considered as property in matters of eminent domain also. The difficulty of the speculative nature of the claim has not been found insurmountable in other jurisdictions. *Rex. v. Condon* (1909) 12 Can. Exch. 275; *White v. Commissioners of Public Works* (1870, Exch.) 22 L. T. 591. The American view seems too narrow, since it results in a taking of recognized economic values without compensation.

EQUITY—POWERS UNDER THE DOCTRINE OF PARENS PATRIAE.—The plaintiff brought action against his wife to share in the custody of their children. The trial court granted the defendant's motion for judgment on the pleadings. The Appellate Division reversed this judgment. *Held*, that the judgment of the Appellate Division be reversed and that of the trial court affirmed, since the court had no statutory authorization to make such an award; even though the inherent equity powers of the court, under the doctrine of *parens patriae*, might be invoked by a petition reciting that the interests of the child demanded the relief requested. *Finlay v. Finlay* (1925) 240 N. Y. 429, 148 N. E. 624.

In feudal times, the king, by virtue of being protector of all his subjects, undertook to care for and defend them. Infants, especially, came within the scope of the crown's benevolence; and the chancellor, as the king's personal representative, had power to act for such infants without special authorization. *Eyre v. Countess of Shaftesbury* (1722, Ch.) 2 P. Wms. 103; 2 Fonblanque, *Treatise of Equity* (1835) Bk. II, Pt. II, ch. 2, sec. 1, note a. The statute of 32 Hen. 8, c. 46, establishing a Court of Wards, took over this jurisdiction of the chancellor to whom it again reverted upon the abolition of this court. *Morgan v. Dillon* (1724, Ch.) 9 Mod. 135; 3 Blackstone, *Commentaries*, *427. The origin of this jurisdiction has been likened to that over insane persons; but the latter was originally vested in the immediate overlords, was granted to the crown by act of Parliament, and was exercised by the king through a special commission to the chancellor. Fonblanque, *loc. cit. supra*. It has also been put on the ground that a guardianship is a trust, although the property element is obviously lacking. *Duke of Beaufort v. Berty* (1721, Ch.) 1 P. Wms. 703. One famous authority has called it a mere usurpation. 1 Butl. & Harg., *Co. Litt.*, *88B, note 70, par. 16. Whatever the origin, this jurisdiction was well established by the beginning of the eighteenth century. *Tcynham v. Lennard* (1724, H. L.) 2 Bro. P. C. 539; *Wellesley v. Wellesley* (1828, H. L.) 2 Bli. (N. S.) 124. It has been generally recognized in the United States. *Cowls v. Cowls* (1840) 3 Ill. 435; *Wilcox v. Wilcox* (1856) 14 N. Y. 575. But because of statutes empowering other courts to care for infants, equity's jurisdiction has fallen into disuse. *Berry v. Johnson* (1866) 53 Me. 401; *Ex parte Dawson* (1855, N. Y.) 3 Bradf. 130. The power to act, if invoked, has nevertheless continued unimpaired. *Jensen v. Early* (1924, Utah) 228 Pac. 217. A petitioner can appeal to this jurisdiction by a bill in equity, a writ of habeas corpus, or a petition without a bill. *Wilcox v. Wilcox, supra; Earl of Shaftesbury v. Shaftesbury* (1725, Ch.) Gilb. Rep. 172. Theoretically, on a writ of habeas corpus the chancellor releases the infant from its restraint, and, having taken jurisdiction, proceeds to determine the rights of the parties litigating. Under the petition, however, the rights of the parties are determined only incidentally. *Queen v. Gyngall* (1893) L. R. 2 Q. B. 232. But in practical effect there is little difference. This equitable relief may be invoked by any interested person. *In re Green* (1923) 192 Calif.

714, 221 Pac. 903; *Baird v. Baird* (1868) 19 N. J. Eq. 481. The welfare of the child is sufficient to induce equity to act, even though no property rights are involved. *Ex parte Badger* (1920) 286 Mo. 139, 226 S. W. 936. But poverty of the parents alone is no ground for equity's intervention. *Ex parte Kirschner* (1920, N. J. Eq.) 111 Atl. 737. As betwen parent and stranger, the "natural" right of the parent to custody prevails, unless by agreement or conduct he has divested himself thereof. *Hickey v. Thayer* (1911) 85 Kan. 556, 118 Pac. 56; *Jensen v. Early, supra.* But the infant's welfare may influence the court to refuse custody to a parent in favor of a stranger. *In re Williams* (1910) 77 N. J. Eq. 478, 77 Atl. 350. As between two parents, living apart, as in the instant case, despite the father's common law right of custody, the child's best interests are paramount. *In re Pinnell's Guardianship* (1921) 52 Calif. App. 177, 198 Pac. 215.

INSURANCE—FORFEITURE OF POLICY FOR NON-PAYMENT OF PREMIUM NOTES. —A life insurance policy provided that if premiums were not paid when due, the policy should *ipso facto* become null and void. By statute it was provided that the "policy shall constitute the entire contract". On one premium date the insured executed and delivered to the defendant a note with a provision that if not paid when due, the defendant should be released from all responsibility under the policy. The note was not paid. The insured died shortly thereafter, and the plaintiff, as beneficiary, sought to recover on the policy. The lower court gave judgment for the plaintiff, and the defendant appealed. *Held,* that the judgment be affirmed, as the note was received as absolute payment of the premium, and the provision in the note was nugatory. *Ritter v. American Life Ins. Co.* (1925, S. D.) 203 N. W. 503.

Where neither the premium notes nor the policy provide that the policy shall lapse on non-payment of the notes at maturity, default in payment will not terminate the policy. *Arkansas Ins. Co. v. Cox* (1908) 21 Okla. 873, 98 Pac. 552; *Intersouthern Life Ins. Co. v. Duff* (1919) 184 Ky. 227, 211 S. W. 738. But if such a provision is found in the policy, or policy and note, forfeiture will occur on non-payment of the note. *Pitt v. Berkshire Life Ins. Co.* (1868) 100 Mass. 500; *Crafton v. Home Ins. Co.* (1922) 199 Ky. 517, 251 S. W. 992. Where, however, the condition is in the premium note only, there is a sharp conflict as to its effect. Some courts, in the absence of statute, have held such provisions nugatory on the ground that the policy and application constitute the entire contract. *Home Fire Ins. Co. v. Stancell* (1910) 94 Ark. 578, 127 S. W. 966. Sometimes, as in the instant case, statutes require this construction. *Coughlin v. Reliance Life Ins. Co.* (1925, Minn.) 201 N. W. 920. Consequently, the note when received is held to be payment of the premium. *Arnold v. Empire Life Ins. Co.* (1908) 3 Ga. App. 685, 60 S. E. 470. But the better view, it would seem, is to give effect to provisions in premium notes, stipulating for forfeiture in case of default in payment, on the theory that the note is a separate agreement whereby the due date for the payment of the premium is extended. *Holly v. Metropolitan Life Ins. Co.* (1887) 105 N. Y. 437, 11 N. E. 507; *Resseler v. Fidelity Life Ins. Co.* (1903) 110 Tenn. 411, 75 S. W. 735. Failure to pay the note, which is failure to pay the premium, should and does result in forfeiture. *Hale v. Michigan Farmers' Mutual Ins. Co.* (1907) 148 Mich. 453, 111 N. W. 1068; *Underwood v. Security Life & Annuity Co.* (1917) 108 Tex. 381, 194 S. W. 585. Some courts have allowed the insurer full recovery on premium notes after default in their payment. Such are cases where in consideration for the insurer's promise to continue the policy in force, the face value of the note is expressly agreed to be the premium rate for the extension period in case the note is unpaid. *Jefferson*

Mut. Ins. Co. v. Murray (1905) 74 Ark. 507, 86 S. W. 813; see *Williams v. Albany City Ins. Co.* (1870) 19 Mich. 451, 465. But it is submitted that a more equitable result is reached by permitting recovery of the *pro rata* amount of the premium for the period covered. *Continental Ins. Co. v. Stratton* (1919) 185 Ky. 523, 215 S. W. 416. Even where statutes have constituted the policy the entire contract, provisions contained only in premium notes have been enforced. Thus, where a policy had lapsed, and a premium note was given for reinstatement, forfeiture was allowed on the ground that a new policy of insurance had been made. *Keller v. North Am. Life Ins. Co.* (1922) 301 Ill. 198, 133 N. E. 726. One court has gone so far as to say that the statute applies only to the original contract of insurance and does not extend to subsequent note agreements. *Southland Life Ins. Co. v. Hopkins* (1922, Tex. Comm. App.) 244 S. W. 989.

INTOXICATING LIQUORS—VIOLATION OF THE VOLSTEAD ACT AS A CRIME INVOLVING "MORAL TURPITUDE".—A former police officer, who had been retired on account of injuries received in the performance of his duties, was convicted of the unlawful possession and transportation of intoxicating liquors in violation of the National Prohibition Law. The commissioners of the District of Columbia, pursuant to a statute empowering them to discontinue pension relief to any person convicted of a crime involving "moral turpitude", dropped him from the pension roll. He brought suit for reinstatement and the lower court directed a writ of mandamus so ordering. The commissioners appealed. *Held,* (one judge *dissenting*) that the judgment be reversed. *Rudolph v. United States* (1925, D. C.) 6 Fed. (2d) 487.

The principal case was one of first instance. Four analagous situations may properly be considered. (1) A violation of state or local liquor laws by an attorney has been held to involve "moral turpitude" for purposes of disbarment. *State v. Edmunson* (1922) 103 Or. 243, 204 Pac. 619; *In re Callicotte* (1920) 57 Mont. 297, 187 Pac. 1019; *Underwood v. Commonwealth* (1907) 32 Ky. L. 32, 105 S. W. 151. (2) An accusation of violating the liquor laws is a charge of a crime involving "moral turpitude" and is actionable as slander *per se*. *Jakula v. Starkey* (1924, Minn.) 200 N. W. 811 (charge of manufacture and sale of "moonshine"); *Smith v. Smith* (1855, Tenn.) 2 Sneed, 473 (charge of unlawfully selling spiritous liquors to a slave); *cf. Baxter v. Mohr* (1902, City Ct. N. Y.) 37 Misc. 833, 76 N. Y. Supp. 982 (charge of drunkenness not a charge of a crime involving "moral turpitude"); *contra*: *Morgan v. Kennedy* (1895) 62 Minn. 348, 64 N. W. 912. (3) A physician's license cannot be revoked for the illegal sale of intoxicating liquors under a statute authorizing such revocation on conviction for a crime involving "moral turpitude". *Fort v. City of Brinkley* (1908) 87 Ark. 400, 112 S. W. 1084. (4) Violation of the liquor laws does not involve "moral turpitude" so as to affect the credibility of a witness, even though the act is made a statutory felony. *Ex parte Marshall* (1922) 207 Ala. 566, 93 So. 471; *Cooper Grocery Co. v. Neblett* (1918, Tex. Civ. App.) 203 S. W. 365. It seems, then, that an act which will be considered as involving "moral turpitude" for one purpose will not necessarily be so considered for a different purpose. The court in the instant case reaches its conclusion, not by deduction from a "pre-existing or fixed rule of law, but on the basis of its views of morality and sound public policy, with which other courts may perhaps disagree.

LIFE ESTATES—RESTRAINTS ON ALIENATION.—In a document embodying an antenuptial agreement, the testator demised to the plaintiff lands for the term of her natural life, using a printed form of lease. A clause provided for forfeiture, if the lessee should assign or sublet without the lessor's written consent. Subsequent to the lessor's death, the lessee

sublet. To establish her privilege of assigning and to enjoin interference therewith the lessee filed her bill against the reversioners and the husband's executors. The lower court found for the plaintiff, on the ground, *inter alia*, that such a provision in a life lease is void as an unreasonable restraint on alienation. *Held*, (three judges *dissenting*) that the judgment be affirmed. *Hess v. Haas* (1925, Mich.) 203 N. W. 471.

While the majority of the court seems to have avoided specific affirmation or rejection of the principle that this provision in the life lease was void as a restraint on alienation, the dissenting opinion raises the question squarely. Restraints on alienation of life estates are sought to be effected in two ways. One is by providing in the conveyance an absolute restraint, i. e., that the lessee cannot avoid the stipulation and that any assignment is inoperative, which provisions are held to be void. Gray, *Restraints on the Alienation of Property* (2d ed. 1895) secs. 10, 134; *McCleary v. Ellis* (1880) 54 Iowa, 311, 6 N. W. 571; *Wellington v. Janvrin* (1880) 60 N. H. 174; *Brandon v. Robinson* (1811, Ch.) 18 Ves. 429; *contra: Henderson v. Harness* (1898) 176 Ill. 302, 52 N. E. 68; but see Kales, *Future Interests* (1920) 393. The other is by inserting a provision, as in the instant case, for forfeiture on alienation. This provision is usually held to be a valid restriction. *Nichols v. Eaton* (1875) 91 U. S. 716; *Barnes v. Gunter* (1910) 111 Minn. 383, 127 N. W. 398; Gray, *op. cit.*, sec. 78; 1 Tiffany, *Landlord and Tenant* (1910) sec. 11B; Kales, *loc. cit.* This is so, even though the forfeiture is based upon a proviso of cesser and not on a gift over. *Cf. Jackson v. Silvernail* (1818, N. Y.) 15 Johns. 278; *Jackson v. Schutz* (1820, N. Y.) 18 Johns. 174; see *Hurst v. Hurst* (1882) 21 Ch. Div. 278, 283; *Pierson v. Dolman* (1866) L. R. 3 Eq. 315; *Joel v. Mills* (1857, Ch.) 3 K. & J. 458. It is true this forfeiture clause will not be construed as a condition subsequent upon breach of which the estate will cease, where it can be interpreted, without violation to its terms, as a mere covenant. *Hague v. Ahrens* (1892, C. C. A. 3d) 53 Fed. 58; *In re Levinson* (1923, W. D. Wash.) 295 Fed. 146. Still even a covenant restraining alienation if it provides to the lessor, as here, the right of re-entry is operative. *Den v. Post* (1855, Sup. Ct.) 25 N. J. L. 285; *In re Levinson, supra.* Where any clause is ambiguous in its terms, however, it will be construed in favor of the grantee. *Burns v. Dufresne* (1912) 67 Wash. 158, 121 Pac. 46; (1920) 29 YALE LAW JOURNAL, 568; 1 McAdam, *Landlord and Tenant* (4th ed. 1910) sec. 141. Thus an assignment by operation of law does not violate a covenant not to assign. *Farnum v. Hefner* (1889) 79 Calif. 575, 21 Pac. 955; *Charles v. Byrd* (1888) 29 S. C. 544, 8 S. E. 1. The reason being that restrictive clauses are viewed with disfavor by the courts and accordingly are interpreted very strictly. *Hilsendegen v. Hartz Clothing Co.* (1911) 165 Mich. 255, 130 N. W. 646; *Riggs v. Pursell* (1876) 66 N. Y. 193. The Supreme Court found in the instant case that the condition of forfeiture for subletting contained in the regular printed lease form and duly agreed to by both parties, while consistent with the purposes of an ordinary short term lease, was necessarily inconsistent with the intent of the parties to convey a life estate. How much this surprising conclusion was influenced by the disfavor with which all courts regard any restraint on alienation can only be conjectured, but such bias should not permit a court to read out of such covenants that which they really contain. See *Gazlay v. Williams* (1906, C. C. A. 6th) 147 Fed. 678, 681.

MUNICIPAL CORPORATIONS—ZONING—AESTHETIC CONSIDERATIONS AND EXTENT OF POLICE POWER.—Under a zoning ordinance prohibiting the maintenance of hospitals in a certain residential district, the plaintiff sought to restrain the defendant from maintaining a hospital for minor operations and maternity cases. *Held*, that the restrictions were arbitrary, "æsthetic

considerations" alone being insufficient. *Mayor of Wilmington v. Turk* (1925, Del.) 129 Atl. 512.

Aesthetic considerations alone have generally been held insufficient as a basis for zoning ordinances. *Byrne v. Maryland Realty Co.* (1916) 129 Md. 202, 98 Atl. 547; COMMENTS (1920) 30 YALE LAW JOURNAL, 171; NOTES (1921) 34 HARV. L. REV. 419. But many courts have had no difficulty in finding other grounds on which the statutes could be sustained. *Atkinson v. Piper* (1923) 181 Wis. 519, 195 N. W. 544; *Town of Windsor v. Whitney* (1920) 95 Conn. 357, 111 Atl. 354. Thus apartment houses have been barred from residential districts, the court finding considerations of public health, safety, and welfare involved. *Miller v. Los Angeles* (1925, Calif.) 234 Pac. 381. Likewise two-family houses. *Brett v. Building Commissioner of Brookline* (1924) 250 Mass. 73, 145 N. E. 269. So also stores. *Inspector of Buildings v. Stokloska* (1924) 250 Mass. 52, 145 N. E. 262. But some courts have reached a contrary result by a strict interpretation of what constitutes public health, safety, and welfare. *Jersey Land Co. v. Scott* (1924, Sup. Ct. N. J.) 126 Atl. 173; *Spann v. Dallas* (1921) 111 Tex. 350, 235 S. W. 513. The police power, however, is flexible and adaptable to the securing of new social objectives. *Miller v. Los Angeles* (1925, Calif.) 234 Pac. 381, 383. And order and beauty in the development of a city has in one case been recognized as *per se* sufficient justification for a zoning ordinance. *Ware v. Wichita* (1923) 113 Kan. 153, 214 Pac. 99. See also *State v. Harper* (1923) 182 Wis. 148, 157, 196 N. W. 451, 454; *State v. New Orleans* (1923) 154 La. 271, 283, 97 So. 440, 444. But apart from aesthetic considerations, it has been held that the maintenance of maternity hospitals in residential dictricts may be enjoined. *Deaconess Home and Hospital v. Bontjes* (1904) 207 Ill. 553, 69 N. E. 748.

SALES—MEASURE OF DAMAGES FOR NON-SHIPMENT.—The defendant agreed to sell to the plaintiff straw braid, delivery f. o. b. New York, to be shipped from China during September, October, and November. Shipment was not made. The market price rose during November and December, but fell during February and March, at which time the cargo should have arrived, had shipment been made in November. *Held*, that the trial judge correctly instructed the jury that damages should be assessed as the difference between the contract price and the market price during February and March. *Schopflocher v. Zimmerman* (1925) 240 N. Y. 507.

The measure of damages under the Uniform Sales Act, sec. 67 (3) depends upon whether the time for delivery is fixed. Where no time is specified, damages are computed as of the time of breach. *Antonacopoulos v. Arax Co.* (1919) 234 Mass. 125, 125 N. E. 161. Likewise at common law. *Heller v. Ferguson* (1915) 189 Mo. App. 484, 176 S. W. 1126. Where the time for shipment is specified, the time for delivery is deemed fixed within sec. 51 of the English Sale of Goods Act (from which Uniform Sales Act, sec. 67 (3) was taken). *Melachrino v. Nickoll & Knight* [1920] 1 K. B. 693 (which was followed by the court in the instant case). Damages are then computed as the difference between the contract price and the market price of the goods at the time when and the place where they ought to have been delivered. *Lehman v. Schapira Bros.* (1923, 1st. Dept.) 206 App. Div. 474, 201 N. Y. Supp. 508; *Hart v. Marbury* (1921) 82 Fla. 317, 90 So. 173 (not under Sales Act). Except under special circumstances showing proximate damages of a greater amount. *Halstead Lumber Co. v. Sutton* (1891) 46 Kan. 192, 26 Pac. 444 (goods for special purpose); *Irwin v. Kelly* (1912) 176 Ill. App. 178 (re-sale contract of which vendor has knowledge). The rule of sec. 67 (3) is founded on the common law principle that the injured party should be placed in the same position as though

the contract had been fulfilled. 2 Williston, *Sales* (2d ed. 1924) sec. 599; *Melachrino v. Nickoll & Knight, supra; Williams Bros. v. Agius* [1914, H. L.] A. C. 510, 522. This principle would seem to be more accurately applied under circumstances similar to those in the instant case, if damages were to be computed as the difference between the contract price and the New York market price in November of a cargo to be delivered in the future (February). Such a rule would seem practicable. *Cf. Staackman & Co. v. Cary* (1916) 197 Ill. App. 601, 607; *cf. Goldfarb v. Campo Corp.* (1917, Sup. Ct.) 99 Misc. 475, 164 N. Y. Supp. 583 (damages for anticipatory breach assessed according to the probable future value of the goods at the time for delivery); *cf. Sharp v. Nosawa* [1917] 2 K. B. 814 (where, under the English Sale of Goods Act, the delivery of the documents was deemed constructive delivery of the cargo, and damages were computed as of the time the documents should have arrived, six weeks before the cargo). Also, had the vendee in the instant case re-purchased at the higher price prevailing before the time for delivery it is at least questionable whether the excess price paid could be recovered as proximate damages under sec. 67 (3). Such damages were allowed in *Kansas Flour Mills Co. v. Brandt* (1916) 98 Kan. 587, 158 Pac. 1120 (not under Sales Act); *contra: Missouri Furnace Co. v. Cochran* (1881, C.C.W.D.Pa.) 8 Fed. 463 (not under Sales Act). As a strict application of the Uniform Sales Act, sec. 67 (3), however, the instant case seems sound, especially as no proximate damages of a greater amount were shown.

VENDOR AND PURCHASER—INSURANCE—VENDEE'S CLAIM TO INSURANCE MONEY RECEIVED BY VENDOR IN ABSENCE OF ASSIGNMENT.—The defendant's contract for the sale of his farm to the plaintiff was silent as to insurance on the buildings. Pending the conveyance of the premises the building burned. The insurance was paid to the defendant. After having paid the defendant the full purchase price, the plaintiff brought this action to recover the insurance money received by the defendant. The lower court entered a decree for the defendant. *Held*, that the decree be reversed, since the vendee, as equitable owner, is entitled to the insurance. *Brady v. Welsh* (1925, Iowa) 204 N. W. 235.

The English rule was that the vendee, as equitable owner, bore the risk of loss, but since a contract of insurance was merely "personal" the vendee was not entitled to the insurance money in the absence of express provisions in the contract of sale. *Rayner v. Preston* (1881, C. A.) L. R. 18 Ch. Div. 1; *Poole v. Adams* (1864, Ch.) 10 L. T. R. (N. S.) 287. The rule in England, however, has been changed by act of Parliament. (1922) 12 & 13 Geo. 5, c. 16, sec. 105; *amended* (1925) 15 Geo. 5, c. 5, sch. 3, pt. 2, sec. 11. Most American courts that place the risk of loss on the vendee hold that the vendor receives the insurance money in trust for the vendee. *Russell v. Elliott* (1922) 45 S. D. 184, 186 N. W. 824; *Skinner & Sons Co. v. Houghton* (1900) 92 Md. 68, 48 Atl. 85; Vanneman, *Risk of Loss, in Equity, Between Date of Contract to Sell Real Estate and Transfer of Title* (1924) 8 MINN. L. REV. 127, 138. A few American cases, however, are in accord with *Rayner v. Preston, supra. King v. Preston* (1856) 11 La. Ann. 95; *cf. Brownell v. Board of Education* (1925) 239 N. Y. 369, 146 N. E. 630; COMMENTS (1925) 10 CORN. L. QUART. 379. See also COMMENTS (1924) 34 YALE LAW JOURNAL, 87, 90.

WILLS—RIGHT OF CODICIL LEGATEES TO SHARE OF RESIDUARY BEQUEST IN ORIGINAL WILL.—The testator bequeathed several legacies in his will and directed that the "persons herein named as pecuniary legatees" should share *pro rata* in the residue. In two codicils he revoked the legacies of two pecuniary legatees who had predeceased him and gave these legacies to new legatees, without directing whether or not they should share in the

residue. *Held*, that the codicil legatees took no share in the residue. *Lodge v. Grubb* (1925, Del.) 130 Atl. 28.

Although will and codicil are to be construed together as part of the same instrument, the terms of a will should not be disturbed further than is necessary to give full effect to the codicil. *Pierpont v. Patrick* (1873) 53 N. Y. 591; 1 Jarman, *Wills* (6th ed. 1910) 177. Where a legatee of a will is given both residuary and non-residuary legacies, the revocation of the non-residuary legacy does not affect the residuary legacy. *Hard v. Ashley* (1890) 117 N. Y. 606, 23 N. E. 177; *Colt v. Colt* (1865) 32 Conn. 422. When it clearly appears that the new codicil legatees are substituted for the old will legatees they are permitted to share in the residue. *Alsop's Appeal* (1848) 9 Pa. 374 (based on the "theory of subrogation"); *cf. Johnston v. Earl of Harrowby* (1859, Ch.) 1 De G. F. & J. 183. Some courts, viewing the will and codicil as an entirety, allow codicil legatees to share in the residue even though the codicil does not specifically so provide. *Guthrie v. Guthrie's Ex'r* (1916) 168 Ky. 805, 183 S. W. 221. But an exception is recognized in the case of codicil legatees who are bequeathed an annuity, because, in the event of a deficiency, the annuity cannot be decreased. *Guthrie v. Guthrie's Ex'r, supra.* The instant case, however, reflects the almost unanimous view in a field where the courts are always troubled in determining the supposed intent of the testator. *In re Gibson's Trusts* (1861, V. C.) 2 J. & H. 656; *Hall v. Severne* (1839, Ch.) 9 Sim. 515; *contra: Sherer v. Bishop* (1792) 4 Bro. Ch. 42; *cf. Washburn v. Sewall* (1842, Mass.) 4 Metc. 63.

WORKMEN'S COMPENSATION—DEPENDENCY ON WAGES VERSUS DEPENDENCY ON WORKER.—The plaintiff, the sister of a deceased employee who died of injuries received during his employment, had been allowed by him to occupy certain property rent free. Under Acts of Indiana, 1919, (Workmen's Compensation) sec. 37, compensation was provided for those partially dependent on the earnings of a deceased employee for support. *Held*, that using employee's property rent free was not partial dependency on his earnings. *Russell v. McCaughey* (1925, Ind.) 147 N. E. 283.

Some statutes provide compensation for those "dependent on the employee for support" and some for those "dependent on the employee's earnings for support"; but there seem to be few decisions as to what constitutes dependency on the employee's earnings. The term "dependent" in both phrases has been liberally construed. Thus contributions by the deceased toward the purchase of a home for his parents have been held sufficient. *Jones v. Texas Employers' Insurance Co.* (1924, Tex. Civ. App.) 263 S. W. 1004. Likewise contributions necessary only when crops were poor. *Richardson Sand Co. v. Industrial Commission* (1921) 296 Ill. 335, 129 N. E. 751. Occasionally "dependent" has been made to include any one who might be a "recipient of benefits", as where there were gifts of foodstuffs, though no need therefor was shown. *Peabody Coal Co. v. Industrial Board of Illinois* (1917) 281 Ill. 579, 117 N. E. 983. But when called on to interpret the phrase "on his earnings for support", courts, as in the principal case, have adopted a strict construction. *In re Derinza* (1918) 229 Mass. 435, 118 N. E. 942 (free use of house in Italy); *Hassan's Case* (1922) 240 Mass. 355, 134 N. E. 260; *Blozina v. Castile Mining Co.* (1920) 210 Mich. 349, 178 N. W. 57; *cf. State v. Beltrami County* (1915) 131 Minn. 27, 154 N. W. 509. It has been held that contributions need not be in cash to constitute "support". *Southern Surety Co. v. Hibbs* (1920, Tex. Civ. App.) 221 S. W. 303 (services rendered); *Finney v. Municipality of Croswell* (1922) 220 Mich. 637, 190 N. W. 856. Where the deceased employee's income included both rent and wages, and where the only benefits conferred were cash contributions, the question of allocating benefits to wages was not considered.

Kenney's Case (1915) 222 Mass. 401, 111 N. E. 47. The fact that the particular benefit received in the instant case appeared to come from the employee's property rather than from his pay envelope does not seem to be a satisfactory test. Had the employee rented the property and used that income for his own support, while he assisted the plaintiff with his wages, the plaintiff would have been no more dependent on earnings, than in the instant case, although probably under the present decision, she could have recovered in full. It is submitted that whenever a claimant can show that, because of the inadequacy of the deceased's other sources of income, the benefits to the claimant must necessarily have been discontinued or reduced upon a cessation of the deceased's wages, then such claimant should be held to be dependent on those wages for support to the extent of the reduction in benefits which the cessation of those wages within the lifetime of the employee would have necessitated.

WORKMEN'S COMPENSATION—INJURY "ARISING OUT OF THE EMPLOYMENT". —On premises adjoining those on which the plaintiff was employed, a shell, preserved as a war memorial, exploded and a flying fragment injured the plaintiff. A claim was made under the Workmen's Compensation Act, and the State Industrial Board granted an award. This was affirmed in the Appellate Division and the employer and insurance company appealed. *Held,* (two judges *dissenting*) that the judgment be reversed on the ground that the injury did not arise out of the employment. *McCarter v. La Rock* (1925) 240 N. Y. 282, 148 N. E. 523.

Most of the American compensation acts provide for compensation for injuries "arising out of . . . and in the course of the employment". *Cf.* Cahill's N. Y. Cons. Laws, 1923, ch. 66, sec. 10. The term "arising out of" has caused much confusion. Courts have in many cases construed it away by in effect adopting the so-called "but for" rule of causation. Thus an injury from lightning was held to arise out of the employment where the worker was exposed to extraordinary risk. *People's Coal and Ice Co. v. Ramsey County* (1915) 129 Minn. 502, 153 N. W. 119; *Central Ill. Service Co. v. Industrial Commission* (1920) 291 Ill. 256, 126 N. E. 144. Likewise, where a painter, because of dizziness due to indigestion, fell from a ladder. *Gonier v. Chase Co.* (1921) 97 Conn. 47, 115 Atl. 677; (1920) 20 MICH. L. REV. 687. A chauffeur, attacked by an insane man in the street was considered to have been exposed to a "street risk" and the injury was held compensable. *In the Matter of Katz* (1922) 232 N. Y. 420, 134 N. E. 330; (1922) 31 YALE LAW JOURNAL, 563. And one hurt because of "horseplay", where he was not a participant, was allowed to recover. *Matter of Leonbruno v. Champlain Silk Mills* (1920) 229 N. Y. 470, 128 N. E. 711. In many similar situations, however, the courts have appeared unwilling to go so far. Thus an injury from falling down an elevator shaft, when in an epileptic fit, was held not compensable. *Kelley v. Nichols* (1921, 3d Dept.) 199 App. Div. 870, 191 N. Y. Supp. 445. And a night watchman, shot by an air gun accidentally discharged, was not injured within the Act. *Matter of de Salvo v. Jenkins* (1924) 239 N. Y. 531, 147 N. E. 182. Before most of the American Acts were drafted a writer pointed out the confusion in the English cases due to the phrase "arising out of" and advised its omission. Bohlen, *The Drafting of Workmen's Compensation Acts* (1911) 25 HARV. L. REV. 517, 545. A few states have followed this advice, thus in effect applying the "but for" rule. Pa. Sts. 1920, sec. 21983; Throckmorton's Ohio Gen. Code, 1921, sec. 1465-68. This rule seems to reach a result more in harmony with the modern tendency to shift the loss from the individual to society through various forms of insurance. And where "arising out of" is still retained it would seem desirable to apply the "but for" rule in all cases.