RECENT CASE NOTES

AUTOMOBILES—TORTS—NON-REGISTRATION OF CAR AS BAR TO RECOVERY FOR DAMAGES.—The plaintiff's unregistered truck collided with a train of the defendant railway on a private railroad crossing, situated 500 feet from the public highway, and reached by way of a private road. In a subsequent action for damages the plaintiff was nonsuited on the ground that the action was barred by a statute providing that "No recovery shall be had . . . by the owner of a motor vehicle which has not been legally registered . . . , for injury to person or property received by reason of the operation of such motor vehicles upon any public highway." [Conn. Pub. Acts 1921, c. 400, § 61] *Held*, on appeal, that the judgment be reversed. *Byrolly Transportation Co. v. N. Y., N. H. & H. Ry.*, 147 Atl. 512 (Conn. 1929).

The Connecticut court, in accord with the rule in most jurisdictions, early refused to bar a recovery for negligent injury to an unregistered motor vehicle on the sole ground of nonregistration. *Hemming v. City of New Haven*, 82 Conn. 661, 74 Atl. 892 (1910); (1920) 18 MICH. L. REV. 234. But a few courts, notably Massachusetts, have consistently held to the contrary, under statutes prohibiting the operation of unregistered machines. *Nichols v. Holyoke Street Ry.*, 250 Mass. 88, 145 N. E. 33 (1924); (1919) 19 COL. L. REV. 408; (1922) 7 MINN. L. REV. 68. The present Connecticut statute, in barring a recovery by the owner of an unregistered car, expressly adopts the rule of these latter jurisdictions. Comment (1922) 32 YALE L. J. 394. But the Connecticut court has strictly limited the operation of the statute. Thus, it has held that an unregistered motor truck which was being "towed" was not being "operated" within the meaning of the statute. *Dewhirst v. Connecticut Co.*, 96 Conn. 389, 114 Atl. 100 (1921). But *cf. Stroud v. Board of Water Comm'rs of Hartford*, 90 Conn. 412, 97 Atl. 336 (1916). The court has also allowed a recovery by the owner of a machine which, although registered, carried improper markers in violation of the statute. *Bohmann v. Perrott*, 97 Conn. 571, 118 Atl. 42 (1922). But *cf. Fahey v. Melrose*, 205 Mass. 329, 91 N. E. 306 (1910). And it has refused to bar an action by an owner who had delivered his unregistered automobile to a dealer to be sold, which dealer in turn allowed the owner to operate the car until the sale was made, on the theory that the owner merely "borrowed" the car and could therefore operate it under the dealer's general registration. *Shaw v. Connecticut Co.*, 86 Conn. 409, 85 Atl. 536 (1912). But see *Cobb v. Cumberland Co. P. & L. Co.*, 117 Me. 455, 456, 104 Atl. 844, 845 (1918). Nor are passengers of unregistered automobiles denied a right of action in Connecticut on the ground of non-registration, as they are in jurisdictions following the Massachusetts rule. *Levine v. Hegeman Transfer & Light Term*, 100 Conn. 122, 123 Atl. 19 (1923); *Wise v. Berger*, 103 Conn. 29, 130 Atl. 76 (1925). But *cf. Dean v. Boston Elevated Ry.*, 217 Mass. 495, 105 N. E. 616 (1914); *Wentzell v. Boston Elevated Ry.*, 230 Mass. 275, 119 N. E. 652 (1918). In holding the statute inapplicable in the instant case, on the ground that the truck was not on a "public highway" at the time of the collision, the court further limited the statute. In view of the consistent attitude of the court and the criticism generally directed at the minority rule, the Legislature might well consider repealing the statute. See (1924) 38 HARV. L. REV. 531.

BANKS AND BANKING—EQUITABLE ASSIGNMENTS—DEPOSITS FOR A SPECIFIC PURPOSE.—Under a loan arrangement, the defendant bank placed funds to the credit of *S* for the purpose of meeting checks to be drawn by him in the purchase of cotton. *S* drew checks in payment for cotton purchased under cash sales from planters. He resold to the plaintiffs, who paid by check, the defendant bank collecting and holding the proceeds. The planters then presented the checks drawn by *S*, but payment was refused. The planters brought a statutory trover action against the plaintiffs. The plaintiffs then brought this bill in equity to enjoin the trover suits, and to establish the primary responsibility in the defendant bank. The court below sustained the demurrer of the bank. *Held*, on appeal, that since the plaintiffs might be held responsible in the trover suits the bank held the proceeds of their checks impressed with a trust in their favor, and should be held primarily responsible to pay the planters' claims. Judgment reversed. *Manget v. National City Bank*, 149 S. E. 213 (Ga. 1929).

Under § 189 of the Negotiable Instruments Law a check of itself does not operate as a pro tanto assignment of the drawer's funds. BRANNON, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) § 189. A few courts have regarded this section as intended only for the benefit of the drawee. *Farrington v. Fleming Com. Co.*, 94 Neb. 108, 142 N. W. 297 (1913) (garnishment of drawer's deposit not allowed as against payee of previously issued check). Most courts, however, regard it as applicable although the drawee would not be injured if an assignment were upheld. *Leach v. Mechanics Sav. Bank*, 202 Iowa 899, 211 N. W. 506 (1926) (holder of check not allowed payment from drawer's bank account as against drawer's receiver); Comment (1928) 37 YALE L. J. 626, 627. The effect of an assignment has been allowed where special circumstances exist showing such an intention. *Cf. Fourth St. Bank v. Yardley*, 165 U. S. 634 (1897); Aigler, *Rights of Holder of Bill Against Drawee* (1925) 38 HARV. L. REV. 857, 859. But in the transmission of credit cases, the receiver of the depository has prevailed as against both the depositor and the beneficiary of the deposit, although the intention to appropriate the fund to the payment of the draft would seem apparent. *Equitable Trust Co. v. First Nat. Bank*, 275 U. S. 359, 48 Sup. Ct. 167 (1928); *First Nat. Bank v. State Bank*, 110 Ore. 601, 222 Pac. 1079 (1924); *Wrightsville & T. R. Co. v. Citizens & So. Nat. Bank*, 36 F. (2d) 736 (C. C. A. 5th, 1929); (1924) 33 YALE L. J. 888. In a similar situation, where a collecting bank draws a remittance draft on its deposit in a third bank, some courts have, however, allowed the payee bank a preferred claim, on assignment principles, upon the insolvency of the remitting bank. *Messenger v. Carroll Trust & Sav. Bank*, 193 Iowa 608, 187 N. W. 545 (1922); *Federal Reserve Bank v. Peters*, 139 Va. 45, 123 S. E. 379 (1924); *Thomas v. Mothersead*, 128 Okla. 157, 261 Pac. 363 (1927). *Contra: Odle v. Barnes*, 117 Tex. 174, 299 S. W. 635 (1927). Where the drawee bank had notice that the deposit was for a specific purpose, it has been disallowed a set-off of a debt owed to it by the depositor as against payees of checks given in accordance with the purpose. *Payne v. Burnett*, 151 Tenn. 496, 269 S. W. 27, 39 A. L. R. 1125 (1925); *Cable v. Iowa State Savings Bank*, 197 Iowa 393, 194 N. W. 957 (1923). Garnishment of such deposit has been disallowed as against such payees. *First Nat. Bank v. Propp*, 198 Iowa 809, 200 N. W. 428 (1924). Such payees have recovered against a bank which permitted the deposit to be withdrawn by paying other checks. *Morton v. Woolery*, 48 N. D. 1132, 189 N. W. 232, 24 A. L. R. 1107 (1922). These decisions, rested on grounds of "equitable assignments," "trusts," and "deposits for a specific purpose," grow out of situations having substantially similar characteristics. But whether the bank of deposit incurs any responsibility seems to depend upon notice to it of the circumstances. The use of these categories, however,

should not be controlling on the question of a preferred claim against the depository upon insolvency. *Cf.* Note (1928) 13 CORN. L. Q. 603. But *cf. Whitman v. Bragg & Co., Inc.*, 30 F. (2d) 736 (C. C. A. 5th, 1929).

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF CHARITABLE COLLECTION AGENCY.—The defendant was convicted under a statute which made it unlawful for any person, copartnership, association, or corporation to solicit money for charitable purposes without a license. It provided that an applicant for a license should file with the Department of Public Welfare such information as the Department might require; that the Department might hold such hearings as it considered necessary; and that if the Department deemed the agency "a proper one, and not inimical to the public welfare, or safety," it should issue the license. Certain named organizations were exempted from the statute. [PA. STAT. (Supp. 1928) § 2637 (a, 1) *et seq.*] The defendant contended that the exemptions rendered the statute unconstitutional. *Held*, on appeal, that the conviction be affirmed. *Commonwealth v. McDermott*, 296 Pa. 299, 145 Atl. 858 (1929).

This case does not involve the question whether a charitable collection agency is a "business affected with a public interest," for even though a business is "private," engaging in it without a license may be prohibited. *Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561 (1916); *Weller v. New York*, 268 U. S. 319, 45 Sup. Ct. 556 (1925). But *cf. Tyson v Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928); Comment (1928) 38 YALE L. J. 225. But the licensing authorities may not be given arbitrary power to grant or refuse a license without regard to the qualifications of the applicant. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1068 (1886). And before the license is refused, the applicant must be given an opportunity to be heard. See *Interstate Comm. Comm. v. Louisville & N. R. R.*, 227 U. S. 88, 91, 33 Sup. Ct. 185, 186 (1913). The courts have sustained many statutes analogous to the one in the instant case in that they were designed to protect the public against imposition and fraud. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217, L. R. A. 1917F 514 (1917) ("Blue Sky Laws"); *Hammer v. State*, 173 Ind. 199, 89 N. E. 850 (1909) (forbidding non-members of secret society to wear its badge); *State v. Rose*, 122 So. 225 (Fla. 1929) (licensing real estate brokers and salesmen); *McMasters v. State*, 21 Okla. Cr. R. 318, 207 Pac. 566, 29 A. L. R. 292 (1922) (prohibiting professional palmistry and mediumship); *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367 (1895) (licensing peddlers); see FREUND, POLICE POWER (1904) c. 11. Such regulation is not confined to occupations which may be considered naturally or generally to involve or encourage fraud (*e.g.*, "book-making"); it may extend to those where fraud is only occasional, but where there is nevertheless an opportunity for fraudulent practice. *Merrick v. Halsey & Co.*, 242 U. S. 568, 37 Sup. Ct. 227 (1917). Several states have enacted statutes similar to the one under discussion, some of them being almost identical, and their constitutionality seems never to have been questioned. ME. REV. STAT. (1916) c. 147, § 5; CAL. CODES and GEN. LAWS (Deering, Consol. Supp. 1917-1919) tit. 95, act 576, p. 881; KAN. REV. STAT. ANN. (1923) c. 17, art. 17, §§ 1706-10; GA. ANN. CODE (Michie, 1926) tit. 22, § 2158 (82); IOWA CODE (1927) c. 93, § 1921 (b, 1) *et seq.*; Ky. Acts 1928, c. 16, § 32. In view of the frequency with which fraudulent "charities" victimize the public, such regulation seems reasonable and proper. The regulation itself being reasonable, a reasonable exemption from it will not render it unconstitutional. *New York v. Zimmerman*, 278 U. S. 63, 49 Sup. Ct. 61 (1928).

CONTRACTS—MORTGAGES—ASSUMPTION OF DEBT BY GRANTEE WHERE PRIOR OWNER HAD NOT ASSUMED.—The defendant, a grantee of mortgaged land, promised in part consideration for the grant to pay the mortgage debt. In a suit by the mortgagee for the debt, the defendant set up that a prior owner subject to the mortgage had not assumed the debt. The trial court gave judgment for the defendant. *Held,* on appeal, that the judgment be reversed, since the right of the plaintiff to recover as a third party beneficiary was not dependant upon an unbroken chain of assumptions by prior grantees. *Schneider v. Ferrigno,* 147 Atl. 303 (Conn. 1929).

It is well settled that a mortgagee may recover as a third party beneficiary from a grantee who has assumed the mortgage debt where the grantor and prior owners were personally responsible for the debt. *Smith v. Kibbe,* 104 Kan. 159, 178 Pac. 427 (1919); Williston, *Contracts for the Benefit of a Third Person* (1902) 15 HARV. L. REV. 767, 808. Many courts, in accord with the instant case, allow a recovery even though the grantor was not personally responsible. *Allen v. Traylor,* 212 S. W. 945 (Tex. 1919); *Cobb v. Fishel,* 15 Colo. App. 384, 62 Pac. 625 (1900); 2 JONES, MORTGAGES (8th ed. 1928) 326, n. 81. *Contra: Fry v. Ausman,* 29 S. D. 30, 135 N. W. 708 (1912); JONES, *op. cit. supra* at 325, n. 77; *cf. Goodenough v. Labrie,* 206 Mass. 599, 92 N. E. 807 (1910). The rule of the instant case has been disapproved by commentators on grounds of legal theory. Thus, it is urged that the mortgagee cannot recover as a "creditor beneficiary" since the grantor did not personally owe the debt. Note (1923) 9 CORN. L. Q. 213. And it is further claimed that recovery "as a donee beneficiary" is unsound since the probable motive of the grantor in requiring the promise was not to benefit the mortgagee but to protect himself against a supposed personal responsibility. 1 WILLISTON, CONTRACTS (1920) § 386; Note (1923) 9 CORN. L. Q. 213. But while it may be conceded that under the present facts the mortgagee does not qualify strictly as a "creditor" or a "donee" beneficiary, it would seem that the factual relationship of the grantor to the mortgagee is so similar to that existing in the creditor beneficiary situation that the same reasons for a recovery exist. The denial of recovery in some of the early cases is based upon the inapplicability of the doctrine of subrogation. *Cf. Vrooman v. Turner,* 69 N. Y. 280 (1887). But while it may be said that a creditor is subrogated to the remedies of his debtor against one who has contracted to pay the debt, the recovery in many creditor beneficiary contracts has not been put upon this ground. *Cf. Lawrence v. Fox,* 20 N. Y. 268 (1859). Hence the fact that this theory is not applicable to the present facts would seem to be an insufficient reason for denying a recovery. ANSON, CONTRACTS (Corbin's ed. 1924) § 290. The principal question would appear to be whether the undertaking of the grantee was in any way influenced by the fact that the grantor had not assumed the debt. Should it be shown that the parties intended the assumption clause only to indemnify the grantor in case he should be found personally responsible, then the grantee should not be held to a performance greater than that promised. But if the consideration was given for an unconditional promise to pay the debt, which was in no way influenced by the grantor's non-assumption, there would appear to be no reason why the grantee should not be held to his promise as much where the grantor had not, as where he had, assumed the debt.

CORPORATIONS—RECOVERY OF UNPAID SUBSCRIPTIONS FOR DEBENTURES UPON INSOLVENCY.—A group of corporations issued "profit-sharing debentures" payable at a fixed date, which entitled the holders to trade discounts at the corporation stores. The corporations later consolidated and issued more "debentures" with the added feature of 8% interest payable out of the

net profits. When the affairs of the corporation were wound up, the shareholders and paid up debenture holders petitioned the court to require all unpaid subscriptions to the "debentures" to be paid up, such subscribers being joined as parties defendant. Demurrers to the complaint were overruled. *Held*, on appeal, that the debenture holders were not "shareholders," and hence were not responsible to creditors for their unpaid subscriptions. Judgment reversed. *Pettingill v. State Marketing Ass'n*, 225 N. W. 834 (Wis. 1929).

The question of whether a security holder, upon insolvency of the corporation, is responsible for the unpaid balance of the purchase price of the securities is usually made to depend upon whether he was a "shareholder" or "bondholder." The presence of certain incidents seems to have influenced the courts in making this classification. Thus, where payments are to be made out of "profits" rather than out of "gross assets," the securities are generally classed as "shares." *In re Hicks-Fuller Co.*, 9 F. (2d) 492 (C. C. A. 8th, 1925) ("interest" payable out of and principal redeemable out of "net earnings"); *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463 (1917) (dividends and principal payable out of "income or earnings" and secured by first lien on the corporate property); *cf. Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496 (1890) (interest payable out of "surplus profits"). And where the security has no maturity date, the absence of such a feature has sometimes been sufficient to cause it to be classified as a "share." *United States & Mex. Oil Co. v. Keystone Co.*, 19 F. (2d) 624 (W. D. Pa. 1924) (dividends and double the principal at an uncertain future date were payable out of a special "bond-fund" created for the purpose from the gross receipts of the company); *Jefferson Banking Co. v. Trustees of Martin Institute, supra* (no maturity date). These tests obviously cannot be conclusive since securities sometimes combine incidents both of "bonds" and "shares." It would seem that the most important consideration is the extent to which rights of creditors are involved. *Cf. Hamlin v. St. L. & K. R. R.*, 78 Fed. 664 (C. C. A. 6th, 1897) ("preferred stockholders" were given a lien on the corporate property to secure payment of dividends; in an action to wind up the affairs of the corporation, held that this lien could have no priority over claims of creditors); *Booth v. Union Fibre Co.*, 142 Minn. 127, 171 N. W. 307 (1919). Another factor to be considered is the apparent intention of the parties to the agreement. See *Armstrong v. Union Trust & Savings Bank*, 248 Fed. 268, 271 (C. C. A. 9th, 1918); *Spencer v. Smith*, 201 Fed. 647, 651 (C. C. A. 8th, 1912). In the instant case, the evident intention of the parties was to negotiate a loan, as shown in the certificates by the use of the words "debenture" and "bond," the provision for the redemption of the principal on a certain date, the fact that all the authorized capital stock had already been subscribed for, and that no control in the management was contracted for. Since there was no such misrepresentation of the amount of the capital stock issued as to mislead creditors, it is sound policy to carry out what appears to have been the intention of the parties.

EVIDENCE—CRIMINAL LAW—STATUTORY PRESUMPTIONS—INSTRUCTIONS TO JURY.—The defendant was indicted under a statute making it a felony to issue a check without sufficient funds in the bank and with intent to defraud. The statute provided that the making of a check, payment of which is refused by the drawee, "shall be prima facie evidence of intent to defraud and knowledge of insufficient funds." [OHIO GEN. CODE (Page, 1926) § 710-176] At the trial the defendant produced evidence of an agreement with the bank to hold his checks temporarily. In speaking of the refusal of the bank to honor the check the court charged the jury: "You may regard

such refusal as sufficient to establish beyond a reasonable doubt the intention to defraud and knowledge of insufficient funds . . . in the absence of explanation or contradiction." The court also charged that notwithstanding this prima facie presumption against the accused the jury must find that he had been proved guilty beyond a reasonable doubt. The defendant was convicted. *Held*, on appeal, that the charge was prejudicial error. *Koenig v. State*, 121 Ohio St. 147, 167 N. E. 385 (1929).

Under the usual criminal statute making certain preliminary facts prima facie evidence of an ultimate fact, it is generally held error to instruct the jury to the effect that the burden of explaining or rebutting the prima facie evidence is on the defendant. *State v. Simon*, 163 Minn. 317, 203 N. W. 989 (1925); *State v. Walser*, 318 Mo. 833, 1 S. W. (2d) 147 (1927). But *cf. State v. Lively*, 311 Mo. 414, 279 S. W. 76 (1925). This is usually put upon the ground that such an instruction is inconsistent with the presumption of innocence and the reasonable doubt rule. *Scott v. State*, 20 Ala. App. 360, 102 So. 152 (1924); *Klaber v. State*, 250 Pac. 142 (Okla. 1926). For the same reason the courts in general do not treat an ordinary statutory presumption as a "Thayer-Wigmore presumption" requiring binding instructions in the absence of evidence by the defendant. *State v. LaPointe*, 81 N. H. 227, 123 Atl. 692 (1924); *State v. Beswick*, 13 R. I. 211 (1881). But *cf. Neal v. Commonwealth*, 124 Va. 842, 98 S. E. 629 (1919). And although according to the Thayer-Wigmore theory the presumption should disappear when the defendant does introduce evidence, a court, as in the instant case, will almost invariably mention the presumption in its instructions. But *cf. People v. Tate*, 316 Ill. 52, 146 N. E. 487 (1925). The theory stated by most courts is that a statutory presumption is sufficient in the absence of other proof to sustain a conviction by the jury although it does not require such conviction or shift the burden of proof. *Commonwealth v. Williams*, 6 Gray 1 (Mass. 1856); *Dorsey v. State*, 279 Pac. 917 (Okla. 1929). Where this theory prevails a court will ordinarily instruct the jury that (a) the preliminary facts, if proved, are prima facie evidence of the ultimate fact, but (b) the defendant is presumed to be innocent, and (c) the burden is on the state, under all the facts and evidence, to satisfy the jury beyond a reasonable doubt of the defendant's guilt. *State v. Sanford*, 317 Mo. 865, 297 S. W. 73 (1927); *State v. Russell*, 164 N. C. 482, 80 S. E. 66 (1913). Whether an ordinary jury can grasp the subtleties of the various theories of presumptions is somewhat doubtful. The instant case illustrates the fine distinctions involved. If the judge in his charge emphasized the word *may*, the instruction could be considered as expressing the theory of the majority of courts; but if he slighted that word, it could be held to have shifted the burden of proof. Moreover, assuming that the jury understands the charge, if, under the instructions usually given, they must be satisfied of the proof of the ultimate fact beyond a reasonable doubt, the statutory presumption should theoretically have no effect upon them. Actually, therefore, the real effect of the presumption is the artificial probative force given to the state's testimony by the mention of the presumption in the instruction. If the purpose of the statute is thus achieved in this informal way, it is not the sharp distinctions of theory but rather the practical effect of the whole charge upon the jury which should be the chief concern of an appellate court.

EMINENT DOMAIN—EVIDENCE—ADMISSIBILITY OF SALE PRICE OF NEIGHBORING PROPERTY TO PROVE VALUE OF CONDEMNED PROPERTY.—The plaintiff railroad brought an action to condemn certain land owned by the defendant. To prove the value of his land, the defendant sought to introduce evidence of a sale of neighboring land for $50,000. The record showed that the pur-

chaser of the land paid only $1,000 in cash, installed an illicit still on the property and later left the city after a raid by the police. The lower court excluded the evidence. *Held*, on appeal, that the judgment be affirmed. *Muccino v. Baltimore & O. R. R.*, 168 N. E. 752 (Ohio App. 1929).

Evidence of the selling price of neighboring property is generally held admissible to prove the value of land taken in condemnation proceedings. 1 WIGMORE, EVIDENCE (2d ed. 1923) § 463; *Campbell v. New Haven*, 101 Conn. 173, 125 Atl. 650 (1924); *Big Sandy & K. R. Ry. v. Stafford*, 207 Ky. 272, 268 S. W. 1071 (1925). *Contra: Roberts v. City of Philadelphia*, 239 Pa. 339, 86 Atl. 926 (1913); *cf. Board of Education v. Heywood Mfg. Co.*, 154 Minn. 486, 192 N. W. 102 (1923) (admissible only in exceptional cases where no other evidence could be had). Some courts admit such evidence only collaterally for the purpose of aiding in the determination of the weight to be given to opinions of expert witnesses. *Gorgas v. Philadelphia, H. & P. R. R.*, 215 Pa. 501, 64 Atl. 680 (1906); *Board of Levee Com'rs v. Dillard*, 76 Miss. 641, 25 So. 292 (1899); *Chicago K. & N. Ry. v. Stewart*, 47 Kan. 704, 28 Pac. 1017 (1892). The trial court has broad discretionary powers with regard to its admission or exclusion. *Chicago N. S. & M. R. R. v. Chicago Title & Trust Co.*, 328 Ill. 610, 160 N. E. 226 (1928); *Hervey v. City of Providence*, 47 R. I. 378, 133 Atl. 618 (1926); *United States v. Nickerson*, 2 F. (2d) 502 (C. C. A. 1st, 1924). Generally, certain requisites must be complied with in order to render the evidence admissible. Thus there must be a sufficient showing of the similarity and proximity of the two pieces of property. *Vineyard Grove Co. v. Town of Oak Bluffs*, 163 N. E. 888 (Mass. 1928); *Department of Public Works & Buildings v. Keck*, 330 Ill. 39, 161 N. E. 55 (1928); *Village of Reeder v. Hanson*, 213 N. W. 492 (N. D. 1927). But *cf. Virginian Power Co. v. Brotherton*, 90 W. Va. 155, 110 S. E. 546 (1922). The sale must not have been too remote in point of time. *McCabe v. City of Chelsea*, 163 N. E. 255 (Mass. 1929); *Commonwealth v. Combs*, 229 Ky. 627, 17 S. W. (2d) 748 (1929); *Dickey's Estate v. Houston Independent School Dist.*, 300 S. W. 250 (Tex. Civ. App. 1927). And it must have been free from any element of compulsion. *Kankakee Park Dist. v. Heidenreich*, 328 Ill. 198, 159 N. E. 289 (1927); *Blick v. Ozaukee County*, 180 Wis. 45, 192 N. W. 380 (1923); *cf. West Shokie Drainage Dist. v. Dawson*, 243 Ill. 175, 90 N. E. 377 (1909) (excluding evidence of sale upon foreclosure of mortgage); 2 NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 456. Similarly, evidence of prices paid or agreed to be paid by the condemnor to neighboring landowners is generally inadmissible on the theory that such price had probably been influenced by a desire to avoid the costs and uncertainty of litigation. *Naftzger v. State*, 24 Ohio App. 183, 156 N. E. 614 (1927); *State v. Wright*, 105 Neb. 617, 181 N. W. 539 (1921); 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 667. *Contra: Charleston & W. C. Ry. v. Spartanburg B. Warehouse*, 149 S. E. 236 (S. C. 1929). In view of the fact that the sale, in the instant case, was made to a man of doubtful financial responsibility who paid only 2% of the purchase price in cash, it would seem reasonable to conclude that the selling price should be of little significance in determining the value of neighboring land.

EXECUTORS AND ADMINISTRATORS—GUARANTY AND SURETYSHIP—RIGHT OF SURETY ON BOND OF DEFAULTING FIDUCIARY TO CONTRIBUTION FROM CO-FIDUCIARY.—Two co-guardians gave separate guardianship bonds. One embezzled the estate of the ward under circumstances rendering the other responsible to the ward because of negligence, although he was not an active participant in the embezzlement. The plaintiff, a surety on the bond of the embezzling co-guardian, paid a judgment in favor of the estate and brought suit to secure contribution or indemnity from the negligent co-guardian and

the sureties on the latter's bond. The lower court gave judgment for the plaintiff against the co-guardian for the full amount of the judgment paid, on the theory of subrogation to the right of the ward. *Held*, on appeal, that the judgment be reversed, since the defendant co-guardian, although responsible to the ward, would have been entitled to complete indemnity from the embezzling co-guardian and the plaintiff. *Southern Surety Co. v. Tessum*, 228 N. W. 326 (Minn. 1929).

Generally, one executor, administrator, or guardian is not responsible for loss caused by the act of his co-fiduciary in the absence of negligence or active participation. *McKim v. Aulbach*, 130 Mass. 481 (1881); *Fleming v. Walker*, 152 Ala. 386, 44 So. 536 (1907). The scope of this rule has been greatly narrowed by statutes requiring fiduciaries to give bonds. Where a joint bond is given, most courts hold each executor jointly responsible as a principal, regardless of fault, to creditors, legatees and sureties for a default of his co-executor. *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165 (1892); 2 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 258. Where the default is committed after the death of one co-executor, his estate may be held similarly responsible. *Eckert v. Myers*, 45 Ohio St. 525, 15 N. E. 862 (1888). *Contra: Towne v. Ammidown*, 20 Pick. 535 (Mass. 1838). A few courts, however, have held that the execution of a joint bond does not change the rule of responsibility, the joint bond being regarded, for this purpose, as the separate bond of each. *Nanz v. Oakley*, 120 N. Y. 84, 24 N. E. 306 (1890); 2 WOERNER, *loc. cit. supra*. Although one executor, through negligence, or by virtue of a joint bond, may render himself responsible to the estate or creditors for a default of his co-executor, he may be entitled to complete indemnity against his co-executor. *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156 (1887) (property of defaulting trustee sequestered to satisfy judgment against the co-trustees in favor of the cestui); *Partington v. Allen*, 57 L. T. R. (N.S.) 654 (1887); *Lincoln v. Wright*, 4 Beav. 427 (1841). (legatee's proof in bankruptcy against embezzling executor ordered to be assigned to negligent co-executor from whom the legatee had recovered); see *Newton v. Newton*, 53 N. H. 537, 538 (1873). It would seem to follow that a co-fiduciary who has been held responsible to the estate although not himself a participant in the default might secure indemnity from the surety on a separate bond of the defaulting fiduciary. But such indemnity has been refused as against the surety on a joint bond, for the asserted reason that the fiduciary seeking indemnity is himself a principal on the bond. *M'Divitt v. M'Divitt*, 4 Watts 384 (Pa. 1835). But *cf. Nanz v. Oakley, supra*. Where a recovery has been obtained against one of two executors, neither of whom is more at fault than the other, he may obtain contribution from his co-executor. *Marsh v. Harrington*, 18 Vt. 150 (1846). But one co-executor who is solely or primarily at fault may not secure contribution. *Cheever v. Ellis*, 144 Mich. 477, 108 N. W. 390 (1906). Recovery by one fiduciary from his co-fiduciary, either by way of contribution or indemnity, being dependent upon comparative fault, it would seem that the court quite properly denied a recovery in the instant case.

INTERSTATE COMMERCE—TAXATION—TAX ON PRIVILEGE OF USING PUBLIC HIGHWAYS WITHIN STATE.—The state of New Jersey, in addition to property taxes, provided for a franchise tax to be collected from all taxpayers using or occupying public streets, highways, roads or other places for telephone and telegraph lines, etc. The tax was to be on such proportion of gross receipts as the length of the line or mains in the streets bore to the length of the whole line or mains. As the lines were used both for intrastate and interstate messages, the defendant telephone company objected to paying that part of the tax based on receipts from its interstate commerce. *Held*,

on appeal (two justices *dissenting*), that the exaction was a direct tax on gross receipts derived from the company's interstate commerce, and, as to that part at least, void. *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of N. J.*, 50 Sup. Ct. 111 (U. S. 1930).

A state tax which regulates or burdens interstate commerce is held to be unconstitutional. *Philadelphia and Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118 (1887); *McCallen Co. v. Massachusetts*, 279 U. S. 620, 49 Sup. Ct. 432 (1929). But a state property tax which incidentally burdens interstate commerce is not thereby unconstitutional. *Railroad Co. v. Peniston*, 18 Wall. 5 (U. S. 1873); *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268 (1895); *Union Tank Line Co. v. Wright*, 249 U. S. 275, 39 Sup. Ct. 276 (1919). These two "rules" clearly admit of no clear-cut separation, the function of the court being to draw between them a practical line, making distinctions of degree rather than of kind. See *Galveston, H. and S. A. Ry. v. Texas*, 210 U. S. 217, 227, 28 Sup. Ct. 638, 640 (1908). When the tax is computed on gross receipts of a company engaging in interstate commerce, the court must decide whether the receipts are being taxed as such, or whether they are being used as a means of evaluating the subject of the tax. See *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453, 38 Sup. Ct. 373, 375 (1918). A tax on gross receipts as such is unconstitutional. *Galveston, H. & S. A. Ry. v. Texas, supra; Meyer v. Wells, Fargo and Co.*, 223 U. S. 298, 32 Sup. Ct. 218 (1912). But a property tax based on the gross receipts from business done within a state, even though taking into account the proportionate parts of interstate journeys made within the state, is considered constitutional. *Maine v. Grand Trunk Ry.*, 142 U. S. 217, 12 Sup. Ct. 121 (1891); *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211 (1912); *Cudahy Packing Co. v. Minnesota, supra; Pullman Co. v. Richardson*, 261 U. S. 330, 43 Sup. Ct. 366 (1923). The tax in the instant case is based on that part of the gross receipts represented by the ratio of the value of the lines in the street to the value of all the lines. This proportionate levy would seem to remove the tax from the category of taxes on gross receipts as such, and classify it as a tax using the receipts as an appropriate means of ascertaining the value to the defendant of the public land used. Nevertheless, were this intended as a tax on the tangible property of the defendant, it would be unconstitutional as being levied in addition to existing property taxes. *Cudahy Packing Co. v. Galveston, H. & S. A. Ry. v. Texas; Meyer v. Wells, Fargo & Co.*, both *supra*. But both the Court and the New Jersey legislature called it a franchise tax rather than a property tax. An earlier case, upholding a charge on a telephone company for the privilege of using the streets for its poles, called that charge a rental. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485 (1893). The Court might here as easily have called this exaction a rental for the use of the streets as did the *St. Louis* case, or a price for the privilege of using the streets, as did Mr. Justice Holmes (see his dissenting opinion, p. 114). The Court seems to have taken refuge in the term "franchise tax," and then, by calling to mind the associations ordinarily connoted by that term, to have declared the tax unconstitutional. This reasoning seems scarcely in accord with the announced policy of the Court to determine the constitutionality of these taxes "upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." See *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 127 (1917).

JUDGMENTS—RES JUDICATA—EFFECT ON THOSE NOT PARTIES TO PROCEEDING.—The plaintiff filed a bill to enjoin the mayor and council from acting under a statute which empowered the council to levy the cost of improving

streets against abutting property. In a previous suit by another abutting owner attacking the constitutionality of the same statute and seeking to enjoin the enforcement of prospective liens on property on the same street, the constitutionality of the act was sustained, and that plaintiff did not appeal. The present plaintiff contended that he was not bound by the former decree because he had no knowledge of the prior proceeding. The decree of the lower court was for the defendants on the ground of res judicata. *Held*, on appeal, that the judgment be affirmed. *Holt v. Moxley*, 147 Atl. 596 (Md. 1929).

Generally, one not joined as a formal party plaintiff or defendant will not be barred by a judgment even though he had knowledge of the suit or assisted a litigant outside of court. *Old Dominion Co. v. Bigelow*, 225 U. S. 111, 32 Sup. Ct. 641 (1912); *Womach v. St. Joseph*, 201 Mo. 467, 100 S. W. 443 (1906). But where one has actively participated in a proceeding, though not a formal party, a judgment therein may bar a subsequent suit. *Plumb v. Goodenow*, 123 U. S. 560, 8 Sup. Ct. 216 (1887) (employing counsel); *State v. St. Louis*, 145 Mo. 551, 46 S. W. 98 (1898) (taking charge of proceedings in court); *Cecil v. Cecil*, 19 Md. 72 (1867) (paying court costs); *Souffront v. La Compagne Des Sucreries*, 217 U. S. 475, 30 Sup. Ct. 608 (1909) (inducing another to become a party to an action). And where the question is one common to many persons, as in the instant case, a final decree in a suit brought by one, wherein a judgment would react to the benefit of the entire group, may be conclusive as to all under the doctrine of class representation. *Cf.* CLARK, CODE PLEADING (1928) 27; EQUITY RULES OF U. S. SUPREME COURT (1912) Rule 38; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 41 Sup. Ct. 338 (1920) (suit by member of fraternal organization against its officers); *Gallagher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859 (1892) (suit by property owner contesting tax levy); *Stewart v. Oneal*, 237 Fed. 897 (C. C. A. 6th, 1917) (contingent remainderman born subsequent to first suit concluded when remaindermen in esse were parties to the first litigation of same question); *Estate of Clark v. Newton*, 190 Cal. 354, 212 Pac. 622 (1923) (judgment in action by administrator to recover property of estate binding on heirs); *Conroy v. Cover*, 80 Colo. 434, 252 Pac. 883 (1927) (decree in suit by one of group of cestuis to recover trust money binding on rest); *Detroit v. Detroit Ry.*, 226 Mich. 354, 197 N. W. 697 (1924) (bill by bondholders for allocation of mortgage liens conclusive on all holders of same type of bond). But *cf. Downey v. Seib*, 185 N. Y. 427, 78 N. E. 66 (1906) (unborn remaindermen not concluded where their interests were shown to be antagonistic to those of the persons who in theory represented them in the prior court). While the plaintiff in the second suit will usually have been cognizant of the previous litigation by another member of his class, lack of such knowledge, as in the instant case, will not defeat a plea of res judicata. *McIntosh v. Pittsburg*, 112 Fed. 705 (W. D. Pa. 1901). To support such a plea, however, it must appear that the present plaintiff's interests were in fact fairly represented in the prior suit. *Cf. Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171 (1904); *Lee v. Albro*, 91 Ore. 211, 278 Pac. 784 (1929). And some of the litigants in the former action must have been in exactly the same class as the present plaintiff. *Ottensoser v. Scott*, 47 Fla. 276, 37 So. 161 (1904). But *cf. El Reno v. Cleveland-Trinidad Co.*, 25 Okla. 648, 107 Pac. 163 (1910) (plaintiff paving company and defendant city officials were both defendants in previous suit by taxpayers seeking to enjoin a paving contract because of illegality; held, that legality of the contract was res judicata in suit for payment by the paving company).

MINES AND MINING—INJUNCTIONS—SUIT BY SURFACE OWNER TO RESTRAIN MINING WHERE MINERAL OWNER HAS GIVEN SECURITY AGAINST DAMAGE.—The plaintiff, owner of the surface of certain land, sought to enjoin the defendant, lessee of the mineral rights beneath, from continuing mining operations, alleging that irreparable injury to the surface would result. A statute provided that where the surface and mining rights are separate, the surface owner may demand security from the miner and, if it be refused, may enjoin him from mining until it is given. [COLO. COMP. LAWS (1921) § 3299] The lower court declined to grant a permanent injunction but enjoined the defendant from mining only until a sufficient indemnity bond be given by him to the surface owner. *Held*, on appeal, that the judgment be affirmed. *Whiles v. Grand Junction Mining and Fuel Co.*, 282 Pac. 260 (Colo. 1929).

The common law theory is that the right to subjacent support of the soil is absolute, in the absence of an agreement to the contrary, and that it is no defense to an action to recover damages for injury to the surface that there was no negligence in the conduct of the mining operations. *Alabama Clay Products Co. v. Black*, 215 Ala. 170, 110 So. 151 (1926); 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 346; 3 LINDLEY, MINES (3d ed. 1914) § 818; *cf. Cole v. Signal Knob Coal Co.*, 95 W. Va. 702, 122 S. E. 268 (1924) (recovery for injuries to horse by fall into opening caused by excavation beneath). And it is generally said that land is property of peculiar value and, where a threatened injury is irreparable and money damages inadequate, an injunction will be issued to protect the surface owner, even though it require leaving the mineral entirely untouched. *Bibbey v. Bunch*, 176 Ala. 585, 58 So. 916 (1912); *Moss v. Jourdan*, 129 Miss. 598, 92 So. 689 (1922); MACSWINNEY, MINES (5th ed. 1922) 279. But in a few jurisdictions the "balance of equities" doctrine has been appealed to and an injunction denied where the injury to the miner would exceed the injury sustained by the surface owner, although the surface might be irreparably damaged. *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335 (1904); *Barker v. Mintz*, 73 Colo. 262, 215 Pac. 534 (1923); see *Berkey v. Bewind-White Coal Mining Co.*, 220 Pa. 65, 75, 69 Atl. 329, 332 (1908); (1923) 33 YALE L. J. 205. The statute, upon which the decision in the instant case was based, had previously been construed by the Colorado court to be non-exclusive, *i.e.*, to give the surface owner a right in addition to his existing equitable rights; but in the particular case an injunction against the owner of the mineral was held unreasonable under the "balance of equities" theory. *Barker v. Mintz*, *supra*. The instant case construes the statute as "restrictive," holding that where a bond is given or offered the court may "in its discretion" permit the mining operations to be continued. The net effect of this interpretation of the statute is to approve the balance of equities doctrine. In situations where the value of mineral rights is generally in excess of the value of the surface, economic welfare sanctions the departure from the usual rule. *Cf.* (1930) 43 HARV. L. REV. 662.

PATENTS—SUBJECT MATTER—"PROCESS" AND "MANUFACTURE" CLAIMS.—The plaintiff's assignor was refused a "process" patent but was allowed an "apparatus" patent upon a "transportation package" calculated to facilitate the shipment of foodstuffs. Solid carbon dioxide (CO_2) was specified as the refrigerant. Instead of surrounding the food stuff with the refrigerant as the former practice had dictated, the carbon dioxide was surrounded with the food stuff. By thus insulating the refrigerant from exterior heat its efficiency was greatly increased. Purchasers of carbon dioxide from the plaintiff were authorized to use it to make up the transportation packages in question. The defendant sold carbon dioxide of its own manu-

facture to one of the plaintiff's customers to be used in making up the transportation packages. In a suit for contributory infringement, the defendant alleged, *inter alia*, the invalidity of the patent. This defense was sustained by the district court. *American Patents Corp. v. Carbice Corp.*, 25 F. (2d) 730 (E. D. N. Y. 1928). *Held*, on appeal, that the judgment be reversed. *American Patents Corp. v. Carbice Corp.*, decided by the Circuit Court of Appeals, Second Circuit, 1930.

A patentable subject matter is defined by statute to be the invention of any new "art, machine, manufacture, or composition of matter" or any improvement thereof. 29 STAT. 692 (1897), 35 U. S. C. § 31 (1929); 32 STAT. 193 (1902), 35 U. S. C. § 73 (1929). To obtain a valid patent, the invention must fall within at least one of these statutory categories. *O'Reilly v. Morse*, 15 How. 62 (U. S. 1853); 1 WALKER, PATENTS (6th ed. 1929) § 18. A "principle" or "law of nature" lies beyond the boundary of these categories. *O'Reilly v. Morse, supra; Morton v. N. Y. Eye Infirmary*, 5 Blatch. 116 (S. D. N. Y. 1862). Yet a process prescribing the specific order or physical means of applying "laws of nature" to achieve a certain result is regarded as an "art" within the meaning of the statute. See *Cochrane v. Deener*, 94 U. S. 780, 788 (1876); *cf. Holland Furniture Co. v. Perkins Glue Co.*, 277 U. S. 245, 48 Sup. Ct. 474 (1928). Accordingly, as the court intimates in its opinion in the instant case, a "process" patent might properly have been issued to the plaintiff's assignor. *Cf. Yablick v. Protecto Safety Appliance Corp.*, 21 F. (2d) 885 (C. C. A. 3d, 1927); *Low v. McMaster*, 266 Fed. 518 (C. C. A. 3d, 1920). Yet the various categories of patentable subject matter are not mutually exclusive and, in addition to a "process" claim, a patent may be issued for the product of a "process" as embodied in a new "machine, manufacture or composition of matter." *American Fruit Growers v. Bragdex Co.*, 35 F. (2d) 106 (C. C. A. 3d, 1929); *Telephone Cases*, 126 U. S. 1 (1888). Of these latter categories, a "manufacture" is considered the broadest in that it includes any new product not found in nature which is neither a "machine" nor a "composition of matter." *Johnson v. Johnston*, 60 Fed. 618 (W. D. Pa. 1894) (special index); *International Mausoleum Co. v. Sievert*, 213 Fed. 225 (C. C. A. 6th, 1914) (building); *American Fruit Growers v. Bragdex, supra* (borax treated oranges); *In re Hadden*, 20 F. (2d) 275 (Ct. of App. D. C. 1927) (grandstand construction); *Cincinnati Traction Co. v. Pope*, 210 Fed. 443 (C. C. A. 6th, 1913) (form of street car transfers). But *cf. Fond du Lac County v. May*, 137 U. S. 395, 11 Sup. Ct. 98 (1890); *American Disappearing Bed Co. v. Arnaelstein*, 182 Fed. 324 (C. C. A. 9th, 1910). But an absolute distinction between a "manufacture" and a "machine," or a "manufacture" and "composition of matter," is admittedly impossible. WALKER, *op. cit. supra* § 33; HOPKINS, PATENTS (1921) § 35. And similarly, although a distinction between a "process" and a "manufacture" may be found in the difference between an intangible method of production and the resulting tangible product, it would seem that with the complexity of modern invention, the process and the product are often so inseparably interwoven as to make even this distinction more or less arbitrary. *Cf. Goodyear v. Central R. R.*, 10 Fed. Cas. No. 5,563 (C. C. N. J. 1854); *Merrill v. Yeomans*, 94 U. S. 568 (1876); *Cochrane v. Badische Anilin and Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455 (1884); WALKER, *op. cit. supra* § 31. In the instant case, the court brings the patentee's claim within the scope of the broadest of the statutory categories by regarding the completed package of carbon dioxide and food stuff as a "manufacture." It would seem that the discovery might more properly have been called a "process," since the novel *manner* of arranging the two substances was the important feature of the patentee's creation. But in view of the nebulous character of the lines separating the different divisions of patentable subject

matter, if a discovery is described in the patent claim with sufficient clarity definitely to bound the limits of the desired monopoly, and it also satisfies the usual tests of "invention," there appears no compelling reason for denying protection merely because the patentee or the patent office attached the wrong name to the invention. See *Ames v. Howard*, 1 Fed. Cas. No. 326 (C. C. Mass. 1833).; *Goodyear v. Central R. R.*, *supra* at 678.

PRACTICE—NEW TRIAL—CONDUCT BETWEEN PARTIES AND JURORS—GRATUITIES AFTER VERDICT.—A statute provided that if either party in a cause in which a verdict was returned gave to any of the jurors who tried the cause any treat or gratuity, during the same term of the court, before or after the trial, the court on motion of the adverse party might set aside the verdict and order a new trial. [ME. REV. STAT. (1916) c. 87, § 109] On the day following the rendition of a verdict for the plaintiff, his attorney invited the jurors who sat on the case to take dinner with him. On the next day, the jurors accepted the invitation. Upon learning of the above statute the attorney withdrew his invitation. The defendants moved for a new trial under the statute. *Held*, that the motion be sustained and a new trial granted. *Ellis v. Emerson*, 147 Atl. 761 (Me. 1929).

Where a prevailing party attempts improperly to influence the action of any of the jurors, a new trial will be granted without reference to the question whether or not the attempt was successful. *Akin v. Lake Superior Consol. Iron Mines*, 103 Minn. 204, 114 N. W. 654 (1908). Conversation with a juror or in the presence of a juror in relation to the trial will warrant the granting of a new trial. *Sherlock v. Dinneen*, 42 S. D. 533, 176 N. W. 519 (1920).; *Manning v. Atlanta, B. & A. Ry.*, 206 Ala. 629, 91 So. 446 (1921); *N. Y. Life Ins. Co. v. Turner*, 210 Ala. 197, 97 So. 687 (1923). This result has been reached even where the conversation had no relation to the trial. *Alabama Fuel & Iron Co. v. Courson*, 212 Ala. 1, 101 So. 642 (1924). But casual meetings and the interchange of ordinary civilities between a party and a juror during the recesses of the court will not ordinarily be sufficient to avoid the verdict. *Boswell v. Land*, 217 Ala. 39, 114 So. 470 (1927); *Nelson v. Kuhfeld*, 158 Minn. 163, 197 N. W. 253 (1924); *Vincent v. Heenan*, 194 Mich. 316, 160 N. W. 563 (1916). A new trial will generally be granted if jurors are entertained during the trial by the party in whose favor a verdict is rendered. *Lynch v. Kleindolph*, 204 Iowa 762, 216 N. W. 2 (1927); *Jones v. Frank*, 62 Okla. 26, 161 Pac. 795 (1916); *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118 (Sup. Ct. 1908) (entertainment furnished by counsel for prevailing party); *Rainey v. State*, 100 Ga. 82, 27 S. E. 709 (1896) (entertainment furnished by state's attorney in criminal prosecution); ANN. CAS. 1912B 744. This rule is based on the policy of the law to keep the jurors free from any influence that would tend to prejudice them against or in favor of either party, in order to avoid all grounds of suspicion and to safeguard the confidence of the public and the litigants in the judicial system. See *Lynch v. Kleindolph*, *supra* at 770, 216 N. W. at 6; *Sherlock v. Dinneen*, *supra* at 534, 176 N. W. at 520. And it would seem that the existence of an improper motive or actual influence upon the verdict is not essential. *Scott v. Tubbs*, 43 Colo. 221, 95 Pac. 540 (1908); *Jones v. Frank*, *supra*. *Contra: St. Louis Ry. v. Ellenwood*, 123 Ark. 428, 185 S. W. 768 (1916). But where knowledge of the misconduct was acquired before the verdict, the failure to bring the matter to the attention of the court until after the verdict was rendered has been held a waiver of the objection. *Wetzler v. Glassner*, 185 Wis. 593, 201 N. W. 740 (1925); *cf. Copper Queen Mining Co. v. Arizona Prince Copper Co.*, 2 Ariz. 10, 7 Pac. 718 (1885). *Contra: N. Y. Life Ins. Co. v. Turner*, *supra*. Where the action complained of takes place after verdict, as in the instant case, the

objections may be: (1) the influence such action might have on juries in future litigation involving the offending party, and (2) the implication to be drawn from such action of influence on the jury exerted before verdict. The instant decision would seem to be supported only on the latter ground.

RECEIVERS—APPOINTMENT WITHOUT NOTICE TO THE ADVERSE PARTY.—The plaintiffs, suing to foreclose a lien on the buildings, machinery, and equipment of the defendant mining company, filed an affidavit alleging that the defendant was rapidly proceeding to wreck its mine and to remove and sell all its property, that it had no other assets out of which the plaintiffs could collect their claim, and that if the plaintiffs were required to give notice of application for a receiver the defendant would have disposed of all the property covered by the lien before the application could be heard. The lower court granted the plaintiffs' petition to have a receiver appointed without notice to the defendant. *Held*, on appeal, that the facts alleged did not warrant an appointment of a receiver without notice, the plaintiffs having failed to show that a temporary restraining order would not have afforded ample protection. Judgment reversed. *Firestone Coal Mining Co. v. Rootzel*, 169 N. E. 465 (Ind. 1930).

Statements of the rule that a court will not appoint a receiver without notice to the adverse party generally include an exception of cases where the plaintiff can show an emergency in which irreparable loss will be caused by the giving of notice or by any delay necessary thereto. See *Ledger Publishing Co. v. Scott*, 193 Ind. 683, 685, 141 N. E. 609 (1923); 1 CLARK, RECEIVERS (2d ed. 1929) § 82. Due to a natural disinclination to take liberties with the defendant's property when he does not appear, however, the professed exception has been hedged in by many qualifications. Thus a mere statement that an emergency exists without pertinent facts to prove it has been held insufficient to justify an appointment without notice. *General Motors Oil Co. v. Matheny*, 185 Ind. 114, 113 N. E. 4 (1916); *cf. Delcambre v. Murphy*, 5 S. W. (2d) 789 (Tex. 1928). And where no affidavit has been filed, verification of the complaint on information and belief has also been considered insufficient. *Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494 (1907), 11 Ann. Cas. 977 (1909). Moreover, a receiver will generally not be appointed without notice if any other remedy for the emergency is available. *Kent Ave. Grocery Co. v. Hitz & Co.*, 187 Ind. 606, 120 N. E. 659 (1918) (remedy by restraining order held adequate); *Rashaw v. Straus Co.*, 94 Okla. 141, 221 Pac. 62 (1923) (remedy by attachment held adequate). But *cf. Temple State Bank v. Mansfield*, 215 S. W. 154 (Tex. 1919). The scope of the exception is even further limited by a very strict interpretation of what constitutes an emergency which will cause irreparable loss. *Feess v. Mechanics' State Bank*, 84 Kan. 828, 115 Pac. 563 (1911) (allegation by shareholder that directors were operating bank fraudulently and about to dispose of assets in a way to make the stock worthless held insufficient); *Pyeatt v. Prudential Ins. Co.*, 38 Okla. 15, 131 Pac. 914 (1913), Ann. Cas. 1915C 894 (allegation that defendant intended to dissipate money of ward held insufficient). In cases where the plaintiff finds it difficult or impossible to serve notice on the defendant, however, notice is often not required. *Schmid v. Ballard*, 175 Minn. 138, 220 N. W. 423 (1928); *Tuller v. Wayne Circuit Judge*, 243 Mich. 239, 219 N. W. 939 (1928) (defendant deliberately avoiding service). And where the defendant appears for any other reason than to object to the lack of notice he will be deemed to have waived the defect. *Union State Bank v. Mueller*, 68 Okla. 152, 172 Pac. 650 (1918). But *cf. Claunch v. Claunch*, 203 S. W. 930 (Tex. 1918). But aside from cases involving these last two situations there are only one or two scattered instances within the last twenty-five years where such an emer-

gency has been deemed to exist as would justify the appointment of a receiver without notice to the adverse party. *Temple State Bank v. Mansfield, supra* (allegation that trust fund was in danger of being lost, diverted, misapplied, and put beyond the reach of the court); *cf. O'Laughlin v. Prockish*, 106 Kan. 616, 189 Pac. 383 (1920).

STATUTE OF LIMITATIONS—APPLICABILITY TO CAUSES OF ACTION ANTEDATING THE STATUTE.—The plaintiff brought suit just within the four year limitation period set by the statute in force when the cause of action accrued. The defendant demurred to the complaint on the ground that the action was barred by an intervening amendment to the statute, which provided that "An action for bodily injury or injury to personal property shall be brought within two years after the cause thereof arose." The trial court overruled the demurrer. *Held*, on appeal (one justice *dissenting*), that the judgment be affirmed. *Faller v. Massachusetts Bonding and Ins. Co.*, 168 N. E. 394 (Ohio 1929).

On the theory that a statute of limitations affects only the remedy, it is well settled that a legislature has the power to make a new and shorter period of limitation applicable to existing causes of action. 1 WOOD, LIMITATIONS (1916) § 11; Note (1905) 1 L. R. A. (N. S.) 528. But the due process clause is held to restrict this power so that a reasonable time in which to commence suit must be allowed before the new limitation is to take effect. WOOD, *loc. cit. supra*; COOLEY, CONSTITUTIONAL LIMITATIONS (1906) 523; see *Atchafalaya Land Co. v. Williams Cypress Co.*, 146 La. 1047, 1063, 84 So. 351, 357 (1920). Where no express provision is made in the amended statute for its application to existing causes of action, the cases are in conflict as to whether such operation should be implied. It has been held that the statute in force at the time of suit governs, provided only that the qualification as to reasonable time to sue is satisfied. *Sansberry v. Hughes*, 174 Ind. 638; 92 N. E. 783 (1910); *National Surety Co. v. Morgan*, 20 Ala. App. 42, 100 So. 460 (1924). But most courts will give the new statute only a prospective effect unless a contrary intent on the part of the legislature is either expressed or clearly implied. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646 (1915); *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919); *Philadelphia B. & W. Ry. v. Quaker City Flour Mills Co.*, 282 Pa. 362, 127 Atl. 845 (1925). The courts will generally consider such an intent indicated by a provision that the amended statute is not to become effective for a specified period after passage, and if the period is reasonable the statute will be given retrospective effect. *Kozisek v. Brigham*, 169 Minn. 57, 210 N. W. 622 (1926); Note (1906) 7 L. R. A. (N.S.) 715. But see *People v. Cohen*, 245 N. Y. 419; 422, 157 N. E. 515, 516 (1927). Since no such provision was included in the instant statute, the court refused to apply the statute to an accrued claim, on the ground that to do so would destroy the plaintiff's vested right to a cause of action. Inasmuch as the Ohio Constitution provides that no act shall become effective until 90 days after it has been filed by the governor, an argument against retrospective operation, based on the absence of a time provision, would seem better directed at a lack of legislative intent than at a violation of the due process clause. *Cf. Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753 (1899). But *cf. Osborne v. Lindstrom*, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715 (1899). But the refusal to bar the instant action may well have been warranted not only by an absence of evidence as to specific legislative intent, but also by the fact that the 90 day period granted by the constitution did not afford a reasonable opportunity for the institution of suit, because during that time the statute was not readily available to the public. See *Adams & Freese Co. v. Kenoyer*, 17 N. D. 302, 309, 116 N. W. 98, 100 (1908).

TAXATION—CONSTITUTIONAL LAW—FEDERAL TAXATION OF MUNICIPAL BONDS.—The plaintiff paid under protest a federal income tax levied on the profit realized on the appreciated value of municipal bonds. In a suit brought to recover the sum so paid the lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be affirmed. *Bunn v. Willcuts*, 35 F. (2d) 29 (C. C. A. 8th, 1929).

It is fundamental that state and federal governments may not tax the instrumentalities of each other. *McCullough v. Maryland*, 4 Wheat. 316 (U. S. 1819). But instrumentalities performing a function not usually considered of an essential governmental character are taxable. *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110 (1905) (federal tax on state liquor dispensary); *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055 (1886) (federal tax on liquor illegally distilled by city); *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869) (federal tax on state bank notes); *State of North Dakota v. Olson*, 33 F. (2d) 848 (C. C. A. 8th, 1929) (federal tax on bank of which state was sole shareholder); (1929) 39 YALE L. J. 279. But taxation by either government of, or based on, the security issues of the other has uniformly been held unconstitutional as being a burden on the government's power to borrow. *Macallen Co. v. Massachusetts*, 279 U. S. 620, 49 Sup. Ct. 432 (1929); *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429 (1895); (1929) 29 COL. L. REV. 675; Note (1929) 43 HARV. L. REV. 280. Unfortunately perhaps, in the application of the broad principle laid down in *McCulloch v. Maryland*, the insignificance of the burden on the government imposed by the tax does not seem to have been considered material. *Cf. Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171 (1922) (state tax on income of lessee derived from a lease of restricted Indian lands held unconstitutional); *Collector v. Day*, 11 Wall. 113 (U. S. 1870) (federal income tax based on salary of state official held unconstitutional); *Panhandle Oil Co. v. State of Mississippi*, 277 U. S. 218, 48 Sup. Ct. 451 (1928) (state tax on gasoline sold to federal government levied on dealer held unconstitutional). The consideration of such a factor might well have produced a desirable flexibility. It is noteworthy that the courts of Canada and Australia have expressly refused to follow *McCullough v. Maryland*. *Abbott v. City of Saint John*, 40 Can. Sup. Ct. 597 (1908) (tax on official's salary upheld); *Webb v. Outtrim*, [1907] A. C. 81 (same).

TRUSTS—RESULTING TRUSTS—FRAUDULENT CONVEYANCE.—The heirs of one Griffin brought suit to have a resulting trust declared in property which Griffin had purchased but title to which had been taken in the name of his son, the defendant, to protect it from possible future creditors. It did not appear that any creditors were ever injured thereby. The lower court dismissed the bill on the ground that Griffin's fraudulent purpose would have prevented the declaration of a resulting trust in his favor, and that his heirs stood in his shoes. *Held*, on appeal, that the decree be affirmed. *Lieb v. Griffin*, 147 Atl. 634 (N. J. 1929).

A conveyance to another than the one paying the purchase price generally raises a presumption of a resulting trust, except where the purchaser is the husband of the grantee or stands *in loco parentis*, in which cases the presumption of a gift is raised. See *Higginbotham v. Boggs*, 234 Fed. 253, 256 (C. C. A. 4th, 1916); BOGERT, TRUSTS (1921) § 33. But these presumptions are rebuttable, and by parol. *Rolofson v. Malone*, 315 Ill. 275, 146 N. E. 169 (1924). (resulting trust rebutted); *Brennaman v. Schell*, 212 Ill. 356, 72 N. E. 412 (1904) (gift rebutted). Where it appears that the transaction was "fraudulent" or "illegal" in purpose, the usual rule is to deny a resulting trust to the purchaser. *Higginbotham v. Boggs*, *supra* (fraud of judgment creditor); *Gammage v. Latham*, 222 S. W. 469 (Mo. 1920) (to cut off right

of redemption); *Derry v. Fielder*, 216 Mo. 176, 115 S. W. 412 (1909) (avoid dower); see *Asam v. Asam*, 239 Pa. 295, 297, 86 Atl. 871, 872 (1913) (dower); *cf. Verne v. Shute*, 232 Mass. 397, 122 N. E. 315 (1919) (in fraud of creditors). *Contra: Brennaman v. Schell, supra* (husband's "dower"); *cf.* 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 165, n. 5. The heirs or assignees of the purchaser stand in his position. *Sell v. West*, 125 Mo. 621, 28 S. W. 969 (1894) (heirs); *Miller v. Davis*, 50 Mo. 572 (1872) (assignees). But in spite of fraud, a resulting trust may be declared for the benefit of creditors. *McKey v. Cochran*, 262 Ill. 376, 104 N. E. 693 (1914); *Herrick v. Woodrow-Shindler Co.*, 75 Colo. 363, 226 Pac. 137 (1924). In the cases where there was no such relationship between purchaser and grantee as to raise the presumption of a gift, a few courts have allowed a resulting trust in spite of a fraudulent purpose, on the theory that the purchaser, being aided by the presumption in his favor, did not have to rely on his fraudulent purpose to establish his case. *Monahan v. Monahan*, 77 Vt. 133, 59 Atl. 169 (1904); (1905) 18 HARV. L. REV. 547; *Luflin v. Jakeman*, 188 Mass. 528, 74 N. E. 933 (1905). An early New Jersey case held that, where the grantee agreed in writing to hold in trust, the trust would be enforced in spite of a fraudulent purpose because there was an equitable estate vested in the grantor which the court would respect. *Ownes v. Ownes*, 23 N. J. Eq. 60 (1872). But there would seem to be a "vested equitable estate" even without a written agreement in a resulting trust case; for the trust arises at the moment of the transaction, if at all. *Cf. Higginbotham v. Boggs, supra;* see *Lord v. Reed*, 254 Ill. 350, 358, 98 N. E. 553, 556 (1912). The refusal to declare a resulting trust in the instant case penalizes the heirs for an attempted "fraud" which apparently injured none and in which they had no hand; while it rewards a grantee who may have aided in the fraudulent attempt. *Cf.* Wigmore, *Summary of Quasi Contracts* (1891) 25 AM. L. REV. 695, 712 n.

WILLS AND ADMINISTRATION—CONTINUATION OF DECEDENT'S BUSINESS BY EXECUTOR OR ADMINISTRATOR.—The decedent in his will directed his executrix and his brother to continue his business for so long a time as, in their opinion, it could be made profitable. A petition was brought by the executrix praying that the will be construed to authorize her to continue the business. *Held*, that, subject to certain legal responsibilities and limitations upon her powers, the petitioner is authorized to continue the business for so long as she and the testator's brother deem it profitable. *In re Gorra's Will*, 135 Misc. 93, 236 N. Y. Supp. 709 (Surr. Ct. 1929).

It is well established that an executor or administrator has no inherent power or authority to continue the business of the decedent. *Willinger v. German Bank of Baltimore*, 132 Md. 237, 103 Atl. 433 (1918); *Succession of Hawkins*, 139 La. 228, 71 So. 492 (1916). But such power may arise if conferred in distinct and positive terms by the provisions of the will. *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705 (1889); *cf. In re Ennis' Estate*, 96 Wash. 352, 165 Pac. 119 (1917) (parol direction of decedent not sufficient). The continuation of the business may also be authorized by the probate court. *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272 (1902); *Smith v. Smith*, 105 S. C. 393, 89 S. E. 1032 (1916) (large number of contracts outstanding). *Contra: Alexander v. Herring*, 99 Miss. 427, 55 So. 360 (1910). This is frequently found necessary as an incident to winding up the estate. *Estate of Fernandez*, 119 Cal. 579, 51 Pac. 851 (1898). The executor or administrator who continues the business of the decedent without authority does so at his own peril and is not only personally responsible for all expenses and losses but must account to the estate for all profits. *Martin Bros. Co. v. Peterson*, 38 S. D. 494, 162 N. W. 154 (1917); *Schneeberger v.*

Frazer, 36 Idaho 737, 213 Pac. 568 (1923); *Riedy v. Bidwell*, 70 Cal. App. 552, 233 Pac. 995 (1925). Where, however, the power is conferred either by testamentary provision or by court decree the executor or administrator may use the fund already invested in the business and, although he remains personally responsible to third parties, he may be indemnified from the estate for responsibilities lawfully incurred within the scope of his powers. *Smith v. Smith; Willis v. Sharp*, both *supra*. Yet the executor generally cannot subject the estate to a direct responsibility to third parties. *Estate of DeRome*, 175 Colo. 399, 165 Pac. 919 (1917); *Succession of Huxen*, 149 La. 61, 88 So. 687 (1921); *Donnelly v. Alden*, 229 Mass. 109, 118 N. E. 298 (1918) (mortgage on real estate given by executor to secure payment of debts contracted by him held void); *cf. Thurmond v. Guyan Valley Coal Co.*, 85 W. Va. 501, 102 S. E. 221 (1920) (executor must sue in his own name upon contracts into which he enters). There are special circumstances, however, in which third parties may look directly to the assets of the estate. *Daniel v. Bank of West Point*, 147 Ga. 695, 95 S. E. 255 (1918) (heirs authorized executor to continue business and impliedly to bind the estate); see Comment (1925) 13 CALIF. L. REV. 495.

WILLS AND ADMINISTRATION—DISTRIBUTION OF REALTY—ADJUSTMENT OF LOCAL STATUTORY RATIOS TO COMPENSATE FOR DIFFERENT FOREIGN RATIOS.—An executor brought an action in the state of the testatrix's domicile to determine the amount to be set aside out of the estate of the testatrix by reason of the election of the surviving husband to take under a statute providing that the surviving spouse should be entitled to the use for life of one-third in value of all the property owned by the other at death. The husband contended that the third should be computed as of the total value of the real property, foreign as well as local. *Held*, that the statute applies only to realty in the jurisdiction. *Banker's Trust Co. of New York v. Greims*, 147 Atl. 290 (Conn. 1929).

The distribution of real property is said to be governed by the *lex rei sitae*. See *McGoon v. Scales*, 9 Wall. 23, 27 (U. S. 1869); STORY, CONFLICT OF LAWS (6th ed. 1865) § 428. In various situations, however, courts are in effect able to control to some extent the disposition of foreign realty. Thus a court of equity may order the conveyance of foreign realty whether or not the plaintiff has a claim against the specific land under the law of the situs. *Massie v. Watts*, 6 Cranch 148 (U. S. 1810); *Meador v. Manlove*, 97 Kan. 706, 156 Pac. 731 (1916); *Woodcock v. Barrick*, 79 W. Va. 449, 91 S. E. 396 (1917). And a conveyance so ordered will be upheld by the court of the situs. *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755 (1909). Furthermore, the doctrine that an heir who accepts property in the state of the situs against a will invalid under the law of the situs must compensate the deprived devisee before he can take under the will in the jurisdiction of the testator's domicil also has the effect of controlling the ultimate disposition of foreign realty. *In re Laurence's Will*, 93 Vt. 424, 108 Atl. 387 (1914); *In re Ogilvie*, [1918] 1 Ch. 492. In ancillary administration some courts distribute real property within their jurisdictions so as in effect to apply to the whole estate the quantitative ratios established by the local statute governing distribution. *Decker v. Vreeland*, 220 N. Y. 326, 115 N. E. 989 (1917); *In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242 (1911). The jurisdiction of last distribution is in a strategic position effectively to apply the local statutory ratio to the whole estate by adjusting its decree to compensate for the ratios on which earlier foreign decrees affecting the foreign property of the decedent were based. *Cf. In re Dwyer's Estate, supra*. Evidence of the actual foreign distribution or of the foreign law dealing with distribution is admissible. *Decker v. Vreeland, supra*. In

view of the fact that the decree of the court of domicil in the principal case is prior to ancillary administration, and that the court would have no control over subsequent foreign decrees, its refusal to apply the local ratio to the entire estate seems proper.

WITNESSES—EXPERT WITNESSES—WHEN ENTITLED TO EXTRA COMPENSATION.—*A* brought an action for personal injuries against *B*, who employed a physician to examine the nature and extent of *A*'s injuries. Subpoenaed by *A*, the physician then appeared before a notary public and answered questions as to the facts of these injuries. He refused to give his opinion as to their nature and extent without being paid additional compensation as an expert witness. The lower court ordered him to answer the questions. *Held* (four judges *dissenting*), that a writ seeking relief from the order be denied, on the ground that the physician had performed no special services to entitle him to extra compensation since, although he had examined *A*, he had done so at *B*'s request. *State of Washington v. Superior Court*, 281 Pac. 335 (Wash. 1929).

If an expert witness contracts for extra compensation, his contract is upheld by the courts. *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207 (N. Y. 1872); *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141 (1896); *Gordon v. Conley*, 107 Me. 286, 78 Atl. 365 (1910). In a few jurisdictions statutes provide for higher fees to expert witnesses than those paid to ordinary witnesses. *Keller v. Harrison*, 151 Iowa 320, 128 N. W. 851 (1910); *Egan v. Hotel Grunewald Co.*, 129 La. 163, 55 So. 750 (1911). In the absence of an express contract or a statute, the weight of authority is against granting such fees to expert witnesses for their testimony alone. *Ex parte Dement*, 53 Ala. 389 (1875); *Philler v. Waukesha County*, 139 Wis. 211, 120 N. W. 829 (1909); *Ulaski v. Morris and Co.*, 106 Neb. 782, 184 N. W. 946 (1921). *Contra: Buchman v. State*, 59 Ind. 1 (1877). But if the witness has performed special additional services to qualify himself to testify in the particular case, he is granted reasonable compensation for such services. *Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459 (1895); *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450 (1912); *Birch v. Sees*, 178 App. Div. 609, 165 N. Y. Supp. 846 (2d Dep't 1917); *Klepper v. Klepper*, 199 Mo. App. 294, 202 S. W. 593 (1918). In the instant case the examination by the plaintiff was made in the course of his employment by a third party; he had in no sense performed it in order to qualify himself as an expert witness on behalf of the party he had examined. The examination was therefore properly held not to be a special service that would entitle him to extra compensation. *Cf. Summers v. State*, 5 Tex. App. 365 (1879).