# RECENT CASE NOTES

ACCORD AND SATISFACTION—NEGOTIATION OF CHECK OFFERED "IN FULL PAYMENT"—CREDITOR'S NOTICE TO DEBTOR TO STOP PAYMENT IF ACCEPTANCE IN PART PAYMENT UNSATISFACTORY.—The defendant sent the plaintiff a check in payment of a freight bill, stating thereon that it was "in full payment as shown in statement on reverse side." The plaintiff replied that it would accept the check "on account only" and that if this was not acceptable the defendant should stop payment. The defendant received the plaintiff's reply on the day the check was paid by the defendant's bank. In a suit for the balance of the bill, the lower court held for the defendant. On appeal, the verdict was reversed on the ground that there had been no accord and satisfaction because the claim was liquidated, and that even assuming the claim to have been unliquidated or in dispute, the plaintiff's acceptance and deposit of the check could not have constituted an accord and satisfaction since he had not assented to a compromise. *Moore & McCormack Co. v. Valley Camp Coal Co.*, 37 F. (2d) 308 (C. C. A. 4th, 1930).

The acceptance and negotiation of a check purporting to be "in full satisfaction" of a disputed or unliquidated claim constitutes an accord and satisfaction in spite of a refusal to accept the check on those terms. *Beck v. Rosenfeld*, 124 Misc. 363, 208 N. Y. Supp. 35 (1st Dep't 1925); *Hoop v. Kansas Flour Mills Co.*, 124 Kan. 769, 262 Pac. 544 (1928); 3 WILLISTON, CONTRACTS (1920) § 1854; (1926) 21 ILL. L. REV. 287. But *cf. Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733 (1908). And mere retention of the check for an unreasonable time without protest has generally been held to constitute a complete discharge. *Willis v. City National Bank*, 280 S. W. 270 (Tex. Civ. App. 1925) (year and half); *Western Pacific Land Co. v. Wilson*, 19 Cal. App. 338, 125 Pac. 1076 (1912) (month); *cf. Unterberger & Co. v. Wiley*, 170 Ark. 976, 281 S. W. 899 (1926) (retention for over month, without cashing, after refusal to accept on condition specified held a discharge); *cf. Worcester Color Co. v. Henry Wood's Sons Co.*, 209 Mass. 105, 95 N. E. 392 (1911) (creditor's obliteration of "in full settlement" without knowledge or consent of debtor of no operative effect). But where the creditor has informed the debtor that he would accept "in part payment" only, the debtor's failure to respond has, in the light of other circumstances, been held a tacit acquiescence and a waiver of the condition on which the check was offered. *Campbell County v. Howard*, 133 Va. 19, 112 S. E. 876 (1922) (payment after notice by creditor that he would not accept in full payment); *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61 (1905) (payment after notice and continued action under the contract); *Levy & Koplan v. Queen Co.*, 73 Pa. Super. Ct. 425 (1910) (check sent back after return by creditor held presumably sent in accordance with terms in creditor's refusal); see *Fuller v. Kemp*, 138 N. Y. 231, 236, 33 N. E. 1034, 1035 (1893); *cf. Burton Coal Co. v. Gorman Coal Co.*, 22 Ohio 383, 153 N. E. 863 (1926) (debtor replied that matter was "up to" plaintiff). Yet silence alone on the part of the debtor does not constitute acquiescence in the creditor's response. *Seeds, Grain & Hay Co. v. Conger*, 83 Ohio St. 169, 93 N. E. 892 (1910);

*cf. List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N. E. 120 (1909) (silence is not a waiver of conditions). Thus the debtor is not penalized for his failure to act affirmatively in reply to the creditor's conditional acceptance. *Cf. Cincinnati Equipment Co. v. Big Muddy River Consol. Coal Co.*, 158 Ky. 247, 164 S. W. 794 (1914) (silence alone is not acceptance of a counter-offer unless expressly agreed); ANSON, CONTRACTS (Corbin's ed. 1921) 93n. Moreover, even assuming the existence of such a duty to act, the time to stop payment afforded the debtor in the instant case seems clearly insufficient. Thus the instant decision seems justifiable only on the alternative ground that the debt was liquidated.

BANKS AND BANKING—SET-OFF—RATE OF EXCHANGE—EFFECT OF WAR ON ACCOUNTS IN ENEMY STATES.—In an action by an Austrian bank to recover from a Pittsburgh bank money which the Alien Property Custodian had returned to the defendant as the amount of its kronen balance in the Austrian bank, it appeared that prior to 1916 the plaintiff had maintained a dollar balance with the defendant, and the defendant a kronen balance with the plaintiff. The defendant sought to set-off its kronen balance at the rate of exchange prevailing before the war. The district court ruled that the defendant could not set-off at the pre-war rate, its account not having been matured by the declaration of war nor by the passage of the Trading With the Enemy Act [40 STAT. 411 (1917), 50 U. S. C. § 30 (1926)] and no step having been taken to set off the deposit before the suit. On appeal, the judgment was affirmed. *First National Bank v. Anglo-Oesterreichische Bank*, 37 F. (2d) 564 (C. C. A. 3d, 1930).

In the absence of the debtor's insolvency, a bank is generally not entitled to apply a deposit to an unmatured debt of its depositor. *Putnam v. United States Trust Co.*, 223 Mass. 199, 111 N. W. 969 (1916); *Fifth National Bank v. Lyttle*, 250 Fed. 361 (C. C. A. 2d, 1918). However, the mutual debts in the instant case were clearly obligations due on demand. *Cf. Zimmerman v. Hicks*, 7 F. (2d) 443 (C. C. A. 2d, 1925). And, for set-off purposes, a bank may treat a demand obligation of its depositor as matured without any actual demand having been made. *Citizens' Savings Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143 (1897); *People v. St. Nicholas Bank*, 44 App. Div. 313, 60 N. Y. Supp. 719 (1st Dep't 1899). Of course, an actual demand is required before a depositor may successfully bring suit to recover his deposit from a bank, but in as much as the purpose of this rule is merely to prevent unwarranted litigation there seems no reason why it should apply to set-offs. However, according to the finding that the defendant had done no acts to indicate that it had in fact set off its kronen deposit against the amount owed to the plaintiff, the dollar value of the defendant's kronen deposit would be determined by its exchange value at the time of judgment, regardless of when the debts matured. *Deutsche Bank v. Humphrey*, 272 U. S. 517, 47 Sup. Ct. 166 (1926). Such a result is in accord with the usual rule that where an obligation is in terms of foreign currency, payable in the foreign country, only the dollar value measured at the time of judgment can be recovered in a United States court. *The Hurona*, 268 Fed. 910 (S. D. N. Y. 1920); *Sirie v. Godfrey*, 196 App. Div. 529, 188 N. Y. Supp. 52 (1st Dep't 1921); *Metcalf v. Mayer*, 213 App. Div. 607, 211 N. Y. Supp. 53 (1st Dep't 1925); *cf. Societe des Hotels v. Cummings*, [1922] 1 K. B. 451 (similar rule in England). On the other hand, where a payment in terms of foreign currency is due in this country, damages are customarily translated into United States money at the exchange rate prevailing at the breach or maturity date. *Det Forenede Dampskibs Selskab v. Ins. Co. of North America*, 31 F. (2d) 658 (C. C. A. 2d, 1929); *Hicks v. Guiness*, 269 U. S. 71, 46 Sup.

Ct. 46 (1925); *cf. Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *In re British American Bank*, [1922] 2 Ch. 575 (similar rule in England). It seems, however, that the defendant in the instant case could have avoided the loss resulting from a decline in foreign currency values by an act unmistakably evidencing its intention to set off; for the balance, since payable to the plaintiff bank in the United States, would thereby have been fixed at the exchange rate at the date of set-off, a new obligation to pay that balance then arising as in an account stated. *Cf. Reed v. Robinson*, 213 Ala. 14, 104 So. 130 (1925); *Benjamin v. Levy*, 176 N. Y. Supp. 454 (Sup. Ct. 1919). Certainly, neither the war itself nor the Trading with the Enemy Act so abrogated the agreement between the parties as to make such a procedure impossible. See (1929) 39 YALE L. J. 286. Of course, fairness to the plaintiff would have required that, once the defendant had determined to set off, its election should be held irrevocable, and notice of such election given to the plaintiff.

BILLS AND NOTES—TIME INSTRUMENTS—DISCOUNT PROVISIONS AS AFFECTING NEGOTIABILITY.—The plaintiff brought suit on a promissory note made by the defendant payable to *X*, and indorsed by him to the plaintiff. The note was payable $200 six months and $200 twelve months from date, with the privilege of discharging "by payment of principal less a discount of five per centum within thirty days from the date hereof." The defendant alleged failure of consideration, and the trial court directed a verdict for the plaintiff. On appeal the judgment was reversed on the ground that the note did not contain a promise to pay a "sum certain" as required by the Negotiable Instruments Law. *Waterhouse v. Chouinard*, 149 Atl. 21 (Me. 1930).

No uniformity of result has been reached on the issue of negotiability in time instruments providing for discounts from their face amount. (1) Where there has been a provision for discount if the instrument is paid "at" maturity, it has been held negotiable. *Capital City State Bank v. Swift*, 290 Fed. 505 (E. D. Okla. 1923); *Mansfield Savings Bank v. Miller*, 2 Ohio Cir. Ct. Rep. 96 (1887); *cf. Commercial Credit Co. v. Nissen*, 49 S. D. 303, 207 N. W. 61 (1926). (2) If the instrument permits a discount upon payment in full at the maturity of a specified installment, the decisions have been divided. *Stevens v. Baldy*, 67 Pa. Super. Ct. 145 (1917) (held negotiable); *Harrison v. Hunter*, 168 S. W. 1036 (Tex. Civ. App. 1914) (held negotiable); *Lambert v. Harrison*, 69 Okla. 172, 171 Pac. 45 (1918) (held non-negotiable as not being a promise for a "sum certain"). (3) When a note provides for a discount if payment is made "on or before" maturity, it has been held negotiable. *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722 (1905); *cf. Union Nat. Bank v. Mayfield*, 71 Okla. 22, 174 Pac. 1034 (1918). (4) An instrument providing for discount if paid any time before maturity, has been held non-negotiable as not being a promise for a "sum certain." *Way v. Smith*, 111 Mass. 523 (1873); *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186 (1899). (5) And a provision for discount if the note is paid on or before a specified date prior to maturity has been held not to preclude negotiability. *Farmers' Loan & Trust Co. v. Planck*, 98 Neb. 225, 152 N. W. 390 (1915); *First National Bank v. Rooney*, 11 D. L. R. 358 (Sask. 1915). Yet such a provision has frequently been used as a basis for denying negotiability on the ground that the instrument did not contain a promise for a "sum certain." *Story v. Lamb*, 52 Mich. 525 (1884); *Fralick v. Norton*, 2 Mich. 130 (1851); *First National Bank v. Watson*, 56 Okla. 495, 155 Pac. 1152 (1916); *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 122 Pac. 125 (1911); *Farmers' Loan & Trust Co. v. Devear, Hair & Co.*, 2

Tenn. Civ. App. 366 (1911). This apparent tendency to declare against negotiability where a discount is provided for if payment is made before maturity, may be a reflection of the common law view that "on or before" instruments bearing interest were uncertain as to amount since payment might be made at any time. *Stults v. Silva*, 119 Mass. 137 (1875); *cf. Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363 (1903). But *cf. Pierce v. Talbot*, 213 Mass. 330, 100 N. E. 553 (1913). *Contra: Leader v. Plante*, 95 Me. 339, 50 Atl. 53 (1901). But this view is no longer tenable as to interest provisions, since the Negotiable Instruments Law provides expressly that an "on or before" provision does not affect negotiability and that a note may be negotiable though payable "with interest." The attempt of the court in the instant case to distinguish between "discount" and "interest" is unconvincing. Both are but means of charging for the use of credit. Moreover the amount due under the various "discount" instruments is just as readily an ascertainable "sum certain" at any particular moment as would be the amount due at any given time on an interest-bearing "on or before" instrument. In view of the evident commercial need for discount provisions in time instruments and the recognition of negotiability accorded such instruments by other recent decisions, the court might well have held the instant note negotiable.

BROKERS—STOCK-BROKERS—MARGIN TRANSACTIONS—AGREEMENT TO WAIVE RIGHT TO NOTICE BEFORE SALE.—A stockbrokers' agreement in a margin transaction provided that if the customer failed to comply with any of its terms, the brokers would be privileged to sell without notice, and that "no specific demand or notice shall invalidate this waiver." The customer's margin having become insufficient the brokers notified him that stop-loss orders had been placed on all his stocks. A day later the brokers sent a second notice, advising that unless they received additional margin immediately, they would sell at market. Before the customer had received this second notice and pursuant thereto, the brokers sold him out. In an action for conversion for selling without reasonable notice, the customer recovered a verdict. A motion to set aside the verdict was denied on the ground that the brokers, by setting stop-loss orders on the customer's stocks, had waived their discretionary privilege of sale without notice. *Klapp v. Bache*, 239 N. Y. Supp. 129 (Sup. Ct. 1929).

In the absence of special agreement, a broker who sells stocks purchased on margin without first demanding more security and allowing the customer a reasonable time to comply with this demand is guilty of a conversion. *Markham v. Jaudon*, 41 N. Y. 235 (1869); *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512 (1908); Note (1925) 41 A. L. R. 1255; Note (1930) 43 HARV. L. REV. 628. But *cf. Papadopulos v. Bright*, 264 Mass. 42, 161 N. E. 799 (1928); *Bentnick v. London Joint Stock Bank*, 2 Ch. 120, 140 (1893); Smith, *Margin Stocks* (1922) 35 HARV. L. REV. 485, 492. In New York the broker has been further required to send a notice of intent to sell specifying both time and place. *Content v. Banner*, 184 N. Y. 121, 76 N. E. 913 (1906); *Mayer v. Monzo*, 221 N. Y. 442, 117 N. E. 948 (1917). The customer, however, can waive his right to demand or notice by special agreement, provided such agreement be not contrary to the rules of the Exchange. *Smith v. Craig*, 211 N. Y. 456, 105 N. E. 798 (1914); see *Evans v. Hubbard*, 220 App. Div. 423, 426, 221 N. Y. S. 642, 645 (1st Dep't 1927); *Stibbard v. Owen*, 243 Mich. 138, 139, 219 N. W. 636 (1928). But though such special agreements usually stipulate "that in all marginal business the broker may close transactions by the sale or purchase of securities at his discretion when the margin is near exhaustion without further notice to the customer," the courts hesitate to give full effect to

such a provision. *Cf. Sanger v. Price*, 114 App. Div. 78, 99 N. Y. Supp. 513 (1st Dep't 1906) (similar provision held to contemplate some original notice to customer that his margins were being depleted); *Thompson v. Baily*, 220 N. Y. 471, 116 N. E. 387 (1917) (burden of proving customer's "acceptance" of such a provision, printed on the standard form of statement, held to rest on broker); *Pearson v. Kurtz*, 280 Pa. 34, 124 Atl. 272 (1924); *Evans v. Hubbard, supra*. But *cf. Stibbard v. Owen, supra*. The tendency of the courts has been to protect the customer's interest in being notified of failing margins, express agreements of waiver notwithstanding. See *Rosenthal v. Brown*, 247 N. Y. 479, 485, 160 N. E. 921, 923 (1928); *Small v. Housman*, 208 N. Y. 115, 126, 101 N. E. 700, 704 (1913); *Miller & Co. v. Lyons*, 113 Va. 275, 290, 74 S. E. 194, 201 (1912); *cf. Toplitz v. Bauer*, 161 N. Y. 325, 333, 55 N. E. 1059, 1061 (1900); CAMPBELL, LAW OF STOCK-BROKERS (2d ed. 1922) 130. But *cf. Godfrey v. Newman*, 239 N. Y. Supp. 585 (Sup. Ct. 1930). But it is difficult to justify the result in the case of an experienced margin trader who has diligently followed the tape and seeks, by taking refuge in a technicality, to escape a loss arising from a speculation whose dangers he well realizes.

COMMON CARRIERS—POWER OF FRANCHISING COMMISSION TO ORDER EQUAL BUS ACCOMMODATIONS FOR NEGROES.—The defendant Commission was authorized by statute to grant franchises to bus operators, and to make rules governing the transportation of passengers for hire. [N. C. PUB. LAWS (1927) c. 136 § 7]. Some of the respondent bus operators had refused to carry negroes, and none had supplied separate accommodations for them. The plaintiffs petitioned the defendant to require that separate and equal bus and station accommodations be provided for negroes. The petition was dismissed by the defendant on the ground that it had no jurisdiction to pronounce the respondents common carriers and thus obliged to carry negroes. The plaintiffs appealed to the Superior Court of North Carolina which issued an order requiring the defendant to grant plaintiff's petition. On appeal by the defendant the decree was affirmed. *Corporation Commission v. Transportation Committee on Interracial Cooperation*, 151 S. E. 648 (N. C. 1930).

The Federal statute of 1875 prohibiting discrimination because of race in theatres and other places of public amusement was held unconstitutional. *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18 (1883). But similar state statutes relating to a variety of enterprises have since been upheld. *People v. King*, 110 N. Y. 418, 18 N. E. 245 (1888); *Pickett v. Kuchan*, 323 Ill. 138, 153 N. E. 667 (1926); (1927) 11 MINN. L. REV. 463; *cf. Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31 (1898); (1918) 27 YALE L. J. 1092. However, even in the absence of a civil rights statute, common carriers of passengers cannot refuse applicants solely on account of race. *Pleasants v. North Beach R. R.*, 34 Cal. 586 (1868); *Chicago & N. W. Ry. v. Williams*, 55 Ill. 185 (1870); *cf. Day v. Owen*, 5 Mich. 520 (1858). Passenger bus lines operating under a state franchise are usually held to be common carriers. *Dobosen v. Mescall*, 205 App. Div. 265, 199 N. Y. Supp. 500 (4th Dep't 1923); *Frick v. City of Gary*, 192 Ind. 76, 135 N. E. 346 (1922). Since the respondents in the instant case purported to carry all passengers at the time the franchises were obtained, a refusal on their part to carry negroes would seem unjustified. Recognition of the rights of negroes to transportation in common carriers, however, has not invalidated railroad regulations for the separation of the races where the accommodations for both races are substantially equal. *Westchester & Phila. R. R. v. Miles*, 55 Pa. 209 (1867); *Chiles v. Chesapeake & Ohio Ry.*, 218 U. S. 71, 30 Sup. Ct. 667 (1910). Similarly, state statutes requiring separate but equal

accommodations in railroads and street cars have been held constitutional. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138 (1896); *Smith v. State*, 100 Tenn. 494, 46 S. W. 566 (1898); *So. Covington Street Ry. v. Kentucky*, 252 U. S. 399, 40 Sup. Ct. 378 (1920); *cf. Hall v. DeCuir*, 95 U. S. 485 (1877). The policy behind the principal case is therefore in accord with that of the majority of the southern states in so far as it involves the separation of the races. See (1927) 36 YALE L. J. 858; Stephenson, *Race Discriminations in American Law* (1909) 43 AM. L. REV. 695. But inasmuch as no provision for negro passengers is required by the statute creating the Corporation Commission, the instant court has taken an affirmative stand for the protection of negroes both in ordering that provision be made for them and in vesting the Commission with the power to enforce such an order.

CONSTITUTIONAL LAW—VALIDITY OF ORDINANCE RESTRICTING USE OF PUBLIC MARKET TO PRODUCERS OF FARM PRODUCTS.—The defendant was convicted of violating an ordinance restricting the privilege of selling farm products in the public market to "producers who have grown and brought them to market." On appeal from an order overruling a demurrer to the information the defendant contended that the enforcement of the ordinance would deprive him of the equal protection of the laws. The decision of the lower court was affirmed, however, on the ground that the differences between producers and non-producers made the classification a reasonable one. *State v. Cullum*, 110 Conn. 291, 147 Atl. 804 (1929).

At common law, forestalling, *i.e.*, buying goods from producers for the purpose of reselling in the public market at a profit, was an offense punishable by fine and imprisonment. *Rex v. Waddington*, 1 East 143 (1801). A similar attitude is to be observed in many early American decisions sustaining the reasonableness of ordinances substantially like that of the instant case. *City of Louisville v. Roupe*, 6 B. Mon. 591 (Ky. 1846); *In re Nightingale*, 11 Pick. 167 (Mass. 1831); *Commonwealth v. Rice*, 9 Metc. 253 (Mass. 1845). Although no constitutional issue was directly raised by these decisions, there is some case authority for sustaining the constitutionality of such an ordinance as is set out in the instant opinion. *Gatto v. Gilmore*, 126 Misc. 47, 213 N. Y. Supp. 217 (Sup. Ct. 1925); *Bruce v. City of Gainesville*, 183 S. W. 41 (Tex. Civ. App. 1916). Furthermore the many statutes and decisions exempting cooperative marketing associations from the penalties of the anti-trust laws and from the assessment of an income tax afford positive support for the view that it is reasonable to favor the farmer as a class. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n*, 276 U. S. 71, 48 Sup. Ct. 291 (1927), *aff'g* 208 Ky. 643, 271 S. W. 695 (1925); *Rifle Potato Growers' Co-op. Ass'n v. Smith*, 78 Colo. 171, 240 Pac. 937 (1925); *Minnesota Wheat Growers' Co-op. Ass'n v. Huggins*, 162 Minn. 471, 203 N. W. 420 (1925); 38 STAT. 731 (1914), 15 U. S. C. § 17 (1926); 44 STAT. 40 (1926), 26 U. S. C. § 982 (1926); KY. STAT. (Carroll, 1930) § 883f-28; see Hamilton, *Judicial Tolerance of Farmers' Cooperatives* (1929) 38 YALE L. J. 936. But *cf. In re Grice*, 79 Fed. 627 (C. C. N. D. Tex. 1897); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431 (1900) (since "distinguished" many times). The most recent manifestation of a similar policy is to be found in the Agricultural Marketing Act and the activities of the Federal Farm Board pursuant thereto. 7 U. S. C. § 521 (1929).

CONTRACTS—COVENANTS NOT TO COMPETE—PARTIAL ENFORCEMENT OF RESTRICTION TOO EXTENSIVE IN SCOPE.—In a contract for the sale of an ice company situated in Dallas the seller bound himself not to undertake in the

state of Texas for five years any line of business in which the company was engaged. Before the termination of the five year period, the seller founded another ice company in Dallas. At the buyer's request, the lower court granted an injunction restraining the seller from engaging in such business anywhere in the state. It was held on appeal that the decree be affirmed but that, in view of the local nature of the plaintiff's business, it be modified to embrace only the city of Dallas. *Hill v. Central West Public Service Ice Co.*, 37 F. (2d) 451 (C. C. A. 5th, 1930).

In the early cases and in general today, contracts not to compete are held invalid because they deprive the covenantor of his livelihood and the community of the benefits of competition. *Dier's Case*, Y. B. 2 Hen. V, f. 5, pl. 26 (1415); *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 61 N. E. 1038 (1901); see *Mitchel v. Reynolds*, 1 P. Wms. 181, 190 (1711); *Alger v. Thacher*, 19 Pick. (Mass.) 51, 54 (1837). Courts early began to recognize the validity of such covenants, however, when they were ancillary to the sale of a business and necessary to ensure its full value to the purchaser. *Rogers v. Parry*, 2 Bulst. 136 (1613); *Broad v. Jollyfe*, Cro. Jac. 596 (1620); *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509 (1898). Agreements by partners not to compete during the life of the partnership, and by retiring partners not to compete for a term of years were also granted validity by courts and legislators. *Ropes v. Upton*, 125 Mass. 258 (1877); *Lange v. Werk*, 2 Ohio St. 519 (1853); WILLISTON, CONTRACTS (1920) § 1664; CAL. CIV. CODE (Deering, 1923) §§ 1673-1675; N. D. COMP. LAWS ANN. (1913) §§ 5928-5930; S. D. REV. CODE (1919) §§ 898-900; OKLA. COMP. STAT. ANN. (1921) §§ 5071-5073. But such covenants were frequently considered invalid if unlimited in regard to extent of territory. *Union Strawboard Co. v. Bonfield, supra; Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770 (1905); *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887). *Contra: Fox v. Barber*, 94 Kan. 212, 146 Pac. 364 (1915). The growing tendency of the courts, however, is to discard arbitrary rules as to space and hold that any covenant reasonably necessary to protect the interests of the parties is enforceable. *Nordenfeldt v. Nordenfeldt Arms Co.*, [1894] A. C. 535; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588 (C. C. A. 7th, 1915); *Williams v. Thomson*, 143 Minn. 454, 174 N. W. 307 (1919); see *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 279 (C. C. A. 6th, 1898). And when a covenant, taken as a whole, is so unduly extensive as to be invalid, it has been held that, if its restrictions are severable from each other, those portions which are lawful will be enforced and the remainder discarded. *Mallan v. May*, 11 M. & W. 652 (1843) (London or elsewhere); *Smith's Appeal*, 113 Pa. 579, 6 Atl. 25 (1886) (Lehigh or elsewhere); *Rogers v. Maddocks*, [1892] 3 Ch. 346 (covenant not to sell malt liquor or aerated waters). *Contra: More v. Bonnet*, 40 Cal. 251 (1870) (county of San Francisco and state of California). It has also been held in a few cases, as illustrated by the instant decision, that even though the covenant is not thus divisible and is in certain respects broader than the law allows, it will be enforced in so far as its provisions come within the law. *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628 (1895); *Gregory v. Spicker*, 110 Cal. 150, 42 Pac. 576 (1895). These cases recognize the fact that the distinction between restrictive covenants which specify separately the territories and objects to which they apply, and those stated in more general terms, is merely one of form, and accordingly enforce a desirable form of trade contract while restricting it within reasonable limits.

CORPORATIONS—CONVERTIBLE STOCK—REFUSAL TO CONVERT STOCK OF NON-RECORD HOLDER.—Upon reorganization in 1916, the defendant railroad

corporation issued preferred stock convertible into common stock any time after November 1, 1919. The certificate of incorporation gave this option to "Any holder . . . of the Preferred Stock . . . ." By virtue of an assignment of a "street" certificate the plaintiff became the owner but not the record holder of 100 shares of such preferred stock. On February 8, 1927, the plaintiff presented the stock certificate at the proper office and demanded 100 shares of common stock, but the defendant refused to convert the stock until February 24, 1927. The plaintiff alleged that he had intended to sell such common stock at the market price on February 8 and sought damages based upon the difference between the market prices of the preferred and common on that date. In defence the defendant claimed, *inter alia*, that the plaintiff was not a stockholder of record and that his damages were merely speculative. A motion to strike out the defendant's answer was denied by the trial court. The decision was affirmed on appeal but leave was granted to file an amended complaint, the court maintaining that the plaintiff could not recover except as a holder of record and that the allegations of damage were "founded on a mere gesture" or "hope for gain." *Cheatham v. Wheeling & L. E. Ry.*, 37 F. (2d) 593 (S. D. N. Y. 1930).

As between the assignee and the assignor, who remains the record holder, an assignment of shares creates complete ownership in the assignee. *Benson v. Saffert-Gugisburg Cement Const. Co.*, 159 Minn. 54, 198 N. W. 297 (1924); CHRISTY, THE TRANSFER OF STOCK (1929) 65 *et seq.* And despite various dicta to the contrary, such an assignment does give rise to certain legal relationships between the assignee and the corporation before a transfer on the record books. *Robinson v. National Bank*, 95 N. Y. 637 (1884) (non-record holder secured transfer of stock and payment of dividends declared). *In re Hastings*, 56 Misc. 45, 106 N. Y. Supp. 938 (Sup. Ct. 1907) (executor permitted to inspect corporate books); *Petty v. Knight-Petty Mercantile Co.*, 93 Okla. 187, 220 Pac. 835 (1923) (non-record holder allowed to "participate in the organization and conduct of the business"); *Van Tuyl v. Robin*, 160 App. Div. 41, 144 N. Y. Supp. 963 (1st Dep't 1913), *aff'd*, 211 N. Y. 540, 105 N. E. 1101 (1914) (under statute "equitable owner" considered a "stock holder" for purposes of corporate liability); *First National Bank v. De Moulin*, 56 Cal. App. 313, 205 Pac. 92 (1922). The reasons advanced for requiring a corporation to recognize only holders of record for purposes of voting, payment of dividends, and other acts involving corporate protection do not seem applicable to this situation as the presentation of a "street" certificate would seem to give sufficient notice to the corporation of the extinguishment of the record-holder's interests and the acquisition of those interests by the assignee. *Cf. Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511, 23 S. E. 503 (1895); *Porter v. Marine Savings Bank*, 186 Mich. 355, 153 N. W. 19 (1915). And in the absence of definite provision in the certificate of incorporation or on the stock certificate restricting the privilege of conversion to holders of record, it is thought that the plaintiff in the instant case should have been accorded the rights and privileges allowed the assignee of any contract obligation. *Cf. Sylvania & Girard R. R. v. Hoge*, 129 Ga. 734, 59 S. E. 806 (1907); CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 151. If the plaintiff was possessed of the assignor's rights and privileges the refusal to convert was clearly a breach of contract. *Cf. U. S. Cities Corp. v. Sautbine*, 126 Okla. 173, 259 Pac. 253 (1927). Then three possible remedies should have been available. As in the case of a wrongful refusal to transfer shares, a decree for specific performance might be secured. See *Oden v. Vaughn*, 204 Ala. 445, 447, 85 So. 779, 781 (1902); *cf.* CHRISTY, *op. cit. supra* at 468. Or the refusal to convert might be treated as a wrongful exercise of

dominion over the shares and the action brought in tort for conversion. *U. S. Cities Corp. v. Sautbine, supra.* Finally as in the instant case, an action might be brought for damages for breach of contract, the measure of recovery usually being the difference in market value of the respective shares on the date of breach. *Cf. Manufacturers Fire & Marine Ins. Co. v. Middlesex* R. R., 146 Mass. 224, 16 N. E. 34 (1888); Berle, *Convertible Bonds and Stock Warrants* (1927) 36 YALE L. J. 649, 654.

CORPORATIONS—RESPONSIBILITY OF PARENT FOR TORTS OF SUBSIDIARY—EVIDENCE REQUIRED TO SHOW ASSIMILATION.—An action was brought against the defendant railroad corporation by the administrator of the deceased to recover for the death of the intestate killed by the negligence of a subsidiary company of the defendant. Evidence was introduced that the train which struck the deceased bore the name of the defendant, and that the initials of the defendant appeared on the uniforms of its crew. The train appeared on the defendant's time tables but its crew were paid by the subsidiary. It was further alleged that the defendant owned a majority of the subsidiary's stock and that the defendant's claim agent in several letters to the plaintiff had indicated that he expected the plaintiff to look to the defendant for recovery. In upholding the trial court's denial of the defendant's motion for a directed verdict, the appellate court held that sufficient evidence of the subsidiary's assimilation by the parent had been introduced to make that question one of fact for jury. *Ross v. Pennsylvania R. R.*, 148 Atl. 741 (N. J. 1930).

Whether a court will disregard the fiction of the corporate entity and allow the parent corporation to be held liable for the torts of a subsidiary depends on the extent of assimilation of the two corporations. *Cf. Bergenthal v. State Garage & Trucking Co.*, 179 Wis. 42, 190 N. W. 901 (1922); *Atchison, T. & S. F. Ry. v. Cochran*, 43 Kan. 225, 23 Pac. 151 (1890). The fact of assimilation is said to be a jury question whenever evidence is introduced indicating that the subsidiary is the mere "agent," "tool," "instrument," "alter ego," or "dummy" of the parent. See *Summo v. Snare & Triest Co.*, 166 App. Div. 425, 429, 152 N. Y. Supp. 29, 32 (2d Dep't 1915); *cf. Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 141 Md. 67, 85, 118 Atl. 279, 285 (1922); *Berkey v. Third Ave. Ry.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926); BALLANTINE, PRIVATE CORPORATIONS (1927) 34; Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193 *et seq.* More particularly such evidence must generally point to something beyond control exerted through the ownership of the majority or all of the voting stock of the subsidiary. *Bethlehem Steel Co. v. Raymond Concrete Pile Co., supra.* For in addition to stock control, there must be evidence of an actual intermingling of the operations of the two companies as shown by common book-keeping, identical management or inadequate financing of the subsidiary. *Costan v. Manila Electric Co.*, 24 F. (2d) 383 (C. C. A. 2d, 1928) (manager of subsidiary's properties employed by parent and subject to supervision of parent only); *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66 (1897) (employees passed indiscriminately from one company to the other); *Erickson v. Minnesota & Ontario Power Co.*, 134 Minn. 209, 158 N. W. 979 (1916) (inadequate financing and direct control by parent); *The Willem Van Driel, Sr.*, 252 Fed. 35 (C. C. A. 4th, 1918) (999 year lease and accounts of subsidiary handled only by the parent); *Oriental Investment Co. v. Barclay*, 64 S. W. 80 (Tex. Civ. App. 1901) (existence of subsidiary unknown to employees); *Chesapeake Stone Co. v. Holbrook*, 168 Ky. 128, 181 S. W. 993 (1916) (rental of quarry by parent to subsidiary so high as to make profits by subsidiary impossible); *Otway v.*

*Snare & Triest Co.*, 167 App. Div. 128, 152 N. Y. Supp. 845 (2d Dep't 1915) (signs on building, marks on tools and method of hiring indicated complete control by parent); *Lehigh Valley R. R. v. Dupont*, 128 Fed. 840 (C. C. A. 2d, 1904) (ticket sold by parent made no mention of subsidiary). The opinion of the instant decision shows little such evidence to have been introduced by the plaintiff. *Cf. Foard Co. v. State*, 219 Fed. 827 (C. C. A. 4th, 1914); Note (1920) 4 MINN. L. REV. 219, 227. The decision may well mark the beginning of a policy of holding the parent corporation responsible for the acts of the subsidiary. But if it be assumed that a corporation, like an individual, may by means of the corporate device elect to risk only a certain portion of its assets in any one enterprise, then the instant decision appears to be incorrectly decided.

EMINENT DOMAIN—RIGHT OF WAY—NECESSITY AS GROUNDS FOR CONDEMNATION PROCEEDINGS.—The petitioner instituted eminent domain proceedings to condemn a location for a pumping station and a right of way for a pipe line for irrigation purposes. At the time of the proceeding the petitioner and his predecessor had operated for ten years under a contract by which the owners of the land sought to be condemned had granted a right of way for such a pipe line in return for the privilege of taking a specified quantity of water therefrom. This contract provided that the power to acquire said right of way by condemnation should be regarded as waived. An order of necessity was granted by the lower court and the order was affirmed on *certiorari* (three judges dissenting). *State ex rel. Henry v. Superior Court*, 284 Pac. 788 (Wash. 1930).

The term "necessity" as used in eminent domain proceedings does not signify absolute indispensability, but is construed as meaning reasonable necessity in view of the circumstances peculiar to each case. *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722 (1914); *Mobile & Girard R. R. v. Alabama Midland Ry.*, 87 Ala. 501, 6 So. 406 (1888); 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 601. It is sometimes said that a reasonable necessity for a road exists when there is no other practicable or feasible way out. *State ex rel. Schleif v. Superior Court*, 119 Wash. 372, 205 Pac. 1046 (1922). Thus, where a floatable river was available, a logging company was not entitled to maintain proceedings to condemn a way over private property. *State ex rel. Stephens v. Superior Court*, 111 Wash. 205, 190 Pac. 234 (1920). And where a railroad over the same land sought to be condemned was contemplated in the future, the exclusion of evidence, on the issue of necessity, that such railroad would be available for the petitioner's use, was error. *Ruddock v. Bloedel Donovan Lumber Mills*, 28 F. (2d) 684 (C. C. A. 9th, 1928). It was contended for the defendant in the instant case that in view of the contract between the parties there was no necessity for the taking. Little doubt as to the necessity would exist if the petitioner had merely a parol license to use the land sought to be condemned. See *Minneapolis & St. L. Ry. v. Minneapolis Western Ry.*, 61 Minn. 502, 508, 63 N. W. 1035, 1037 (1895). Or if he had only a one-year lease with an option to renew for such other time as he might retain possession of the land. *State ex rel. Preston Mill Co. v. Superior Court*, 91 Wash. 249, 157 Pac. 689 (1916). Or if the agreement had been for another route found to be impracticable for present purposes. See *State ex rel. Eastern Railway & Lumber Co. v. Superior Court*, 127 Wash. 30, 33, 219 Pac. 857, 858 (1923). The court in the instant case correctly held that the waiver clause in the contract was ineffectual. The power to take by eminent domain cannot be bargained away by contract. *Cf. Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718 (1879); *Cornwall v. L. & N. R. R.*, 87 Ky. 72, 7 S. W. 553 (1888). But

if, as the dissenting opinion insists, the right of way acquired by the petitioner under the contract was sufficient for all present and prospective needs, and no enlarged right of way was obtainable by condemnation, then it would seem that the petitioner's only object was to escape the burden of his contractual obligations. A way of necessity cannot be secured simply because it will be less expensive for the applicant than the one he already possesses. *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 Pac. 689 (1919); 1 LEWIS, *op. cit. supra* § 260.

EMPLOYERS' LIABILITY—FEDERAL ACT—PERIOD OF LIMITATIONS—ACTION FOR DEATH.—Plaintiff's testator, an employee of the defendant railroad was injured by the defendant in 1923 and died in 1928. Plaintiff brought suit in 1929 under the Federal Employer's Liability Act to recover for pecuniary loss to the testator's widow and children, alleging that the injury and death were caused by the defendant's negligence. The defendant demurred on the ground that the action was barred by the two year period of limitation imposed by the Federal Employers' Liability Act. [35 STAT. 66 (1908), 36 STAT. 291 (1910), 45 U. S. C. §§ 51-59 (1926)]. The lower court sustained the demurrer and the judgment was affirmed on appeal. *Flynn v. N. Y., N. H. & H. R. R.*, 149 Atl. 682 (Conn. 1930).

It is generally stated that the right of action for wrongful death depends upon the existence of a right of action in the decedent at the time of death so that a judgment and satisfaction, or settlement and release, obtained by the decedent, bars a subsequent action brought by the personal representative. *Seaboard Air Line Ry. v. Oliver*, 261 Fed. 1 (C. C. A. 5th, 1919); *Mellon v. Goodyear*, 277 U. S. 335, 48 Sup. Ct. 541 (1928); (1928) 13 MINN. L. REV. 47. *Contra: Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E 1075 (1915). See Schumacher, *Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114. This premise has led to the conclusion of the instant case that the right of action of the personal representative is barred if the decedent's action was not brought within the time prescribed by statute. *Cf. Rodgers v. Pa. R. R.*, 19 F. (2d) 522 (E. D. N. Y. 1927); *Kelliher v. N. Y. C. & H. R. R.*, 212 N. Y. 207, 105 N. E. 824, L. R. A. 1915E 1178 (1914). Yet some courts have reached the opposite conclusion since the requirement that the decedent should have been able to maintain an action is nowhere specifically expressed in the Federal Employers' Liability Act nor in many of the state statutes. *Western Union Telegraph Co. v. Preston*, 254 Fed. 229 (C. C. A. 3d, 1918); *Donnelly v. Chicago Ry.*, 163 Ill. App. 7 (1911); *cf. Little v. Blue Goose Motor Coach Co.*, 224 Ill. App. 427 (1927). And other courts holding contrary to the principal case, insist that the statute of limitations cannot begin to run against the claim for damages for the wrongful death until the cause of action has accrued by death having occurred. *Louisville & St. Louis R. R. v. Clark*, 152 U. S. 230, 14 Sup. Ct. 579 (1894); *German American Trust Co. v. Lafayette Box Board Co.*, 52 Ind. App. 211, 98 N. E. 874 (1912); *Causey v. Seaboard Air Line Co.*, 166 N. C. 5, 81 S. E. 917 (1914), L. R. A. 1915E 1185. The effect of the instant decision is to prohibit an action for damages for a death which takes place more than two years after the injury. It has to recommend it all the usual arguments in favor of any statute of limitations. *Cf. Baltimore & O. S. W. R. R. v. Carroll*, 50 Sup. Ct. 182 (U. S. 1930); *Reading Co. v. Koons*, 271 U. S. 58, 46 Sup. Ct. 405 (1926); (1930) 39 YALE L. J. 1067; (1926) 11 MINN. L. REV. 73; (1927) 22 ILL. L. REV. 329. And while such decisions may lead to hardship in the few cases of latent or undiscovered injuries, it would seem that a contrary holding would open the doors to a multitude of doubtful claims whenever death occurs long after the injury.

EVIDENCE—ADMISSIBILITY OF BOOK ENTRIES—CONSTRUCTION OF NEW YORK STATUTE.—In an action to recover damages for the wrongful death of the plaintiff's intestate, the defendant offered in evidence a policeman's report of the statements of bystanders filed at the station house. The New York Civil Practice Act authorizes the admission of records if "made in the regular course of any business" provided that "it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." It is further provided that: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." [N. Y. C. P. A. § 374-a, added by laws 1928, c. 532.] In sustaining the lower court's decision, the Court of Appeals held that the statute did not permit the admission of this report since it was not made in the regular course of a business or calling by persons under a duty to impart the information. *Johnson v. Lutz*, 170 N. E. 517 (N. Y. 1930).

Verified regular entries or reports are admissible as an exception to the hearsay rule when made in the regular course of business from reports of others after a showing that the original observers are deceased, insane, or absent from the jurisdiction. *American Surety Co. v. Pauly*, 72 Fed. 470 (C. C. A. 2d, 1896); *Dameron v. Harris*, 281 Mo. 247, 219 S. W. 954 (1920); *Squires v. O'Connell*, 91 Vt. 35, 99 Atl. 268 (1916). A more liberal rule in some states will now admit verified regular reports without requiring the original observers to be produced when such observers are unavailable or the cost of tracing and producing them would be prohibitory. *Reyburn v. Queen City S. B. & T. Co.*, 171 Fed. 609 (C. C. A. 3d, 1909); *Louisville & N. Ry. v. Daniel*, 122 Ky. 256, 91 S. W. 691 (1906); *Wells Whip Co. v. Tanners' Ins. Co.*, 209 Penn. 488, 58 Atl. 894 (1904); 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1530. However, in New York, as in most jurisdictions, the rule was narrowly restricted to entries of information communicated by one who had personal knowledge and whose duty it was to make the report. *Mayor v. Second Ave. R. R.*, 102 N. Y. 572, 7 N. E. 905 (1886); *cf. Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713 (1898); Comment (1927) 37 YALE L. J. 245. The restricted ruling has been severely criticized as not being in conformity with business practice. WIGMORE, *loc. cit. supra;* MORGAN AND OTHERS, LAW OF EVIDENCE (1927) 50. And the statute in the instant case was proposed in order to change the law to conform with current practices. MORGAN AND OTHERS, *op. cit. supra* at 63. It seems clear that the statute was intended to include businesses and callings of every kind and to dispense with the personal knowledge as well as the duty to make reports previously required for admissibility. See RICHARDSON, LAW OF EVIDENCE (1928) 188. In the instant case, the first under the statute, the lower court decision might well have been affirmed on the ground that the original observors were not unavailable, or upon the ground, perhaps, that the reports were not made in the course of the by-standers' "business, profession, occupation, and calling." *Cf. Pennsylvania Co. v. McCaffrey, supra.* But in upholding the lower court because the information was not "imparted by persons who were under a duty to impart such information," the court has restricted the statute to a mere codification of the rule in *Mayor v. Second Ave. R. R., supra.* But *cf.* Note (1930) 15 CORN. L. Q. 476.

MASTER AND SERVANT—SPECIAL POLICEMEN—LIABILITY OF MINE OPERATORS FOR TORTS OF COAL AND IRON POLICE.—During a strike against the

defendant coal company, the plaintiff, an officer of the Mine Workers' Union, was addressing a group of strike-breakers on the public highway when he was arrested for disorderly conduct by three coal and iron policemen. These officers had been commissioned by the Governor and invested with the powers of municipal policemen, but were selected, paid, and subject to discharge by the defendant. [PA. STAT. (West, 1920) § 18548]. The plaintiff was convicted by a magistrate, but the decision was reversed on appeal. In a subsequent suit for false imprisonment, the lower court gave judgment for the plaintiff. On appeal, this decision was reversed on the ground that the evidence was insufficient to overcome the presumption that the policemen were acting as officers of the state and not as servants of the defendant. *Fagan v. Pittsburgh Terminal Coal Corp.*, 149 Atl. 159 (Pa. 1930).

Although this is the first reported case concerning the liability of private employers for the tortious acts of members of the coal and iron police of Pennsylvania, there have been many cases concerned with the legal status of special railroad police similarly appointed and of special deputies selected and paid by private individuals. See Note (1925) 35 A. L. R. 645, 681; Note (1928) 55 A. L. R. 1197. The rule usually stated is that the employer of a special policeman is liable for the torts which the latter commits in his capacity as a private servant but not for torts committed in his capacity as an officer of the state. 39 C. J. § 1461; see *Kusnir v. Pressed Steel Car Co.*, 201 Fed. 146 (S. D. N. Y. 1912); *Tucker v. Erie R. R.*, 69 N. J. L. 19, 54 Atl. 557 (1903). Since it is for the jury to apply the rule results are not easily classified or predicted, but they are at least partly controlled by the manner in which the instructions present the issue. In jurisdictions where, because of statute or the unorthodox doctrine of the highest court, a special policeman is prima facie a private servant, the jury need determine only whether he acted within the scope of his employment; and his employer is usually held liable. *Louisville & N. R. R. v. Offutt*, 204 Ky. 51, 263 S. W. 665 (1924); *Louisville & N. R. R. v. Mason*, 199 Ky. 337, 251 S. W. 184 (1923); *Armstrong v. Stair*, 217 Mass. 534, 105 N. E. 442 (1914). In jurisdictions in which no presumption as to the officer's capacity is raised, it is entirely for the jury to determine whether the policeman acted as a public or a private servant, and his employer is often found liable. *Scipio v. Pioneer Mining & Mfg. Co.*, 166 Ala. 666, 52 So. 43 (1910); *Shope v. Alabama Fuel & Iron Co.*, 195 Ala. 312, 70 So. 279 (1915); *Sharpe v. Erie R. R.*, 184 N. Y. 100, 76 N. E. 923 (1906). But the presumption indulged in Pennsylvania and a few other jurisdictions, that the special policeman acts as a servant of the state, tends to force a finding for the defendant or a reversal of a finding for the plaintiff, so that the employer is seldom held liable. *Finfrock v. Northern C. Ry.*, 58 Pa. Sup. Ct. 52 (1914); *Layne v. C. & O. Ry.*, 66 W. Va. 607, 67 S. E. 1103 (1909). Theoretically this presumption is rebuttable by evidence showing either express or implied authority from the private employer; practically it is almost conclusive because the facts of express authority are peculiarly within the knowledge of the defendant, and implied authority may not be argued from the nature of the employment itself. *Ruffner v. Jameson Coal & Coke Co.*, 247 Pa. 34, 92 Atl. 1075 (1915); *Keidel v. B. & O. R. R.*, 281 Pa. 289, 126 Atl. 770 (1924). But *cf. Tufshinsky v. Pittsburgh, C., C. & St. L. Ry.*, 61 Pa. Sup. Ct. 121 (1915). Some courts apply the presumption only when the special policeman is also a regular member of a municipal police force and subject to the orders of the chief of police. *Pennsylvania R. R. v. Kelly*, 177 Fed. 189 (C. C. A. 2d, 1910); *Adler v. White City Const. Co.*, 147 Ill. App. 20 (1909); *Samuel v. Wanamaker*, 107 App. Div. 433, 95 N. Y. Supp. 270 (1st Dep't 1905). But its

application to cases of the instant sort disregards the fact that the coal and iron police receive orders from none but their private employers. *Cf.* Shalloo, *The Private Police of Pennsylvania* (1929) 146 ANN. AM. ACAD. SOC. & POL. SCI. 55. And the conclusion of the court is strikingly at variance with the reports of investigators who have found the coal and iron police not so much public officers as hired gunmen, whose brutal and lawless conduct has largely contributed to the bitter industrial warfare in the Pennsylvania coal mines. 1 REP. U. S. COAL COMM. 163 (1922); *cf.* LANE, DENIAL OF CIVIL LIBERTIES IN THE COAL MINES (1924) c. 4 & 5; Woltman and Munn, *Cossacks* (1928) 15 AMERICAN MERCURY 399; Chafee, *Coal and Civil Liberties,* (1923) REP. to U. S. COAL COMM. (unpublished). A recent Pennsylvania statute changes the official name of the coal and iron police to Industrial Police and requires bonds for the faithful performance of their duties [Pa. Laws 1929, No. 243]; but this statute does not seem to affect the civil liability of the policemen or the employers and has been characterized as an ineffective gesture. Shalloo, *op. cit. supra.* That the application of stricter rules of liability might have been a more effective check on lawless conduct the court apparently did not consider. The case seems an unfortunate example of the mechanical application of rules of vicarious liability without regard to the social factors which underlie them and the practical consequences which they may produce. *Cf.* Laski, *The Basis of Vicarious Liability* (1916) 26 YALE L. J. 105.

MUNICIPAL CORPORATIONS—PROFIT-PRODUCING ENTERPRISES—CONSTITUTIONAL DEBT LIMITS.—Defendant city planned to enter into a contract for the erection and subsequent purchase of an electrical power plant and distributing system. The contract provided that the purchase price was not a general liability of the municipality but was payable in installments from a special fund supplied from rates collected for the service and that no payments would be made unless the fund were sufficiently large to meet the installments falling due. A writ prohibiting the municipality from entering into the contract was granted by the trial court. Upon appeal the writ was made permanent on the ground that such a contract was in violation of Art. 8, § 3 of the Constitution of Idaho providing: "No . . . city . . . shall incur any indebtedness or liability in any manner or for any purpose exceeding in that year the income and revenues provided for it for such year without assent of two-thirds of the qualified electors thereof . . . ." *Miller v. City of Buhl,* 284 Pac. 843 (Idaho 1930).

The purpose of constitutional provisions limiting municipal indebtedness is to curb reckless expenditures and limit improvements to a pay-as-you-go plan. 6 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 2365. Some courts, mindful of this purpose, maintain that a contract amounting to a total obligation exceeding the difference between the total annual indebtedness which the city may incur and the liabilities already incurred in that year is void, even though the contractual obligation is payable in annual installments no one of which would in any year raise the city's liabilities beyond the constitutional limit. *Jones v. Rutherford,* 225 Ky. 773, 10 S. W. (2d) 296 (1928). *Cf. Muir v. Murray City,* 55 Utah 368, 186 Pac. 433 (1919). These constitutional provisions have been successfully evaded by "piece-meal construction" contracts. *Falls City Construction Co. v. Fiscal Court,* 160 Ky. 623, 170 S. W. 26 (1914). Likewise the constitutional exemption for "necessary expenses" has lent itself to the same purpose. *Caldwell County v. Sidney Spitzer & Co.,* 173 N. C. 147, 91 S. E. 707 (1917) (county orphans' home); *Lacy v. Fidelity Bank,* 183 N. C. 373, 111 S. E. 612 (1922) (schoolhouse under compulsory education act); *Jones v. Power County,* 27 Idaho 656, 150 Pac. 35 (1915) (county

house in newly organized county). But *cf. Hollowell v. Borden*, 148 N. C. 255, 61 S. E. 638 (1908) (schoolhouse before compulsory education act); *Ball v. Bannock County*, 5 Idaho 602, 51 Pac. 454 (1897) (county building). In profit-producing enterprises the debt limitation provision is applicable to contracts providing for annual installment payments, which are to be within the income from the industry for each year, whenever the project involves a possible liability of the municipality if the income should fall short of the annual payment. *Holmgren v. City of Moline*, 269 Ill. 248, 109 N. E. 1031 (1915); *Lobdell v. City of Chicago*, 227 Ill. 218, 81 N. E. 354 (1907). *Ironwood Waterworks Co. v. Trebilcock*, 99 Mich. 454, 58 N. W. 371 (1894). *Contra: City of Bowling Green v. Kirby*, 220 Ky. 839, 295 S. W. 1004 (1927) (statutory mortgage lien would permit bondholders to enforce all mortgage rights except compulsory sale of property). The tendency is, however, to hold the constitutional provision inapplicable whenever the contract contains a stipulation, as in the instant case, that the municipality has no liability beyond making annual payments from a special fund when, and only when, the income from the enterprise swells the fund sufficiently to allow the payment. *Twichell v. City of Seattle*, 106 Wash. 32, 179 Pac. 127 (1919); *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888 (1895); *cf. Shelton v. City of Los Angeles*, 275 Pac. 421 (Cal. 1929). *Contra: Feil v. Coeur d'Alene*, 23 Idaho 32, 129 Pac. 643 (1912), 43 L. R. A. (N.S.) 1095 (1913); *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839 (1912) (property subject to foreclosure proceedings in default of payments even though city expressly absolved from any liability in the contract). Unqualified adherence to a single precedent seems to be the major justification for the instant holding. *Cf. Feil v. Coeur d'Alene*, *supra*. The undoubted benefits to a community from a profit-producing enterprise which the members of the community finance and to some degree control, and the contractual stipulations throwing the risk of loss upon the subscribers rather than upon the city, would seem to indicate that the constitutional provisions regarding limitations on municipal indebtedness were never intended for the situation presented by the instant case. *Cf.* DODD, STATE GOVERNMENT (2d ed. 1928) 467.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND—CREDITOR-BENEFICIARIES—LAW AND EQUITY.—Plaintiff and defendant were lessees of stores in the same building. The lessor of the plaintiff's assignor had covenanted not to let any other store for a restaurant during the term of that lease. In the defendant's lease from a subsequent owner was a provision against his use of the premises as a restaurant until after the expiration of the prior lease, which had previously been assigned to the plaintiff. In an action for damages for violation of that covenant by the defendant, a motion to dismiss the complaint was granted, the court holding that the covenant by the original lessor created a right in the plaintiff enforceable only in equity, and that the covenant in the defendant's lease was not made for the plaintiff's benefit. *Safran v. Westrich*, 240 N. Y. Supp. 238 (Sup. Ct. 1930).

Among the contracts generally recognized as creating a legal right in a stranger to the agreement are those of the "creditor-beneficiary" type in which the promise sought to be enforced has been procured for the purpose of discharging a legal or equitable obligation owed by the promisee to the beneficiary. *Lawrence v. Fox*, 20 N. Y. 268 (1859); 1 WILLISTON, CONTRACTS (1920) §§ 362, 381; Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE L. J. 1008, 1013. *Contra: National Bank v. Grand Lodge*, 98 U. S. 123 (1878). It is submitted that such an obligation existed in the instant case, since the defendant's promisee and the plaintiff

were assignees respectively of the lessor covenantor and the lessee covenantee. When an owner of property leases a portion thereof to be used for a definite purpose, at the same time covenanting not to let any part of the residue for competitive use, the benefit of such covenant may run with the term at law. *Norman v. Wells*, 17 Wend. 136 (N. Y. 1837); *Ricketts v. Enfield Churchwardens*, [1909] 1 Ch. 544; *cf. Union Bank v. Segur*, 39 N. J. L. 173 (1877); see Ames, *Lectures on Legal History* (1913) 388; Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 YALE L. J. 123, 128. *Contra: Thomas v. Hayward*, L. R. 4 Ex. 311 (1869). It is true that the burden cannot run with the reversion, when it affects only property separate and distinct from the demised premises. *Dewar v. Goodman*, [1907] 1 K. B. 612; *Thruston v. Minke*, 32 Md. 487 (1870); Bigelow, *The Contents of Covenants in Leases* (1914) 12 MICH. L. REV. 639, 657, (1914) 30 L. Q. REV. 319, 337. Yet the burden might well be said to attach to the restricted property, and some cases, apparently adopting this view, have held that the assignee of the lessor's interest in both the leased and the restricted premises was bound at law by the covenant. *Athol v. R. R.*, 3 Ir. R. C. L. 333 (1868); *cf. Noonan v. Orton*, 27 Wis. 300 (1820); CLARK, REAL COVENANTS (1929) 75 *et seq.* Moreover, such a covenant is frequently enforced according to the equitable principle binding subsequent holders of the restricted property, who take with notice of the covenant. *Tulk v. Moxhay*, 2 Ph. 774 (1848); *Snavely v. Berman*, 143 Md. 75, 121 Atl. 842 (1923); *McBride Realty Co. v. Grace*, 15 S. W. (2d) 957 (Mo. App. 1929); 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1425; Clark, *The Assignability of Easements, Profits and Equitable Restrictions* (1928) 38 YALE L. J. 139. Whichever theory be adopted, the lessor's assignee is under a definite obligation to the lessee of such a nature as to satisfy the requirements of the creditor-beneficiary doctrine. *Vogeler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928); Note (1928) 13 CORN. L. Q. 619. Moreover this obligation is not discharged by literal compliance with the covenant not to rent, but requires affirmative effectuation of the intended result. *Snavely v. Berman, supra; Hiatt Inv. Co. v. Buchler*, 16 S. W. (2d) 219 (Mo. App. 1929); see (1929) 29 COL. L. REV. 1161. Since the provision in the instant defendant's lease was inserted for the sole purpose of discharging that obligation, the plaintiff was clearly entitled to sue at law on the promise. Furthermore, the court conceded the plaintiff a cause of action in equity. And since the codes supposedly eliminate the formal distinction between suits at law and suits in equity, the dismissal of an otherwise valid complaint because it proceeded upon a mistaken legal theory would seem entirely unjustified. *Cf. Phillips v. Gorham*, 17 N. Y. 270 (1858); *N. Y. Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357 (1861); Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1. But *cf. Reubens v. Joel*, 13 N. Y. 488 (1856); *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917).

TRIAL—POLLING OF JURY—EFFECT OF A JUROR'S DISSENT.—A jury brought in a verdict for the defendant. Counsel for the plaintiff requested a poll, and one juror replied that it was not his verdict. Upon detailed questioning by the court it appeared that the juror had finally consented to the verdict, after it had been agreed in the jury-room that a three-fourths majority vote should decide. The trial court overruled a motion for a new trial. On appeal, it was held that after the juror had replied that the verdict was not his, it was reversible error to receive and record it. *Sanders v. Charleston Ry.*, 151 S. E. 438 (S. C. 1930).

Members of a jury usually may not impeach their own verdict. *Sanitary*

*District v. Cullerton,* 147 Ill. 385 (1893); *State v. Cash,* 138 S. C. 167, 136 S. E. 222 (1926). But see (1923) 32 YALE L. J. 503 (exceptions to general rule). Polling the jury, however, seems never to have been considered an attempt to impeach the verdict. See 2 THOMPSON, TRIALS (2d ed. 1912) § 2632; *cf. Bishop v. Muggler,* 33 Kan. 145, 5 Pac. 756 (1885); *Root v. Sherwood,* 6 Johns. 68 (N. Y. 1810). If upon a poll one or more jurors dissent from the verdict as announced by the foreman, in a large majority of jurisdictions it is held proper to order the jury to retire for further deliberation. *State v. Waltermath,* 162 Wis. 602, 156 N. W. 946 (1916); *Macon Ry. v. Barnes,* 121 Ga. 444, 49 S. E. 282 (1904); *State v. Johnson,* 141 La. 775, 75 So. 678 (1917); *cf. Kramer v. Kister,* 187 Pa. 227, 40 Atl. 1008 (1898) (dissent by a juror in open court a mistrial). In many states, questions on the poll are limited strictly to the fact of the juror's concurrence in the verdict. *Moss v. State,* 152 Ala. 30, 44 So. 598 (1907) (improper to ask if juror gave up honest convictions); *State v. Hubbs,* 294 Mo. 224, 242 S. W. 675 (1922). In others, even where a juror at first hesitates, if he finally states that he consented to the verdict it will be sustained. *Hughes v. Detroit Ry.,* 78 Mich. 399, 44 N. W. 396 (1899) (juror finally assented to verdict after being twice stopped by court from making speech); *State v. Asher,* 63 Mont. 302, 206 Pac. 1091 (1922) (juror first replied he concurred only with understanding sentence would be suspended, then agreed it was his verdict); *State v. Millroy,* 103 Wash. 193, 174 Pac. 10 (1918) (juror answering "it was either that or a hung jury," told to answer "yes" or "no," replied "yes"); *State v. Nutter,* 99 W. Va. 146, 128 S. E. 142 (1925) (juror declared his assent to verdict based upon jury-room compromise). It would seem, however, that the better rule would permit a juror to dissent from the verdict as agreed until the time when it is recorded in open court, thereby minimizing the danger of intimidation of a minority in the jury room. *Cf. Devereux v. Champion Cotton Co.,* 14 S. C. 396 (1880); *Weeks v. Hart,* 24 Hun. 181 (N. Y. 1881). The rule of the instant case likewise prevents the trial court from inquiring beyond the juror's present declaration that the verdict is not his and perhaps sustaining the verdict by persuading him to admit that he did assent to it in the jury-room.

TRUSTS—CY PRES—EDUCATIONAL BEQUESTS—GENERAL OR SPECIFIC INTENT.—The testator left a legacy to Harvard University to be used in founding courses in eugenics relating particularly to the treatment of defective and criminal classes by surgical procedures as advocated in a book published by the testator. Harvard University refused the bequest and the lower court appointed a new trustee to administer the fund *cy pres.* The plaintiff, the testator's administrator, appealed on the ground that the charitable gift had been created on a condition or for a special purpose, which had failed, and that the legacy therefore reverted to the testator's heirs. The judgment of the lower court, however, was affirmed. *In re Mears' Estate,* 149 Atl. 157 (Pa. 1930).

In the United States the judicial *cy pres* doctrine is usually invoked to prevent the failure of a valid educational trust if the donor has manifested a general charitable intent. *In re Hunter's Estate,* 279 Pa. 349, 123 Atl. 865 (1924); ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) § 123; see (1930) 39 YALE L. J. 437. A few states have repudiated the doctrine. *Mars v. Gibert,* 93 S. C. 455, 77 S. E. 131 (1913); *Trustees of Cumberland University v. Caldwell,* 203 Ala. 590, 84 So. 846 (1920): see (1923) 8 CORN. L. Q. 179. And in no state can the trustees apply it on their own initiative. *Lakatong Lodge v. Board of Education,* 84 N. J. Eq. 112, 92 Atl. 870 (1915); *Trustees of Andover Theological Seminary v. Visitors*

*of Andover Theological Institution*, 253 Mass. 256, 148 N. E. 900 (1925); (1926) 35 YALE L. J. 643. Moreover any alterations in the donor's scheme will be forbidden if the donor's intention, as evidenced by the wording of the instrument or the purpose of the gift, is interpreted as specific. *Harvard College v. Attorney Gen.*, 228 Mass. 396, 117 N. E. 903 (1917). But *cf. Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N. W. 496 (1922) (gift to a college on condition that it never be diverted and that the college be named after the donor could be administered by another college). If the intent is said to be general, as in the instant case, the proposed alteration must nevertheless conform as nearly as possible to the donor's directions. *Mason v. Bloomington Library Ass'n*, 237 Ill. 442, 86 N. E. 1044 (1909) (fund to establish an art gallery connected with a certain library might be similarly administered by another library); *Trustees of Rush Medical College v. Chicago University*, 312 Ill. 109, 143 N. E. 434 (1924) (gifts to medical school in Chicago could be used by Chicago University for medical education); *Trustees of Methodist Episcopal Church v. Scarritt Collegiate Institute*, 264 Mo. 713, 175 S. W. 571 (1915) (gift to church college might be intrusted to another college under same church, but could not be used for education only nor for building a church); *cf. Curtis & Barker v. University of Iowa*, 188 Iowa 300, 176 N. W. 330 (1920) (gift to a Baptist college on condition the college remain in the town of Pella under Baptist control could not be transferred to a Dutch Reformed college in Des Moines). It is generally held that *cy pres* can not be invoked unless alterations in the settlor's original scheme be deemed absolutely necessary. *Harvard College v. Society for Theological Education*, 3 Gray 280 (Mass. 1885) (inapplicable to authorize separation of college and theology department on grounds of expediency); *Allen v. Trustees of Nasson Institute*, 107 Me. 120, 77 Atl. 638 (1910) (not applicable although fund was at the time insufficient to form specified school); *Harvard College v. Att'y Gen., supra*. But *cf. Ely v. Malone*, 202 Mass. 545, 89 N. E. 166 (1909) (applied where fund was insufficient to build school). A few courts have held that expediency is sufficient to justify alterations *cy pres*. *Adams Female Academy v. Adams*, 65 N. H. 225, 18 Atl. 777 (1889) (funds for private girls school, no longer wanted, used for public schools of both sexes); *Inglish v. Johnson*, 95 S. W. 558 (Tex. Civ. App. 1906) (same). Inasmuch as it seems a questionable policy, particularly in educational matters, to allow deceased individuals to control the disposition of funds, according to ideas which have become antiquated or impracticable, those decisions which invoke the doctrine of *cy pres* on the ground of expediency seem highly commendable. See Scott, *Education and the Dead Hand* (1920) 34 HARV. L. REV. 1. Moreover, since the donor's general or specific intention is so frequently, as in the instant case, a matter of speculation, there is little justification for permitting a narrow interpretation to defeat the trust where a broad one, which would sustain it, is possible. *Cf.* Willard, *Illustrations of the Origins of Cy Pres* (1894) 8 HARV. L. REV. 69.

ZONING—LAND VALUE DEPRECIATION CAUSED BY ORDINANCE AS GROUND FOR RELIEF.—The petitioner owned unimproved land on a main thoroughfare in the immediate vicinity of a business development. Evidence showed that for commercial purposes the property was worth from $90,000 to $100,000, and for residential purposes from $12,500 to $20,000. A zoning ordinance was passed classifying the property as restricted to residential use. The complainant then petitioned the board of adjustment for the removal of his land from the zoned district. Later, without having appealed from the adverse ruling of the board on his request, he filed a petition under

the Uniform Declaratory Judgment Act to determine the constitutionality of the ordinance as applied to his land. The trial court found, in addition to the loss in value, that the property was unsuitable for residential purposes and especially adaptable for business use, and that by putting it to commercial use adjacent property values would not be adversely affected. It held that the application of the ordinance to this particular property was therefore unreasonable and confiscatory, and that the ordinance was in that respect unconstitutional. On appeal, the judgment was affirmed. *Taylor v. Haverford Township*, 149 Atl. 639 (Pa. 1930).

It has often been judicially asserted that the courts will not interfere with the determinations of zoning authorities unless it is clear that the restrictions sought to be imposed bear no real or substantial relationship to public health, safety, or welfare. See *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395, 47 Sup. Ct. 114, 121 (1927); *People v. Clarke*, 216 App. Div. 351, 361, 215 N. Y. Supp. 190, 196 (2d Dep't 1926). Hence the fact that an ordinance causes a depreciation in property values should not of itself have any weight. *Cf. Ware v. Wichita*, 113 Kan. 153, 214 Pac. 99 (1923); *Wulfsohn v. Burden*, 241 N. Y. 288, 150 N. E. 120 (1925). Nevertheless the question arises constantly, especially where property which is restricted under a zoning ordinance to residential development could be used more profitably for commercial purposes. *Cf. Zahn v. Board of Public Works*, 274 U. S. 325, 47 Sup. Ct. 594 (1927); *Spector v. Building Inspector*, 250 Mass. 63, 145 N. E. 265 (1924). In such instances, elements of special or great hardship are frequently held to justify relief in the individual case. *Heffernan v. Board of Appeal*, 144 Atl. 674 (R. I. 1929). It is fairly well settled, for instance, that if the land is so unfit for the use to which it is limited by the ordinance that it will become worthless if thus restricted, the ordinance will not be enforced. *Terrace Park v. Errett*, 12 F. (2d) 240 (C. C. A. 6th, 1926) (gravel bed zoned for residential use); *North Muskegon v. Miller*, 249 Mich. 52, 227 N. W. 743 (1929) (marsh land restricted to residential development). But *cf. Marblehead Land Co. v. Los Angeles*, 36 F. (2d) 242 (S. D. Cal. 1929) (oil land zoned and held suitable for residential purposes). Some courts have gone farther and held that where the loss is great, the mere fact that land zoned for residences is within or in close proximity to a business district may warrant relief. *Willerup v. Hempstead*, 120 Misc. 485, 199 N. Y. Supp. 56 (Sup. Ct. 1923); *Sundlun v. Board of Appeal*, 145 Atl. 451 (R. I. 1929). Where none of these factors is unqualifiedly present but where the value of the land has so depreciated on account of the zoning ordinance that there can be no adequate return on any investment for its development, the decisions are not uniform. *Cf. Nectow v. Cambridge*, 277 U. S. 184, 48 Sup. Ct. 447 (1928) (relief granted); *American Wood Products Co. v. Minneapolis*, 35 F. (2d) 657 (C. C. A. 8th, 1929) (relief refused). The instant case, on its facts, can doubtless be brought within one of the established categories where relief is allowed. Yet the exclusive emphasis placed by the court on loss in value seems unfortunate, since the salutary effects of zoning will be jeopardized if that criterion comes to be regarded as decisive. See Comment (1930) 39 YALE L. J. 735, 737.