RECENT CASE NOTES

ADMINISTRATIVE LAW—FEDERAL JUDICIAL CODE—EFFECT OF THE THREE JUDGE RULE.—The plaintiff filed a bill in the federal court to restrain the South Carolina Tax Commission from collecting certain income taxes. A temporary restraining order was granted, pending a hearing before three judges for an interlocutory injunction pursuant to § 266 of the Judicial Code [U. S. Comp. Stat. (1916) § 1243]. The statute creating the commission provided that by paying under protest, the aggrieved party could sue the commission for recovery of the taxes within thirty days. *Held*, on rehearing, that a permanent injunction be granted, since the statutory legal remedy involved a suit against the state and therefore was not available in a federal court. *Southern Ry. v. Query*, 21 F. (2d) 333 (E. D. S. C. 1927).

When an appeal from a commission order to a state court is provided, the statutory mode of appeal must be strictly followed. *Devereaux v. Public Utilities Comm.*, 125 Me. 520, 134 Atl. 545 (1926) (failure to except to orders was waiver); *N. Y. & Pa. Co. v. N. Y. Central Ry.*, 282 Pa. 257, 126 Atl. 382 (1924) (appeal lay to superior court only). And the administrative remedies provided must first be exhausted. *Capital Water Co. v. Public Utilities Comm.*, 41 Idaho 19, 237 Pac. 423 (1925) (appeal from interlocutory order premature). But usually, staying the operation of the orders pending appeal to a state court is left to the court's discretion. *Tacoma Grain Co. v. Northern Pac. Ry.*, 123 Wash. 664, 213 Pac. 22 (1923); see *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, 44 Sup. Ct. 553 (1924); *Banton v. Belt Line Ry.*, 268 U. S. 413, 45 Sup. Ct. 534 (1925). On appeal, it seems that the courts examine only the regularity of the proceedings before the commission. *Chicago, M. & St. P. Ry. v. Public Utilities Comm.*, 41 Idaho 181, 196, 238 Pac. 970, 975 (1925); *Boston & A. Ry. v. N. Y. Central Ry.*, 256 Mass. 600, 618, 153 N. E. 19, 24 (1926). And if there is some evidence supporting the order it is affirmed. *Pittsburg Gas Co. v. Public Utilities Comm.*, 101 W. Va. 63, 132 S. E. 497 (1926); *Jeremy Fuel & Grain Co. v. Public Utilities Comm.*, 63 Utah 392, 226 Pac. 456 (1924). After a state court has ajudicated the matter on appeal, the federal courts will not take original jurisdiction of the issue. *Detroit Mackinac Ry. v. Mich. Ry.*, 235 U. S. 402, 35 Sup. Ct. 126 (1914); *Mellon v. McCafferty*, 239 U. S. 134, 36 Sup. Ct. 94 (1915). Thus there are practical disadvantages in utilizing state remedies and this has induced a liberal attitude in the federal courts toward granting equitable relief. *Pendergrast v. New York Tel. Co.*, 262 U. S. 43, 43 Sup. Ct. 466 (1923) (because operation of orders not stayed pending appeal to state court); *Chicago B. & A. Ry. v. Osborne*, 265 U. S. 14, 44 Sup. Ct. 431 (1924) (because state court bound down to record and unable to try *de novo*). Formerly, as a matter of comity, exhaustion of state administrative remedies was a prerequisite to federal equitable aid. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67 (1908). But that requirement seems to have completely disappeared. *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587, 46 Sup. Ct. 408 (1926); *Banton v. Belt Line Ry.*, 268 U. S. 413, 45 Sup. Ct. 534 (1925). Federal equity courts will not entertain jurisdiction when an adequate legal remedy is available in the federal courts. *Union Pac. Ry. v. Weld County*, 247 U. S. 282, 38 Sup. Ct. 510 (1916). But the existence of a legal remedy in a state court does not preclude federal equity jurisdiction. *Chicago B. & O. Ry. v. Osborne, supra.* And federal courts have been reluctant to hold that a legal remedy available in a state court

can be enforced in a federal court so as to preclude federal equitable jurisdiction. *Risty v. Chicago Ry.*, 270 U. S. 378, 46 Sup. Ct. 236 (1926) (appeal to a state court available); *Western Union Tel. Co. v. Tax Comm.*, 21 F. (2d) 355 (S. D. Ohio, 1927) (action to recover taxes paid under protest available). However, the instant decision seems to be supported by authority in treating an action against the commission as one against the state. *Cf. Ex parte New York*, 256 U. S. 490, 500, 41 Sup. Ct. 588 (1920). The anticipated reduction in the number of interruptions in the operation of state legislation has apparently not been effected by the three judge rule. Therefore, the state administrative machinery is practically useless in the important cases for which it was specially designed. An effective remedy for the situation would be a federal statute making the existence of an adequate legal remedy in the state courts a bar to equitable relief under § 266 *supra*.

AGENCY—AGENTS OF NECESSITY—TERMINATION OF AGENCY BY WAR.—The plaintiff was a British exporter who had made consignments of goods to Turkey through the defendant bank as agent. The latter undertook to make deliveries and collections which were to be remitted to the plaintiff. The defendant received goods in Turkey sent by the plaintiff shortly before the outbreak of war between England and Turkey. After the declaration of war he delivered the goods to the Turkish buyers and accepted payment therefor according to the contracts of sale. At the war's conclusion, the plaintiff demanded the pre-war sterling amount of the bills paid to the bank or damages for conversion. The defendant claimed that it owed only the present value in sterling of the piastres received and claimed to have acted as "agents of necessity." The lower court ordered that the plaintiff be awarded the pre-war sterling amount of the bills. *Held*, on appeal, that the order be varied, as the contracts of sale with the Turkish buyers and the contract of agency with the defendants were dissolved by the war. The defendant was therefore guilty of conversion in disposing of plaintiff's goods. *Jebara v. Ottoman Bank*, 137 L. T. R. 101 (1927).

War is said to terminate an agency where the principal and agent are residents of the belligerents. Tiffany, *Agency* (2d ed. 1924) § 87; Mechem, *Outlines of Agency* (3d ed. 1923) § 216; see Note (1918) 31 HARV. L. REV. 637. The rule is not applied, however, to certain acts which are held to be permissible if they are such as the principal would presumably still desire to have done. *Ward v. Smith*, 7 Wall. 447 (U. S. 1868) (agency to collect debts); *Tingley v. Müller* [1917] 2 Ch. 144 (power of attorney to sell land); Mechem, *loc. cit. supra*; 1 Williston, *Contracts* (1920) § 279. Under the facts of the instant case it seems that the defendant might well come within this exception. The attitude of the instant court would seem to indicate that the agent should abandon the merchandise, on the ground that the agency is terminated and any further dealing with the goods is a conversion. No authority appears to have gone so far. Some theory, therefore, must be worked out to justify an agent in such circumstances either in disposing of the goods or charging the principal for the safe keeping of his property. Where an agent in a belligerent country finds it necessary to sell his principal's goods, the doctrine of "agency by necessity" has been recognized as applicable. *Prager v. Blatspiel* [1924] 1 K. B. 566 (no necessity, because goods could be stored). This doctrine has also been applied to a situation where an agent, to save his principal's goods from invading forces, deviated from instructions by removing them to a foreign country. *Tetley & Co. v. British Trade Corp.*, 10 Lloyd's List L. R. 678 (1922); see Note (1925) 2 CAMBRIDGE L. J. 241. The prerequisites to the application of this doctrine seem to be: (1) impossibility of communication with the

principal, *Springer v. Gt. Western Ry.*, 89 L. J. K. B. 1010 (1920); (2) actual "necessity," *Phelps, James & Co. v. Hill*, 1 Q. B. 605 (1891); *Sims v. Midland Ry.*, 82 L. J. K. B. 67 (1913); Carver, *Carriage of Goods by Sea* (7th ed., 1925) § 297; (3) good faith. *Prager v. Blatspiel, supra;* see Tiffany, *op. cit. supra*, § 22; Note (1925) 25 COL. L. REV. 646. There is nothing to show that all of these factors were not present in the instant case. The requirement that the agent store the goods would seem to be unreasonable as imposing upon him the burden of speculating as to the war's duration, which, if extended, might result in enormous charges. Unless the goods are extremely valuable, therefore, a disposal at any time after the outbreak of the war would be reasonable. A rule might be worked out, however, to make it necessary for agents in such circumstances to store the goods, if non-perishable, until communication with the principal is restored, such charges to fall upon the principal. *Cf. Tetley & Co. v. British Trade Corp., supra.* It would seem preferable, however, to protect the agent in the exercise of his own discretion as to a reasonable course to follow on the theory of "agency of necessity."

ALIENS—RIGHT OF COUNSEL—DUE PROCESS.—The plaintiff was subjected to a department rule of the Commissioner of Labor denying counsel before a board of special inquiry to aliens seeking admission and was denied admission. Another department rule granted a right of counsel to aliens in deportation proceedings. In a petition for a writ of habeas corpus, charging that the hearing under the department rule denying counsel was unfair, *held* that such action was a denial of due process of law and discriminatory. *Miers v. Brownlow*, 21 F. (2d) 376 (S. D. Ala. 1927).

The courts will interfere by *habeas corpus* if the administrative board before whom aliens appear denies a "fair hearing." *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644 (1905); (1927) 22 ILL. L. REV. 203. Also, if the board decides against an alien asserting a claim of citizenship which is supported by substantial evidence. *Ng Fung Ho v. White*, 259 U. S. 276, 42 Sup. Ct. 492 (1922). If the hearing is held to be unfair, the court will assume jurisdiction and determine the issue. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201 (1908); *Ex Parte Gin Mun On*, 286 Fed. 752 (N. D. Cal. 1920). Otherwise, the administrative hearing is final. *Lewis v. Frick*, 233 U. S. 291, 34 Sup. Ct. 488 (1914). Even showing the decision to be erroneous on the basis of the evidence does not establish an unfair hearing. *Chin Yow v. United States, supra; United States v. Hughes*, 299 Fed. 99 (C. C. A. 3d, 1924). Many deportation cases hold that aliens have the right of counsel. *Ungar v. Seamen*, 4 F. (2d) 80 (C. C. A. 8th, 1924); *Dioguardi v. Flynn*, 15 F. (2d) 576 (W. D. N. Y. 1926). But these cases may have been based on a department rule which allows counsel in such cases. As to aliens seeking admission, the specific point remains unsettled by the latest case in the Supreme Court involving due process under such proceeding. *Quon Quon Poy v. Johnson*, 273 U. S. 352, 47 Sup. Ct. 346 (1927). But in that case the alien was not informed of any right of counsel before the hearing, only being advised of his statutory right to have one friend or relative at the proceedings. And in fact counsel was not present at any of the proceedings, which were held, nevertheless, to have constituted a "fair hearing." In view of the custom of informing aliens of all their rights, the implication is that no right of counsel exists. And other cases have expressly denied right of counsel to aliens seeking admission. *Ex Parte Ching Hing*, 224 Fed. 261 (W. D. Wash. 1915); *Buccino v. Williams*, 190 Fed. 897 (N. Y. 1911). An alien has no constitutional rights of admission, his exclusion or expulsion being completely under the power of Congress. *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup.

Ct. 31 (1912). It would seem, therefore, that an alien seeking admission is not protected by the constitutional guarantee of "due process of law" as was reasoned in the instant case, but that rather he is protected only to the extent that Congress has by legislation assured him a "fair hearing." And there seems to be no reason why, as in the *Quon Quon Poy* case, *supra*, such is not possible without the presence of an attorney. Barring counsel, then, is not necessarily inconsistent with a "fair hearing," and such a rule would not seem to be discriminatory merely because another department rule allows counsel in deportation proceedings. Aside from legal theory, and as a matter of policy, however, it would seem that the result in the instant case is most desirable, as the ignorance of aliens in most cases is obviously a serious handicap toward proving qualifications for admission. And it would undoubtedly be fairer to treat all aliens alike in this regard. It has often been felt that in our desire for self-preservation, the tendency may be to treat aliens too harshly. Bevis, *The Deportation of Aliens* (1920) 68 U. PA. L. REV. 97. But the instant desirable result should be achieved by proper legislation.

BANKS AND BANKING—NATIONAL BANKS—PROMISE TO REPURCHASE REAL ESTATE MORTGAGE.—The defendant, a national bank, sold to the plaintiff a real estate mortgage acquired in a loan transaction and promised to repurchase it upon demand. It later refused to honor the buyer's demand. In a contract action, judgment was rendered for the plaintiff. *Held*, on appeal, that the judgment be reversed since the bank had no authority to enter into the contract. *Greene v. First Nat. Bank of Thief River Falls*, 215 N. W. 213 (Minn. 1927).

The express statutory provision that a national bank cannot guarantee a real estate loan which it has negotiated for another is cited, *inter alia*, as authority for the instant decision. 39 Stat. 753, (1916) U. S. Comp. Stat. (1916) § 9764. There seems to be no reason for its application to the instant case. A national bank can guarantee or endorse its own paper. *People's Bank v. National Bank*, 101 U. S. 181 (1879); see *Farmers' & Merchants' Bank v. Kingwood National Bank*, 85 W. Va. 371, 375, 101 S. E. 734, 735 (1920). Further, a national bank has express authority in certain situations to make loans on real estate. 38 Stat. 273, (1913) U. S. Comp. Stat. (1916) § 9763. By reasonable implication, this power should carry with it authority to sell the mortgages received as security for such loans. See Morse, *Banks and Banking* (Carter, 5th ed. 1917) § 74. This may be justified on the ground that any other rule would greatly decrease the value of the mortgage to the bank as an asset and preclude the possibility of converting such holdings into liquid assets. If it be assumed that sales may be made, the means of making such sales should be those customary in the community. And since promises to repurchase appear to be customary incidents of mortgage loans in the middle west, it seems unreasonable to deny their validity. The mortgage notes taken by banks are generally acceleration notes. Selling and endorsing them creates, therefore, a duty similar to the liability of repurchase. The undertaking to repurchase would be no more arduous, in effect, than would the contract of endorsement on either a demand note or an acceleration time note. The real objection to giving effect to these promises is the objection of creating "contingent liabilities" which do not appear on the bank's reports. Admitting that this is repugnant to sound banking, yet it is undesirable to escape the difficulty by the means adopted in the instant case. The difficulty can be more satisfactorily remedied by appropriate legislation, requiring that such "liabilities" be satisfactorily brought to the attention of the bank examiners.

BILLS AND NOTES—TRADE ACCEPTANCES—NEGOTIABILITY.—The acceptor of several trade acceptances brought suit against the drawer and indorsee for cancellation thereof because of failure of consideration. The indorsee counterclaimed for payment as a holder in due course. The trial court gave judgment for the plaintiff on the ground that a clause, "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer," rendered the instrument non-negotiable in form. The Court of Civil Appeals reversed this judgment. *Held*, on appeal, that the judgment of the Court of Civil Appeals be reversed and that of the trial court reinstated. *Lane Co. v. Crum*, 291 S. W. 1084 (Tex. Comm. App. 1927).

Courts have with substantial unanimity held that such a clause does not affect negotiability in view of N. I. L. § 3 (2), which provides that a negotiable instrument may contain "a statement of the transaction which gives rise to the instrument." *Atterbury v. Bank of Washington Heights*, 241 N. Y. 231, 149 N. E. 841 (1925); *Wakem v. Schneider*, 192 Wis. 528, 213 N. W. 328 (1927); *Havens v. Foskett*, 254 Pac. 642 (Cal. 1927). *Contra: Citizens' State Bank of Marianna v. Carmichael*, 103 So. 111 (Fla. 1925) (opinion not clear whether such clause renders instrument non-negotiable *per se* or merely puts purchaser on notice). The decisions directly so holding give no idea of the extent of the judicial opinion favoring the negotiability of trade acceptances, as in most cases this point is taken for granted. Some of the opinions show definitely that the acceptances contain the above clause. *International Finance Co. v. Northwestern Drug Co.*, 282 Fed. 920 (D. Minn. 1922); *State Bank of Kansas City v. Harford*, 116 Kan. 262, 226 Pac. 750 (1924); *Commercial Investment Co. v. Whitlock*, 217 Mo. App. 676, 274 S. W. 833 (1925). Others do not mention the clause at all. *Guaranty Finance Corp. v. Mire*, 2 La. App. 794 (1925); *Merchants' Bank & Trust Co. v. Thurman Motor Co.*, 10 F. (2d) 141 (C. C. A. 6th, 1926); *Garner v. F. T. Crowe & Co.*, 138 Wash. 584, 244 Pac. 970 (1926). It may be assumed that these acceptances did contain much the same wording, since such a clause is one of the identifying features of a trade acceptance, having been incorporated in the acceptance form adopted by various banking and trade organizations. Mathewson, *Acceptances* (1921) 15, 18, 20-22, 309, 310; Steiner, *Mechanism of Commercial Credit* (1922) 120 *et seq.* Trade acceptances are fast displacing open book accounts covering current sales of merchandise on the time basis. See *Capital City State Bank v. Swift*, 290 Fed. 505, 506 (E. D. Okla. 1923). The reasoning of the instant court, that, since a negotiable instrument is a "courier without baggage," it cannot contain such a clause and still be negotiable, entirely disregards the economic effect of such instruments. In the face of this economic situation, to hold them non-negotiable, a conclusion based wholly on a figure of speech, is unfortunate.

CORPORATIONS—APPORTIONMENT OF SHARE DIVIDENDS BETWEEN LIFE-TENANT AND REMAINDERMAN.—The corpus of a trust fund included 10,202 shares of $100 par value each in the *C* corporation. Earnings accruing during the life of the trust increased the corporation's surplus by over $6,000,000. In 1922 enough of this sum was added to the book capital to increase it by one third. At the same time two and two thirds new no-par-value shares were exchanged for each old share. The trustee applied to have the rights of the life-tenant and remainderman determined. *Held*, that one fourth of the no-par-value shares in the trust fund after this exchange represents a share dividend, and, as such, was payable to the life-tenant since the book value of the remaining three fourths of the shares was as great as that of all the original shares in the trust fund at its commencement. *Matter of Norton*, 129 Misc. 875, 224 N. Y. Supp. 77 (Surr. Ct. 1927).

Some courts award all share dividends to the remainderman and all cash dividends to the life-tenant. *Minot v. Paine*, 99 Mass. 101 (1868). Although this rule is simple to administer it has been criticized on the ground that it is unjust for the remainderman to receive earnings accruing during the life-tenancy simply because the directors have chosen to add them to the corporation's capital stock. *Pritchett v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064 (1896); (1923) 23 COL. L. REV. 369. But *cf.* Comment (1924) 34 YALE LAW JOURNAL 195. Where a dividend in shares having a par value is declared, usually the book item "earnings" (or "profits," or "surplus") is reduced by an amount at least equal to the total par value of the share dividend, and the book item "capital stock" is increased by a similar amount. *Macy v. Ladd*, 128 Misc. 732, 219 N. Y. Supp. 449 (Sup. Ct. 1926); *In re Duffill's Estate*, 180 Cal. 748, 183 Pac. 337 (1919). The so-called "Pennsylvania rule" pays so much of the dividends declared during the life-tenancy to the trust estate as may be necessary to compensate for an impairment of the original book value of the shares in the trust, and the remainder to the life beneficiary. *Earp's Appeal*, 28 Pa. 368 (1857). This rule has also been applied where there has been a liquidation of the net assets of a corporation remaining upon its dissolution. *In re McKeown's Estate*, 263 Pa. 78, 106 Atl. 189 (1919); *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959 (1891). And there seems to be no reason for a variant result even if the transaction in the instant case be viewed as an "exchange of shares" rather than a "share dividend." Since the apportionment proceeds entirely on the basis of book value, with which the par value of a share has no necessary connection, the absence of such par value should not influence the result. The decision seems to effect justice to both the remainderman and the life tenant. A recent New York statute makes all share dividends payable to the corpus of trusts created after 1926. N. Y. Laws 1926, c. 843.

CRIMINAL LAW—AMENDMENT OF INDICTMENT—VARIANCE.—An indictment charged the defendant with embezzlement of county funds. The proof offered was that a check was obtained by the defendant from the county supervisor on a false claim and thereafter used to pay off a debt owed by the defendant to the county. The defendant appealed from a verdict of guilty, on the ground of variance between the indictment and the proof. *Held*, on appeal (one judge *dissenting*), that the appeal be dismissed. *State v. Alexander*, 138 S. E. 835 (S. C. 1927).

At common law, an amendment to an indictment was not permitted. See *People v. Motello*, 157 App. Div. 510, 511, 142 N. Y. Supp. 622, 624 (2d Dept. 1913). But this has been changed generally by statute. Cal. Penal Code (Deering, 1923) § 1008; Mich. Comp. Laws (1915) § 15093; Pa. Stat. (West, 1920) § 8096; Kan. Gen. Stat. (1915) § 7982. Such statutes generally permit amendments to cure variances in allegations of time, place, person or thing, unless the defendant is thereby prejudiced. *Cf.* N. Y. Code of Crim. Proced. (1925) § 293. But the construction of such statutes has not been sufficiently liberal to permit a substantial departure from the strictness of the common law rule. Thus where the information described incorrectly the location of a house wherein an alleged violation of the prohibition law occurred, it was held reversible error to permit an amendment. *State v. Adler*, 119 Kan. 757, 241 Pac. 119 (1925). And when the defendant was charged with falsely registering in the thirty-first election district instead of the thirty-fifth, it was held improper to amend this defect, as changing the identity of the offense. *People v. Bromwich*, 200 N. Y. 385, 93 N. E. 933 (1911). Likewise where the indictment alleged burglary in the daytime instead of at night. *State v. Sowell*, 85 S. C. 278, 67 S. E. 316 (1910). Or charged abandonment after seduction and marriage and

omitted the date of the abandonment. *Kirkendall v. State*, 78 Tex. Cr. App. 168, 180 S. W. 676 (1915). Neither was amendment permitted where larceny of a check was charged and larceny of money was proved. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48 (1909). It is submitted that if the original indictment gives the defendant sufficient notice of the accusation, trial convenience is better served by a more liberal attitude towards amendment. On facts similar to the instant case the variance is usually held fatal where amendment has not been resorted to. *Pruitt v. State*, 21 Ala. App. 113, 105 So. 429 (1925); *People v. Borchees*, 199 Cal. 52, 247 Pac. 1084 (1926); *State v. Peck*, 299 Mo. 454, 253 S. W. 1019 (1923) (charge of money, proof of shares). A minority bases a contrary view on the fictitious ground that when a check is drawn there is a segregation of that much money from the general funds of a bank which thereupon becomes the property of the depositor. *Fulkerson v. State*, 17 Okla. Crim. 103, 189 Pac. 1092 (1920); *Territory v. Hale*, 13 N. M. 181, 81 Pac. 583 (1905). The action in the instant case was brought under a statute relating to public funds. The term "public money" in a similar statute was construed to include credits, checks and funds of every kind as well as money. *Fulkerson v. State, supra; Territory v. Hale, supra.* Since the term "public funds" is of wider implication than "public money" and in view of the restricted field of amendments to indictments, the instant case is justified in its conclusion. It is suggested that such problems could probably be prevented by a policy of greater liberality in the matter of amendments to indictments.

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—SPECIFIC INTENT.—The prosecuting witness, a county policeman, while pursuing the defendants because of suspicion that they were transporting liquor in their automobile, inhaled poisonous gas fumes emitted by a smoke screen device attached to the exhaust of the motor car. The defendants were indicted for assault with intent to kill. It appeared that the fumes emitted were deadly if inhaled in sufficient quantity; but it did not appear that the defendants knew that these fumes were emitted when the smoke screen device was in operation. A verdict and judgment of guilty was entered. *Held*, on appeal, that the judgment be reversed because there was no evidence of a "specific intent" to kill which is an essential element of the crime charged. *Andrews v. State*, 138 S. E. 923 (Ga. 1927).

"Specific intent" is the traditional requisite of a statutory crime such as assault with intent to kill. *People v. Santoro*, 229 N. Y. 277, 128 N. E. 234 (1920); see Comment (1920) 30 YALE LAW JOURNAL 184, 185. And, unlike cases where the homicide has been committed, such intent must be found as a fact by the jury. *Posey v. State*, 22 Ga. App. 97, 95 S. E. 325 (1918); *cf. Garrett v. State*, 110 Neb. 118, 193 N. W. 159 (1923). *Contra: State v. Wansong*, 271 Mo. 50, 195 S. W. 999 (1917) ("irrebuttable presumption" may arise from deadly character of assault); *People v. Shaw*, 36 Cal. App. 441, 172 Pac. 401 (1918) (same). The intent may be "deduced" from "sufficient" evidence. *Cf. State v. Minousis*, 64 Utah 206, 228 Pac. 574 (1924). Although the burden of proving "intent" is on the state, it is often "deduced" where the assault was the outgrowth of an independently unlawful act on the part of the defendant. *Phinazee v. State*, 22 Ga. App. 258, 95 S. E. 878 (1918); *People v. Murel*, 225 Mich. 499, 196 N. W. 376 (1923). Likewise, where the character of the assault is deadly. *People v. Murray*, 307 Ill. 343, 138 N. E. 681 (1923); *Smith v. State*, 172 Ark. 156; 287 S. W. 1026 (1926). And where a deadly weapon is used. *Slaytor v. State*, 141 Ark. 11; 215 S. W. 886 (1919); *Parrot v. State*, 101 Tex. Cr. R. 553, 276 S. W. 279 (1925). But verdicts of assault with intent to murder arising from similar fact situations have been held to be against the evidence, for want

of "specific intent." *State v. Kester*, 201 S. W. 62 (Mo. 1918) (firing in direction of dwelling house is not a fact from which intent to kill may be reasonably deduced); *Davis v. State*, 96 Tex. Cr. App. 646, 259 S. W. 946 (1924) (counter-attack in retaliation for pain inflicted held more apt to be actuated by sudden passion than by cool intent). The varying results of the courts suggest that their effort to understand the state of mind is little more than an inquiry into the circumstances involved. See *Dixon v. State*, 162 Ark. 584, 258 S. W. 401, 402 (1924). The trend of the cases of assault by reckless driving furnishes a hint as to what may well be the controlling factor in the decisions. Most state statutes have outlined several grades of assault for which the severity of punishment increases proportionately. See Ga. Penal Code Ann. (1926) §§ 95-97. Where injuries result from reckless driving, intent seems easily inferred, *a simple assault* being charged. *State v. Schutte*, 87 N. J. L. 15, 93 Atl. 112 (1915); *Bleiweiss v. State*, 188 Ind. 184, 119 N. E. 375 (1918) *aff'd*, 188 Ind. 184, 122 N. E. 577 (1919). Where, however, the charge is assault with intent to do bodily harm, the jury is less inclined to find the necessary intent. *Cf. People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917); *State v. Richardson*, 179 Iowa 770, 162 N. W. 28 (1917); *People v. Anderson*, 310 Ill. 389, 141 N. E. 727 (1923); *Radley v. State*, 197 Ind. 200, 150 N. E. 97 (1926). *Contra: People v. Benson*, 321 Ill. 605, 152 N. E. 514 (1926) (proof of reckless driving upholds charge of assault with a deadly weapon even though there was no specific intent); *Brimhall v. State*, 255 Pac. 165 (Ariz. 1927) (gross negligence in driving while intoxicated without lights and on wrong side of street imports to defendant intent necessary to prove aggravated assault). The difference, if any, between the intent required for simple assault and the statutory intent required for "assault with intent to inflict bodily harm" is too slight to account for this difference in tendency. It is submitted that the disinclination to find the latter intent is dictated by an unwillingness to impose the severer penalty which a finding of such intent involves. For the purpose of reaching a verdict in situations similar to the instant case, confusion might be avoided by substituting for the search for "intent" an examination of previously presented fact situations in order to determine the degree of punishment which seems desirable.

CRIMINAL LAW—CUMULATIVE SENTENCE—FAILURE TO INSTRUCT ON LIMITATION OF EVIDENCE NOT ERROR.—The appellant was convicted on four counts, *viz.*, (1) importation, (2) concealment of narcotics, (3) introducing the same into commerce, (4) conspiracy to commit (1) and (2). On appeal, error was assigned because of the failure to instruct the jury as to the limitation of the admission of a telephone conversation overheard and tending to prove the conspiracy. *Held*, that the conviction be affirmed (one judge *dissenting* on the ground that since a cumulative sentence was involved, any technical error should be a ground of reversal). *Vachuda v. United States*, 21 F. (2d) 409 (C. C. A. 2d, 1927).

It is generally held that the failure to instruct a jury as to the limitation or purpose of evidence, in the absence of a request to this effect, is not reversible error. *State v. Marshall*, 297 S. W. 63 (Mo. 1927); *State v. Schlaps*, 254 Pac. 858 (Mont. 1927); 2 Thompson, *Trials* (2d ed. 1912) § 2339. But in capital cases, appellate courts consider the proceedings of the trial court in detail, regardless of whether exceptions have been taken. *Vichers v. United States*, 1 Okla. Cr. Rep. 452, 98 Pac. 467 (1908) (failure to instruct concerning qualified verdict); *People v. Jung Hing*, 212 N. Y. 393, 106 N. E. 105 (1914) (incorrect admission of evidence). And it has been urged that in cases where cumulative sentences may be imposed, appellate courts should take a similar attitude. *Amendola v. United States*,

17 F. (2d) 529 (C. C. A. 2d, 1927); see *State v. Tobin*, 31 Wyo. 355, 372, 226 Pac. 681, 686 (1924). Some courts have held that when two or more offenses are committed as parts of the same "transaction" it is improper to sentence for both offenses if the penalty imposed is greater than the penalty provided for either. *State v. Garton*, 133 Atl. 403 (N. J. 1926) (possession and sale of liquor); *Patmore v. State*, 152 Tenn. 281, 277 S. W. 892 (1925) (possession of still and manufacture of liquor). However, it is more generally held that sentence may be imposed for both offenses. *Woodworth v. State*, 185 Ind. 582, 114 N. E. 86 (1916) (possession and sale of liquor); *United States v. Hampden*, 294 Fed. 345 (D. Mich. 1923) (transporting and storing stolen car); see Bishop, *Criminal Law* (9th ed. 1923) § 815a. This is the view adopted by the Supreme Court in *Morgan v. Devine*, 237 U. S. 632, 35 Sup. Ct. 712 (1915) (burglary and stealing stamps). If the modern theory of fitting the punishment to the individual is accepted as desirable, the highly technical approach in failing to discuss the desirability of cumulative punishment in the instant case would seem to be out of line. On the other hand, the court may regard the conduct as so reprehensible as to convict on all counts violated. Which procedure will lead to better results in deterring crime or reforming the criminal is a matter of conjecture.

DECLARATORY JUDGMENT—POWER TO DECLARE RIGHTS ARISING AND ENFORCEABLE IN A FOREIGN JURISDICTION.—The plaintiff was the assignee of a note and collateral security. The note, made in Rhode Island for $14,000 at 10% interest, was usurious and void under the New York law. In Rhode Island it was valid but the extent of the validity depended upon the determination of the equity court of that state. The collateral was an interest in a trust fund consisting of property in Rhode Island. The plaintiff sought a declaratory judgment in New York granting him a prior and paramount lien upon the defendant maker's interest in the trust fund to the extent of the note and interest. The defendant asked that the note be declared usurious and void. *Held*, two judges *dissenting*, that the Appellate Division was correct in declaring the loan contract and note valid under the Rhode Island law but was in error in declaring the extent of a lien enforceable only in Rhode Island. *Westchester Mortgage Co. v. G. R. & I. R. R.*, 246 N. Y. 194, 158 N. E. 70 (1927).

The court's power to render a declaratory judgment is discretionary, subject, however, to rules, precedent and appellate review. See *Ackerman v. Union and New Haven Trust Co.*, 91 Conn. 500, 507, 100 Atl. 22, 24 (1917); Uniform Declaratory Judgment Act, § 6; Borchard, *The Uniform Act on Declaratory Judgments* (1921) 34 HARV. L. REV. 710. The procedure will be used if it will serve a useful or practical purpose in settling legal relations. See *Guaranty Trust Co. v. Hannay*, 113 L. T. [N. S.] 98, 101 (1915). Thus, a declaratory judgment will be granted where it will avoid the necessity of future litigation. Borchard, *The Declaratory Judgment* (1918) 28 YALE LAW JOURNAL 110. Or where the declaration of the law of the jurisdiction will be an aid to a foreign court. *The Manar; Northern Trust Limited v. Strachan Bros.*, 89 L. T. [N. S.] 218 (1903). The court may refuse a declaratory judgment where other specific or statutory remedies have been provided, and assure full relief. *N. E. Marine Eng. Co. v. Leeds Forge Co.* [1906] 1 Ch. 324 (petition for revocation available to determine the validity of a patent). However, the mere existence of other common law remedies presents no sufficient ground for refusing a declaratory judgment. Comment (1927) 36 YALE LAW JOURNAL 403. The judgment may be refused where it cannot be made effective by further coercive relief. *Bruce v. Commonwealth Trade Label Ass'n*, 4 C. L. R. 1569 (Aus-

tralia, 1907). Obviously a declaratory judgment will be declined where the court has no jurisdiction over the subject matter or person. *British South Africa Co. v. Companhia de Mocambique*, A. C. 602 (H. L. 1893); *N. Y. & Ottawa Ry. Co. v. Township of Cornwall*, 29 Ont. L. Rep. 522 (1913). Since the declaratory judgment has the effect of a final judgment, the courts, like equity courts generally, are reluctant to grant a judgment which they may be unable to enforce. See *Paine v. Schenectady*, 11 R. I. 411 (1876); Comment (1918) 28 YALE LAW JOURNAL 579; Note (1923) 35 HARV. L. REV. 610. Thus the instant case seems correct in refusing to render a declaratory judgment which must finally be enforced against real property in another state. *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923) (declaration refused in Connecticut because will was to be enforced in Rhode Island).

EVIDENCE—WITNESSES—LEADING QUESTIONS.—In contesting the validity of a will, the contestants sought to prove undue influence and lack of capacity. The question, "What is the fact as to whether you noticed that same line of conduct on his part in later years?", and several others of a like tenor were ruled inadmissible by the trial court as leading questions under Cal. C. C. P. (1923) § 2046 (defining leading questions as those suggesting the answer desired by the examiner). On appeal it was *held, inter alia*, that it was reversible error to interpret the question as leading and to exclude it. *In re Melvin's Estate*, 259 Pac. 980 (Cal. 1927).

Reversals of rulings as to whether questions are leading are infrequent, a wide discretion being allowed the trial court. *Audibert v. Michaud*, 119 Me. 295, 111 Atl. 305 (1920). I Greenleaf, *Evidence* (16th ed. 1899) § 434. Reversals have, however, been granted in a few cases. *In re Wright-Dana Co.*, 199 Fed. 632 (N. D. N. Y. 1912); *State v. Alexander*, 89 Kan. 422, 131 Pac. 139 (1913); *Brown v. Yoakum*, 170 S. W. 803 (Tex. Civ. App. 1914). And this is the result where the trial court has expressly applied a wrong test for determining when a question is leading. *Waltosh v. Pa. Ry.*, 259 Pa. 372, 103 Atl. 55 (1918) (in a grade crossing case question, "Did you listen for a train coming down?" held not leading although answerable by "yes" or "no"); *People v. Jones*, 160 Cal. 358, 117 Pac. 176 (1911) (same as to question of whether it was possible during the time the fight was in progress, "for any man to leave that crowd and go a distance of 40 feet to first base and return with a bat, without your seeing him?"). The trial court may, in its discretion, permit admittedly leading questions and will not be reversed in the absence of obvious abuse of discretion. *People v. Schladweiler*, 315 Ill. 553, 146 N. E. 525 (1925); *Casey v. Atlantic City & S. R. R.*, 100 N. J. L. 376, 126 Atl. 293 (1924); 2 Wigmore, *Evidence* (2d ed. 1923) § 770. Old cases saying that the discretion is not reviewable are not now followed. The rule announced in *Steer v. Little*, 44 N. H. 613 (1863), that the admission of a question recognized expressly as leading is not reviewable, although the admission of a leading question without remark is reviewable, does not seem to be followed in later cases. *O'Dowd v. Heller*, 82 N. H. 387, 134 Atl. 344 (1926). In Texas it is reversible error to admit a leading question. *Gully v. Nystel*, 233 S. W. 122 (Tex. Civ. App. 1921). A determination of whether a question is leading, or whether a leading question may be asked is seldom the sole ground of reversal. Since such issues generally receive only passing notice it might be desirable to allow the trial court, which has the opportunity to observe the psychological climate of the courtroom, to make the final ruling.

INJUNCTION—ZONING ORDINANCE—PRIVATE PARTY SPECIALLY DAMAGED MAY ENJOIN VIOLATION OF ZONING ORDINANCE.—The plaintiff, alleging special damages, sought to enjoin the defendant from maintaining a com-

mercial structure on its land opposite the plaintiff's residence in violation of a municipal zoning ordinance. Judgment below was given for the defendant on the ground that the enforcement of the zoning regulations belonged exclusively to the zoning commission. *Held,* on appeal, that this was error. *Fitzgerald v. Merard Holding Co.,* 106 Conn. 475, 138 Atl. 483 (1927).

The mere fact that the defendant's act violates a municipal ordinance does not entitle a private individual to an injunction. *Joseph v. Wieland Dairy Co.,* 297 Ill. 574, 131 N. E. 94 (1921) (erection of stable); *Coley v. Campbell,* 126 Misc. 869, 215 N. Y. Supp. 679 (Sup. Ct. 1926) (gasoline station). *Contra: Pritz v. Messer,* 112 Ohio St. 628, 149 N. E. 30 (1925). But where the violation causes special damage to the plaintiff it will be enjoined. *Holzbauer v. Ritter,* 184 Wis. 35, 198 N. W. 852 (1924) (erection of store in residential district in violation of zoning ordinance might cause irreparable injury to neighboring property); *Shelton v. Lentz,* 191 Mo. App. 699, 178 S. W. 243 (1915) (erection of building violating fire ordinance and tending to increase fire hazard and insurance premiums). But *cf. O'Brien v. Turner,* 255 Mass. 84, 150 N. E. 886 (1926). This rule has also been applied in the case of public utilities. *Cf. Puget Sound Traction, Light & Power Co. v. Grassmeyer,* 102 Wash. 482, 173 Pac. 504 (1918) (injunction obtained by street railway company against operation of busses in violation of statute and ordinance). But *cf. Public Service Ry. Co. v. Reinhardt,* 92 N. J. Eq. 365, 112 Atl. 850 (1921). Some courts have enjoined the violation of statutes or ordinances on the ground that violations thereof constituted nuisances. *Memphis St. Ry. Co. v. Rapid Transit Co.,* 133 Tenn. 99, 179 S. W. 635 (1915) (operation of busses). But *cf. Whitridge v. Calestock,* 100 Misc. 367, 165 N. Y. Supp. 640 (Sup. Ct. 1917) (restaurant established in violation of zoning ordinance not a nuisance). This is the theory adopted by the instant court. The result reached seems desirable in view of the refusal of the zoning commission to take any action to prevent or abate the violation of the ordinance, since the plaintiff suffered substantial damage.

LIMITATION OF ACTIONS—SUIT TO SET ASIDE DEED—PERIOD APPLICABLE.—On the representation of her husband that she was merely relinquishing her dower rights in his land, the plaintiff conveyed her own land to *C. C* conveyed to *R,* who had procured the plaintiff's husband to make the false representation. *R* executed an oil lease to *O.* The deception was discovered in 1907, but the plaintiff remained in possesion until 1915, when she was ousted. Suit was instituted in 1924 against the above parties to cancel the deed, regain possession, remove the cloud on title, and obtain an accounting for rents and profits. The trial court sustained a demurrer. *Held,* on appeal (two judges *dissenting*), that the judgment be affirmed since, the concellation of the deed being necessary to regain possession, the two year statute of limitations for relief from frauds, and not the fifteen year statute for recovery of real property, applied. *Tomlin v. Roberts,* 258 Pac. 1041 (Okla. 1927).

The decisions as to the period of limitations applicable in actions to set aside a deed for fraud are in irreconcilable conflict. *Foy v. Greenwade,* 111 Kan. 111, 206 Pac. 332 (1922) (fraud); *Brasie v. Minneapolis Brew Co.,* 87 Minn. 456, 92 N. W. 340 (1902) (fraud); *Newport v. Hatton,* 195 Cal. 132, 231 Pac. 987 (1924) (real property); *Turnmire v. Claybrook,* 204 S. W. 178 (Mo. App. 1918) (real property). Even within the same jurisdiction courts do not consistently apply the same period. Thus, the statute of limitations for fraud barred an action by a wife to set aside a quitclaim deed executed to her husband without knowledge on her part of her statutory interest in the land. *Morgan v. Morgan,* 10 Wash. 99, 38 Pac. 1054

(1894). But relief was given under the longer real property limitation when the defendant obtained a deed on a false representation that he would secure a loan. *Bradbury v. Nethercutt*, 95 Wash. 670, 164 Pac. 194 (1917). Likewise, a creditor's suit to set aside a fraudulent conveyance was sustained where a subsequent creditor, after obtaining land from the debtor, reconveyed to the debtor's sons and the debtor remained in possession as tenant and recognized the validity of a sheriff's deed for many years. *Vanduyn v. Hepner*, 45 Ind. 589 (1874). But the limitation for fraud barred a creditor's action to cancel a fraudulent conveyance when the grantee was unaware of the fraud and no attempt was made to conceal it from the plaintiff. *Lemster v. Warner*, 137 Ind. 79, 36 N. E. 900 (1893). Furthermore this anomaly is presented: the more extreme the facts constituting fraud, the more hesitant are courts to cut off the plaintiff's remedy by applying the Statute of Limitations of actions based on fraud. Thus, an action by a wife to set aside a deed executed on the representations of her husband that it was a mortgage to secure his debt to his brother, by which the land through mesne conveyances reached the defendant husband, was held to be not an action for relief on the ground of fraud, but an action to have the true character of the deed established. *Names v. Names*, 48 Neb. 701, 67 N. W. 751 (1896). Similarly, where the president of a realty corporation conveyed some of its land to his wife without consideration, it was held that since the wife had not fraudulently induced the conveyance, the limitation for fraud did not apply in a suit by the corporation to set aside the deed. *Hutchinson Realty Corp. v. Hutchinson*, 136 Wash. 184, 239 Pac. 388 (1925). As to the tendency of the courts generally to postpone the running of the statute, see Comment (1925) 34 YALE LAW JOURNAL 432. The instant court bases its decision on the ground that the deed must be cancelled before the plaintiff could be given possession. This distinction is, however, largely historical. Under our modern procedure reformation of instruments is largely a mere incident of the relief desired. Clark, *Trial of Actions Under the Code* (1926) 11 CORN. L. Q. 482; Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL 645. It would seem that the court might well have considered this an action for recovery of real property, and allowed a cause of action.

MUNICIPAL CORPORATIONS—RESPONSIBILITY IN TORT FOR PERFORMANCE OF GOVERNMENTAL ACTS.—The defendant city maintained a public swimming pool, charging a small fee for its use. This helped to defray but did not cover the expenses of operation. The plaintiff cut her foot on a jagged end of a locker. In a suit for personal injuries, the plaintiff was non-suited. *Held*, on appeal, that the judgment be affirmed, on the ground that the municipality acting not for private gain but in a "governmental" capacity was hence immune from tort responsibility. *Hannon v. City of Waterbury*, 106 Conn. 13, 136 Atl. 876 (1927).

In the absence of statute a municipal corporation is not responsible in tort for the results of its "governmental" acts. See (1921) 30 YALE LAW JOURNAL 303. This is the settled rule in Connecticut. *Jewett v. New Haven*, 38 Conn. 368 (1870) (injury caused by fire engine); *Pope v. New Haven*, 91 Conn. 79, 99 Atl. 51 (1916) (pyrotechnical exhibition on July 4); *Epstein v. New Haven*, 104 Conn. 283, 132 Atl. 467 (1926) (defective swing on public play ground). But the desirability of this rule has often been criticized by commentators. See Comment (1920) 29 YALE LAW JOURNAL 911; Doddridge, *Distinction between Governmental and Proprietory Functions of Municipal Corporations* (1925) 23 MICH. L. REV. 325, 337; Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL 129, 134, 229, 258; *ibid.* (1927) 36 *ibid.* 757, 805, 1039, 1099-1100. But even

in Connecticut recovery has been allowed under a statute making a municipality responsible for defects in the highway. *Frechette v. New Haven,* 104 Conn. 83, 132 Atl. 467 (1926). And where a municipality has been held to "assume" a duty. *Jones v. New Haven,* 34 Conn. 1 (1867) (care of trees); *Weed v. Borough of Greenwich,* 45 Conn. 170 (1877) (removal of obstructions from highway). In these latter cases, the defendant is regarded as exercising a "corporate" as distinguished from a "governmental" function. Recovery has also been granted where the acts of the defendant have been regarded as "ministerial." *Judd v. Hartford,* 72 Conn. 350 (1899) (building sewer held "governmental" but failure to remove obstruction distinguished, allowing responsibility to attach); *Perrotti v. Bennett,* 94 Conn. 533, 109 Atl. 890 (1920) (adopting plan of improperly constructed sewer a "governmental" function but execution of same "ministerial"). Recovery has also been allowed where the defendant's enterprise has been for pecuniary gain. *Richmond v. City of Norwich,* 96 Conn. 582, 115 Atl. 11 (1921) (reservoir guard shot plaintiff). The many "distinctions" recognized by the courts leave little remaining in the common law rule. *Cf.* Comment (1919) 17 MICH. L. REV. 503, 504; (1927) 26 MICH. L. REV. 222. Yet, after holding the maintenance of a swimming pool to be a "governmental" function, the instant court felt constrained to apply the rule and deny the plaintiff an action. But the tendency of modern jurisprudence and public policy to spread such burdens over the community rather than let them rest on the innocent victim would seem an adequate reason for change. See Borchard, *Government Liability in Tort* (1925) 34 YALE LAW JOURNAL 229, 258; *ibid.* (1927) 36 *ibid.* 757, 805, 1039, 1099-1100. From the attitude taken by the instant court, legislation would seem the only effective way to accomplish such a change in Connecticut.

MUNICIPAL CORPORATIONS—STATUTORY ACTION—SUIT BY TAXPAYER TO ENJOIN "ILLEGAL OFFICIAL ACT."—A town employed an engineering firm to make an assessment of its taxable property. The plaintiff, a taxpayer, sued under a statute [N. Y. Cons. Laws (Cahill, 1923) c. 26, art. 4, § 51] to restrain the town from paying the engineers on the ground that the contract between the two was "illegal." The trial court dismissed the bill. *Held,* on appeal, that the judgment be reversed (two judges *dissenting* on the ground that there was no "waste" or public injury justifying equitable intervention). *Leffingwell v. Scutt,* 221 App. Div. 462 (N. Y. 3d Dept. 1927).

Originally in New York, a citizen could not sue the municipality or its officers in his capacity as taxpayer to restrain "waste." *Doolittle v. Broome County,* 18 N. Y. 155 (1858) (special injury prerequisite); see *Roosevelt v. Draper,* 23 N. Y. 318, 323 (1861). But this was changed by statute as to actions against local officers. N. Y. Laws 1872, c. 161. The passage of the statute is said to have been occasioned by the fraud and corruption then prevalent. See *Ayers v. Lawrence,* 59 N. Y. 192, 195 (1874); *Schieffelin v. Craig,* 183 App. Div. 515, 523, 170 N. Y. Supp. 603, 609 (1st Dept. 1918). Later, an injunction for "illegal official acts" was also allowed. N. Y. Laws 1881, c. 531; N. Y. Cons. Laws (Cahill, 1923) c. 26, art. 4, § 51. There is some confusion in the New York cases as to whether "illegal official acts" apart from "waste" are a sufficient basis for a taxpayer's action. *Bush v. O'Brien,* 164 N. Y. 205, 58 N. E. 106 (1900); *Bush v. Coler,* 60 App. Div. 56, 69 N. Y. Supp. 770 (1st Dept. 1901); *Brill v. Miller,* 140 App. Div. 602, 125 N. Y. Supp. 865 (1st Dept. 1910) (holding "illegal acts" sufficient basis). *Contra: Cobb v. Ramsdell,* 59 Hun 627, 14 N. Y. Supp. 93 (Sup. Ct. 1891); *Altschul v. Ludwig,* 216 N. Y. 459, 111 N. E. 216 (1916); *Western N. Y. Water Co. v. Buffalo,* 242 N. Y. 202, 151 N.

E. 207 (1926); *Brown v. Ward*, 218 App. Div. 643, 219 N. Y. Supp. 139 (3d Dept. 1926); *Vandervoort v. Troy*, 223 N. Y. Supp. 454 (Sup. Ct. 1927) (requiring "waste" also). The effect of these latter decisions is a disregard of the amendment of 1881. The notion underlying them is that an injury to the resources of the community is necessary before a taxpayer has a sufficient interest to bring suit. See *Gilgar v. Law*, 38 Misc. 292, 294, 77 N. Y. Supp. 852, 853 (Sup. Ct. 1902). Where the "illegal act" causes no damage, the New York courts have often denied relief in this particular form of action and have suggested other remedies to the petitioner. See *Erie R. Co. v. Buffalo*, 96 App. Div. 458, 463, 89 N. Y. Supp. 122, 125 (4th Dept. 1904) (new-election); *cf. dissenting* opinion, *Brill v. Miller*, *supra* at 610, 125 N. Y. Supp. at 871 (mandamus). The instant interpretation of the statute, in making available a remedy in anticipation of "waste," seems the better cure for the evil which the legislature had in mind.

NUISANCES—UNSIGHTLY STRUCTURE CAUSING DEPRECIATION IN VALUE OF PLAINTIFF'S PROPERTY.—The plaintiff brought an action to recover damages for injury to his residential property alleged to have been caused by the maintenance by the defendant of a large gas container on its adjacent property. The evidence showed that its presence caused a depreciation in the value of the plaintiff's property of $2,000, one half of which was caused by the unsightliness of the container. Judgment was given for the plaintiff for $2,000. *Held*, on appeal, that the judgment be reduced one half on the ground that the mere appearance of the structure was not to be considered in the award of damages. *Houston Gas & Fuel Co. v. Harlow*, 297 S. W. 570 (Tex. Civ. App. 1927).

Obnoxious smells have been held nuisances even though not injurious to health. *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. 246 (1890). Likewise excessive noises. *Froelicher v. Oswald Ironworks*, 111 La. 705, 35 So. 821 (1903). But not unsightly structures even though they affect the value of the plaintiff's property. See *Ross v. Butler*, 19 N. J. Eq. 294, 303 (1868); *cf. Lane v. Concord*, 70 N. H. 485, 49 Atl. 687 (1900) (ugliness of adjoining lot no ground for damages). And the erection of such structures will not be enjoined. *Whitmore v. Brown*, 102 Me. 47, 65 Atl. 516 (1906) (extension of wharf); *Flood v. Consumers Co.*, 105 Ill. App. 559 (1903) (icehouse in residential section). For a criticism of this rule, see Mallard, *Present Legal Aspect of the Billboard Problem* (1916) 11 ILL. L. REV. 29, 30; Note (1916) 29 HARV. L. REV. 860, 862. In recent years, however, there has been a tendency to regulate the use of property in the interests of urban beauty, primarily by means of zoning ordinances. Chandler, *The Attitude of the Law Towards Beauty* (1922) 8 AM. B. A. J. 470; *cf.* Ark. Acts 1924, No. 6, § 1; *Ware v. Wichita*, 113 Kan. 153, 214 Pac. 99 (1923). The segregation of industry in a separate part of each city, which is the ultimate end towards which zoning ordinances aim, may eventually obviate situations such as that of the instant case. See Bettman, *Constitutionality of Zoning* (1924) 37 HARV. L. REV. 834, 837. But no court has yet gone so far as to give damages for injury to the value of property caused by the unsightliness of an adjoining structure. This injury must still be borne as an incident of city life. See *Dallas Land & Loan Co. v. Garrett*, 276 S. W. 471, 474 (Tex. Civ. App. 1925).

SURETYSHIP—SURETY ON BUILDING CONTRACTOR'S BOND—RIGHTS OF SUBROGATION.—The plaintiff was surety for the faithful performance of a building contract. After the building was completed a final payment check to the order of the contractor was given by the owner to the surety. The surety transferred this check to the contractor to be deposited in the

latter's account with the defendant bank, in return for which the contractor gave him individual checks to the order of unpaid materialmen. The defendant bank appropriated the deposited funds for a previous debt owed by the contractor. Consequently the checks to the materialmen were dishonored and the surety was obliged to pay. In an action to recover the amount deposited on the ground that the surety's right of subrogation was superior to the bank's lien, it was *held* that judgment be entered for the defendant since no notice of equities was given to the bank and the bank's claim arose out of a transaction prior to the maturing of the right to subrogation. *Fidelity and Deposit Co. v. Union State Bank*, 21 F. (2d) 102 (D. Minn. 1927).

Where a surety pays the claims against the contractor, or completes the contract, he is said to have a right to subrogation for purposes of collecting retained percentages from the contractee. *Hartford Accident and Indemnity Co. v. Federal Const. Co.*, 168 Minn.202, 209 N. W. 911 (1926); *Sumter Trust Co. v. Sumter County*, 136 S. C. 15, 134 S. E. 209 (1926). But such right of subrogation is available only for the purpose of reimbursement and not for profit. *U. S. Fidelity & Guaranty Co. v. Worthington*, 6 F. (2d) 502 (C. C. A. 5th, 1923); see Comment (1926) 35 YALE LAW JOURNAL 484. The doctrine of subrogation has been used to give a surety a right superior to trustees and creditors in bankruptcy of the contractor. *In re Scofield*, 215 Fed. 45 (C. C. A. 2d, 1914) (surety paid off materialmen who had no statutory liens). Likewise, in insolvency proceedings where persons paid by the surety had liens. *Southern R. R. v. Brets*, 181 Ind. 504, 104 N. E. 19 (1914) (action by receiver of contractor). But otherwise if they had no liens. *Pratt Lumber Co. v. Gill*, 278 Fed. 783 (E. D. N. C. 1922) (receivership). The surety who has been subrogated to a paid off materialman's lien has a prior right to retained percentages in the hands of the contractee, even though these funds thereafter are attached. *Illinois Surety Co. v. Mitchell*, 177 Ky. 367, 197 S. W. 844 (1917); L. R. A. 1918A. 931, annotation. However, the surety's right of subrogation is not prior to the rights of innocent purchasers of additional collateral which had been given to the creditor. *Ahern v. Freeman*, 46 Minn. 156, 48 N. W. 677 (1891) (purchaser of mortgaged land at execution sale). Where the contractor has attempted to assign future receivables in the form of retained percentages, a surety's right to subrogation, intervening before the assignment is physically completed, is superior. *National Surety Co. v. Jackson County Bank*, 20 F. (2d) 644 (C. C. A. 4th, 1927); *Barrett Bros. Co. v. St. Louis County*, 165 Minn. 158, 206 N. W. 49 (1925); see (1925) 10 MINN. L. REV. 357. A bank is often protected from other kinds of intervening equities of which it had no notice at the time the funds were appropriated by it to satisfy a previous debt. Thus a cestui que trust cannot recover from a bank which applied the trustee's deposit to the latter's previous debt. *Horrigan Realty Co. v. First Nat'l Bank*, 273 S. W. 772 (Mo. 1925). *Contra: Fulton Nat. Bank v. Hosier*, 295 Fed. 611 (C. C. A. 5th, 1923). Nor can a receiver in bankruptcy recover the appropriated deposit of the bankrupt. *In re Goll*, 8 F. (2d) 101 (S. D. N. Y. 1925). Likewise a mortgagee. *Security State Bank v. First Nat. Bank*, 254 Pac. 417 (Mont. 1927). Since a bank was involved, the instant case would appear to be consistent with the prevailing attitude of the courts.

TAXATION—TAXATION OF INCREMENT IN CAPITAL VALUE BEFORE ACQUISITION AS INCOME TO DONEE.—The plaintiff received certain securities by gift and converted them into money. The value of the securities had increased while in the hands of the donor. Under the federal income tax law [U. S. Comp. Stat. (Supp. 1923) § 6336 1/8 bb] the increment in value which had

accrued in the hands of the donor was taxed to the donee. In an action to recover the tax paid under protest, the statute was held to be unconstitutional. *Held*, on appeal (one judge *dissenting*), that the judgment be reversed, since it was expedient to treat the increment as income to the donee. *Bowers v. Taft*, 20 F. (2d) 561 (C. C. A. 2d, 1927).

It has been stated that either the entire gift was income to the donee or else none of it was. See Notes (1927) 27 COL. L. REV. 287, 289; (1927) 41 HARV. L. REV. 101. For purposes of taxation, income has been defined by the Supreme Court as "gain derived from capital, from labor, or from both." *Eisner v. Macomber*, 252 U. S. 189, 207, 40 Sup. Ct. 189, 193 (1920). This definition explicitly requires that sums taxable as income be derivative in nature, *i. e.*, constitute gains proceeding from existing capital assets. And such gains must be realized by the actual sale or conversion of the assets. See *Carter v. United States*, 19 F. (2d) 121, 122 (C. C. A. 5th, 1927). Consistently, therefore, although the entire gift represents an increase in the donee's assets, it would not be taxable as income. *Cf.* U. S. Comp. Stat. (Supp. 1923) § 6336 1/8 ff. Yet the portion of the gift representing the appreciation in value of the securities before acquisition by the donee would be so taxable. Furthermore, if the particular securities in question had been sold instead of transferred by gift, the increment, having been realized, would have been subject to a tax. *Merchants L. & T. Co. v. Smietanka*, 255 U. S. 509, 41 Sup. Ct. 386 (1921). It has been held that the donor of the securities, however, cannot be taxed on the appreciation. *Brewster v. Wendell*, 196 App. Div. 613, 188 N. Y. Supp. 510 (3d Dept. 1921). But when the increment is actually realized by one to whom it represents an increase in capital assets, there would appear to be no valid reason why it should not be subject to taxation. Such income need not arise from the capital or labor of the tax payer himself. *Cf. Irwin v. Gavit*, 268 U. S. 161, 45 Sup. Ct. 475 (1925); *Heiner v. Beatty*, 17 F. (2d) 743 (C. C. A. 3d, 1927); Sol. Op. 160, 111-2 Cum. Bull. 60 (1924). See Magill, *The Income Tax Liability of Annuities and Similar Periodical Payments* (1924) 33 YALE LAW JOURNAL 229. The federal statute affords an effective means of securing revenue on the untaxed gain in the gift which could not otherwise be reached, and thus serves to prevent tax evasion. Congress having expressly construed the Sixteenth Amendment as permitting the taxation of capital increment in the hands of the one by whom it is actually realized, the instant decision is in accord with the rule that every reasonable presumption is in favor of the legislative construction. See *Sinking Fund Cases*, 99 U. S. 700, 718 (1878); Thayer, *American Doctrine of Constitutional Law* (1893) 7 HARV. L. REV. 129, 139 *et seq.*

TORTS—TRESPASS ON HIGHWAY DOCTRINE—ACTION BY PASSENGER.—The plaintiff, a passenger in an unregistered automobile, was injured in an accident caused by a defect in the highway, and brought suit against the defendant town. He recovered judgment under a statute imposing responsibility on towns to keep highways in a condition safe for travelers. *Held*, on appeal, that the judgment be reversed because the automobile was unlawfully on the highway, and the plaintiff was, therefore, not a "traveler" within the meaning of the statute. *Hanley v. Town of Poultney*, 135 Atl. 713 (Vt. 1927).

The case is somewhat analogous to the much criticized Massachusetts doctrine, followed by a few New England states, that an unregistered motor vehicle is a "nuisance" on the highway, and that the owner is barred from recovery against a negligent traveler or against one who has breached a statutory duty. *Nichols v. Holyoke St. Ry.*, 250 Mass. 88, 145 N. E. 33 (1924); *Chase v. New York Central R. R.*, 208 Mass. 137, 94 N. E. 377

(1911); (1926) 36 YALE LAW JOURNAL 149; (1922) 38 HARV. L. REV. 531; *cf. Klinkenstine v. Third Avenue Ry.*, 216 App. Div. 187, 215 N. Y. Supp. 873 (1st Dept. 1926), (1926) 35 YALE LAW JOURNAL 1024. The Massachusetts rule formerly applied even to innocent passengers. *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306 (1910). In Connecticut, prior to a statute adopting the Massachusetts doctrine, the unregistered car was not a trespasser, and recovery was allowed. *Hemming v. City of New Haven*, 82 Conn. 661, 74 Atl. 892 (1910). Further statutory changes in both those states now expressly exempt the innocent passenger from the category of trespassers. *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507 (1917); *Wise v. Berger*, 103 Conn. 29, 130 Atl. 76 (1925). In Maine and Vermont the innocent passenger may recover as against a *negligent party. Gilman v. Central Vt. Ry.*, 93 Vt. 340, 107 Atl. 122 (1919); *Cobb v. Cumberland County Power and Light Co.*, 117 Me. 455, 104 Atl. 844 (1918). But where recovery would be based on the defendant's *statutory fault*, the illegality of the plaintiff's act, although admittedly not a physical cause of the injury, bars recovery. *McCarthy v. Inhabitants of the Town of Leeds*, 116 Me. 275, 101 Atl. 448 (1917); see *Gilman v. Central Vt. Ry., supra* at 347, 107 Atl. at 125. The purpose of the Massachusetts doctrine is said to be to facilitate ready identification of motor vehicles. The Maine-Vermont theory originated in the early New England attitude toward travelling on Sunday. *Johnson v. Irasburgh*, 47 Vt. 28 (1874); *cf. Cleveland v. Bangor*, 87 Me. 259 (1895). And the refusal to impose a duty to maintain a highway for illegal travel resulted from this attitude. See *Johnson v. Irasburgh, supra* at 36. The Massachusetts courts, however, choose to consider the unlawful act of the plaintiff as the "legal cause" of the injury. *Chase v. New York Central R. R., supra.* But most states have repudiated this theory of fictitious causation. *Platz v. City of Cohoes*, 89 N. Y. 220 (1882); *Wentworth v. Jefferson*, 60 N. H. 158 (1880); *Sutton v. Town of Wauwatesa*, 29 Wis. 21 (1871); see Huddy, *Automobiles* (7th ed. 1924) § 128. Analytically, therefore, the basis of the Vermont view is more accurate than that of Massachusetts. But in view of the tenuous character of the distinction between statutory fault and common law negligence, and of the questionable efficacy of the rule with respect to an owner of an unregistered automobile in assisting the enforcement of motor vehicle regulations, a decision that the municipality is under no duty to maintain highways for a passenger in an unregistered automobile is unfortunate. It is at best a far-fetched deduction from a puritanical disapproval of Sunday law violations.

TRADE MARKS—GOODS OF SAME DESCRIPTIVE PROPERTIES.—On the opposition of the Yale & Towne Manufacturing Co., registrant and user of the trade-mark "Yale" on locks and keys made by it, the Commissioner of Patents refused to register the same trade-mark for use on electric batteries and flashlights manufactured by the plaintiff. On appeal the ruling was affirmed. *Yale Electric Corp. v. Yale & Towne Mfg. Co.*, 56 App. D. C. 242, 12 F. (2d) 183 (1926). The plaintiff brought a bill in equity against the Commissioner and the Yale & Towne Co. to compel the registration of the trade-mark. The defendant counterclaimed, asking for an injunction to prevent the use of the name by the plaintiff. *Held*, that the bill be dismissed, and the decree of injunction for defendant be granted. *Yale Electric Corporation v. Robertson*, 21 F. (2d) 467 (D. Conn. 1927).

Where a company has firmly established a trade-mark in the minds of the public as representing primarily its goods, courts have tended to give protection to the use of that trade-mark on the ground that a "valuable property right" has been violated. Goble, *What a Trade-Mark Protects*

(1927) 22 ILL. L. REV. 379. That the reason ascribed is merely an undescriptive statement of a desirable result is apparent. The usually stated requirement of an action based on unfair competition is that the goods be of the same class. *George v. Smith*, 52 Fed. 830 (S. D. N. Y. 1892); Hopkins, *Law of Trade-marks, Trade-names and Unfair Competition* (4th ed. 1924) § 129; Nims, *Unfair Competition and Trade-Marks* (2d ed. 1917) § 221. But where the trade-mark has become well established, courts have found little difficulty in holding this requirement satisfied. *Vogue v. Thompson-Hudson Co.*, 300 Fed. 509 (C. C. A. 6th, 1924) ("Vogue" style magazine and ladies hats same class of goods); *Wall v. Rolls-Royce of America*, 4 F. (2d) 333 (C. C. A. 3d, 1925) ("Rolls-Royce" automobiles and radio tubes same). This tendency has been widely noted and generally approved. See Note (1925) 25 COL. L. REV. 199; Note (1925) 38 HARV. L. REV. 370; (1924) 34 YALE LAW JOURNAL 213; Lukens, *Application of the Principles of Unfair Competition to Cases of Dissimilar Products* (1927) 75 U. PA. L. REV. 197; Schecter, *Rational Basis of Trade-mark Protection* (1927) 40 HARV. L. REV. 813. The instant decision shows this same tendency existing in the closely allied field of trade-mark *registration*, where no trade-mark can be registered if it has previously been registered by another party on goods of the "same descriptive properties." 33 Stat. 724, (1905) 15 U. S. C. A. (1927) § 85. This requirement has usually been held satisfied if the name has become prominent. *Aluminum Cooking Utensil Co. v. Sargoy Bros.*, 276 Fed. 447 (E. D. N. Y. 1921) ("Wearever" Aluminum cooking utensils and tin wash boilers are of "same descriptive properties"); *Duro Pump & Mfg. Co. v. California Cedar Products Co.*, 56 App. D. C. 156, 11 F. (2d) 205 (1926) (likewise as to "Duro" wall board and pneumatic pressure systems). The instant decision is another illustration of the modern tendency to recognize and protect interests which would be excluded by giving a literal connotation to terms used to describe existing categories; and thus to expand those categories.