

RECENT CASE NOTES

ADMIRALTY—APPLICATION OF JONES ACT IN DEATH ACTION—STATE STATUTE REMEDIES.—An American citizen was killed while in the employ of a Delaware stevedoring concern on defendant's ship, a German vessel anchored within the territorial waters of New Jersey. In an action by the personal representative, a judgment of dismissal was entered. *Held*, on appeal, (one judge *dissenting*) that the judgment be affirmed, since the sole remedy in admiralty is by virtue of the Jones Act which applies only to seamen on American vessels. *Resigno v. F. Jarka Co.*, 223 N. Y. Supp. 5, 1927 Am. Mar. Cas. 1488 (1st Dept. 1927).

The Jones Act. [41 Stat. 1007 (1920), 2 U. S. Comp. Stat. (Supp. 1923) § 8337 a] applies to American seamen in foreign ports. *Wenzler v. Robin Line*, 277 Fed. 812 (N. D. Wash. 1921). But not to foreign seamen in American ports. *The Pinar Del Rio*, 16 F. (2d) 984 (C. C. A. 2d, 1927). There is conflict as to whether it applies to American stevedores on foreign vessels within American waters. *Cf. Stewart v. Pacific Nav. Co.*, 3 F. (2d) 329 (S. D. N. Y. 1924); *Clark v. Montezuma*, 217 App. Div. 172, 216 N. Y. Supp. 295 (2d Dept. 1926). Actions by non-articled seamen have been governed by the *lex loci delicti*. *The Sammanger, Marshall v. Westfal, Larsen & Co.*, 298 Fed. 620 (S. D. Ga. 1924); *The Cuzco*, 225 Fed. 169 (N. D. Wash. 1915). This result is desirable in the case of a stevedore, hired indirectly, and not a part of the "ships internal discipline." See *Wenzler v. Robin Line*, *supra* at 814. *Contra: Clark v. Montezuma, supra*. The Jones Act purports to benefit the "merchant marine." Thus it might be applied in the instant case either to prevent possible discrimination against American ships in respect to tort responsibility, or to benefit *all* American stevedores. A contrary result could be justified to induce employment on American vessels. Admiralty courts have taken cognizance of State Death Statutes. *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133 (1907); *Patton-Tully Transp. Co. v. Turner*, 269 Fed. 334 (C. C. A. 6th, 1920). But not Workmen's Compensation Acts, when in conflict with the Uniformity Rule announced in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (1917). *State v. Dawson*, 264 U. S. 219, 44 Sup. Ct. 302 (1924). Thus the plaintiff in this case is barred of that remedy. Workmen's Compensation Acts still apply if the injury does not occur on navigable waters. *Industrial Comm. v. Nordenholt*, 259 U. S. 263, 42 Sup. Ct. 473 (1922) (workmen injured on dock). Or if it did not arise out of a maritime contract. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 42 Sup. Ct. 157 (1922) (carpenter worked on land but injured after ship launched). Workmen's Compensation Acts, whenever applicable, exclude Death Statutes. *Bloom v. Furness-Withy*, 293 Fed. 98 (S. D. Cal. 1923). When, however, they do not afford an adequate remedy, the State Death Acts have been held to apply. *Roswall v. Grays Harbor Stevedoring Co.*, 132 Wash. 274, 231 Pac. 934 (1925); *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 Sup. Ct. 89 (1921). The New York court can recognize a foreign Death Statute when applicable. *Johnson v. Phoenix Bridge Co.* 197 N. Y. 316, 90 N. E. 953 (1910). It is suggested that the plaintiff might be granted relief apart from the Jones Act if the instant court recognized the New Jersey Death Statute. *Cf. The James McGee*, 300 Fed. 93 (S. D. N. Y. 1924). Query, whether this would violate the principle of "uniformity." *Cf. Southern Pacific Co. v. Jensen, supra*; Magruder and Grout, *Wrongful Death Within the Admiralty Jurisdiction* (1926) 35 YALE LAW JOURNAL 395, 428.

AGENCY—RESPONSIBILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—The plaintiff, while attending a pyrotechnical exhibition connected with a fair held under the auspices of the defendant, was injured by fireworks negligently set off. The defendant contended that the fireworks exhibitor was an independent contractor and that the defendant was, therefore, not responsible. The trial court found the evidence insufficient to sustain the defense. *Held*, on appeal, that the judgment for plaintiff be affirmed since the defendant's contention, if proved, would not constitute a defense. *Wilson v. Thayer County Agricultural Soc.*, 213 N. W. 966 (Neb. 1927).

It was formerly held that a contractee was responsible for the negligence of an independent contractor. *Bush v. Steinman*, 1 Bos. & P. 404 (1790). But this rule has been generally abrogated. *Laffery v. United States Gypsum Co.*, 83 Kan. 349, 111 Pac. 498 (1910); *Reedie v. The London & N. W. Ry. Co.*, 4 Exch. 244 (1849); 2 Mechem, *Agency* (2d. ed. 1914) §§ 1917-18. However, he may contract to assume entire tort responsibility. *Maryland Dredging & Contracting Co. v. State of Maryland*, 262 Fed. 11 (C. C. A. 4th, 1919). And sometimes responsibility is imposed by statute. *Girdzus v. Van Etten*, 211 Ill. App. 524 (1918). But such statutory responsibility must not be so imposed as to discriminate against particular individuals, thus violating the Fourteenth Amendment. *Vigant v. Postal Telegraph Cable Co.*, 157 N. E. 651 (Mass. 1927) (statute imposed absolute responsibility on telegraph companies, alone, for injuries from wires, poles, or other apparatus). Another exception to the general rule is recognized when the contract necessitates an unlawful act or a nuisance. *Ellis v. The Sheffield Gas Consumers Co.*, 2 El. & Bl. 767 (1853); *Buchholz v. Standard Oil Co.*, 211 Mo. App. 397, 244 S. W. 973 (1922). Or extra-hazardous and "inherently dangerous" work. *Bower v. Peate*, 1 Q. B. D. 321 (1876) (excavating dangerously close to neighbor's foundations); *Ashcville Const. Co. v. Southern Ry. Co.*, 19 F. (2d) 32 (C. C. A. 4th, 1927) (blasting); *Bianki v. Greater American Exposition*, 3 Neb. (Unof.) 656, 92 N. W. 615 (1902) (fireworks exhibition). Or as it is sometimes called, "work subjecting person or property to probable injury." *Continental Paper Bag Co. v. Bosworth*, 276 S. W. 170 (Tex. Com. App. 1925) (printing without customary protective screen for molten metal); *Cole v. City of Durham*, 176 N. C. 289, 97 S. E. 33 (1918) (loading coke through coal doors in sidewalk); *North American Dredging Co. v. Pugh*, 196 S. W. 255 (Tex. Civ. App. 1917) (silt cast on another's land as the inevitable result of dredging); *Trump v. Bluefield Waterworks & Improvement Co.*, 99 W. Va. 425, 129 S. E. 309 (1925) (flood from partially constructed dam broken by extraordinary but not unprecedented freshet). Thus the constantly increasing number of cases brought within the last exceptions indicate a reaction towards the rule of *Bush v. Steinman*. The instant case is fully in accord with this prevailing tendency, holding certain duties non-delegable and creating almost absolute responsibility.

ARBITRATION—PENDING ACTIONS—REFERENCE IRREVOCABLE BEFORE AWARD.—Pending an action at law, the parties entered into a written stipulation waiving jury trial and submitting all issues to the trial judge as arbitrator for final determination. After submission, but before award, the defendant sought to revoke by filing with the court an appropriate written instrument, but was denied power to do so. *Held*, on appeal, that the judgment be affirmed since the court, by accepting and acting on the stipulation, adopted it as a "special rule of court," thereby making it irrevocable. *Hastings v. Jones*, 18 F. (2d) 833 (C. C. A. 7th, 1927).

Revocation of a submission to arbitration results by implication of law when the arbitrator dies before award. *Parsons v. Ambos*, 121 Ga. 98,

48 S. E. 696 (1904). Or refuses to act. *Wolf v. Augustinc*, 181 Pa. 576, 37 Atl. 574 (1897). So, too, it has been held that there is an implied revocation where one of the parties dies. *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793 (1900). *Contra: Bash v. Christian*, 77 Ind. 290 (1881). Likewise in case of lunacy or bankruptcy. See *Sutton v. Tyrrell*, 10 Vt. 91, 94 (1838). Or the marriage of a femme sole. *Abbott v. Keith*, 11 Vt. 525 (1839). At common law an ordinary reference to arbitrators is revocable by either party before award. *Venyor's Case*, 8 Co. 81 b; *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398 (C. C. A. 6th, 1909). But where it concerns a dispute already in litigation, it becomes irrevocable upon the stipulation becoming a part of the court record, *i. e.*, it is treated as a "rule of court." *Keavy v. Shisler*, 8 Phil. 54 (Pa. 1871); *Zehner v. Lehigh Coal & Navigation Co.*, 187 Pa. 487, 41 Atl. 464 (1898). Such submission has been analogized to a trial before a jury; in neither can the proceedings be stopped by one party. *Haskell v. Whitney*, 12 Mass. 47 (1815). Even a mutual agreement to withdraw the reference has been held inoperative without a court order. *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 128 Pac. 663 (1912). Its revocation rests within the discretion of the court. *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114 (1909). But the mere pending litigation of the controversy is insufficient to make its submission to arbitration one by rule of court when it has not become a part of the court records. *Minneapolis & St. Louis Ry. v. Cooper*, 59 Minn. 290, 61 N. W. 143 (1894). Some states provide by statute that a submission may be made so by the parties thereto. *Cf. Pa. Stat. (West, 1920) § 597*. In each such jurisdiction, the question of revocation must be viewed with regard to the terms of the particular statute. In the instant case, the court has, in the absence of regulating statute, apparently construed the submission to be by "rule of court" because of the mode of procedure of the trial court. This would appear to be a desirable step towards establishing arbitration as an inexpensive, speedy, and economically justifiable method of settling disputes. See *Martin v. Vansant*, 99 Wash. 106, 108, 168 Pac. 990, 991 (1917).

ARBITRATION AND AWARD—QUALIFICATION OF ARBITRATORS—INTERSTATE COMMERCE COMMISSION HELD INELIGIBLE.—By agreement the parties submitted a controversy with reference to certain demurrage charges to the Interstate Commerce Commission. The Commissioners ruled in favor of the plaintiff who brought an action on the award. *Held*, on appeal from judgment for plaintiff, (one judge *dissenting*) that no valid award existed upon which an action could be predicated, since the I. C. C. was a corporate entity whose delegated powers did not include that of arbitration. *Davis v. Rochester Can Co.*, 220 App. Div. 487, 221 N. Y. Supp. 660 (4th Dept. 1927).

Generally, anyone mutually selected by the parties to a dispute is a competent arbitrator. Russell, *Arbitration and Award* (10th ed. 1919) 33. Thus, an ecclesiastical court, *Poggenburg v. Corniff*, 23 Ky. Law Rep. 2463, 67 S. W. 845 (1902); a committee of a board of trade, *Vaughn v. Herndon*, 91 Tenn. 64, 17 S. W. 793 (1891); judges, *Hasting v. Jones*, 18 F. (2d) 833 (C. C. A. 7th, 1927); and ministers of foreign governments, *Gernon v. Cothran*, 10 Fed. Cas. No. 5,368 (1804), have been adjudged qualified arbitrators. State statutes generally contain no provision regarding qualifications of arbitrators. *Year Book on Commercial Arbitration* (1927) Annex 1. Some states merely provide for "one or more persons" to so act. Cal. C. C. P. (1923) § 1282; Ill. Rev. Stat. (Smith, 1921) c. 10, § 2; Mo. Rev. Stat. (1919) § 596; Idaho Comp. Stat. (1919) § 7429. Others qualify "any person mutually agreed upon." Ohio Ann. Gen. Code (Page, 1926) § 12148; Ind. Ann. Stat. (Burns, 1926) § 926; Or. Gen. Laws (1925) c. 186, § 1; Wash. Comp. Stat. (Rem. 1922) § 420. The usual grounds for incompetency leading to avoid-

ing of awards are bias, partiality, or prejudgment of dispute. See *Brocklehurst and Potter Co. v. Marsh*, 225 Mass. 3, 8, 113 N. E. 646, 649 (1916). So too where a relationship through affinity, consanguinity, or business exists. *Stone v. Johnston*, 167 Mo. App. 456, 151 S. W. 937 (1912); Russell, *op. cit. supra*, at 35. Even these qualifications are waived when the parties appoint the arbitrators with knowledge of such disqualification. *State v. Bowley*, 74 Wash. 54, 132 Pac. 723 (1913). The I. C. C. in the instant case comes within none of these disqualifications and the New York arbitration statute provides for no qualifications for arbitrators. N. Y. Cons. Laws (Cahill, 1923) c. 72. Nothing appears to indicate that the commission sought to give official significance to its award, hence its limited corporate powers would appear to be immaterial. The benefits of arbitration might well have been attained by treating the award as that of "one or more arbitrators" mutually agreed upon. See Grossman, *Trade Security Under Arbitration Laws* (1926) 35 YALE LAW JOURNAL 310.

BANKS AND BANKING—ASSESSMENT PAID BEFORE LIQUIDATION NOT DEDUCTIBLE FROM "DOUBLE LIABILITY."—The share-holders of a bank paid a 50% voluntary assessment on their capital stock in accordance with the bank examiner's recommendation. The bank nevertheless failed two months later and the shareholders were permitted to deduct the 50% assessment already paid from their "double liability." *Held*, on appeal, that the judgment be reversed since the prior 50% assessment was utilized in keeping the bank open and not for the sole benefit of creditors. *Andrew v. Farmers' Trust and Savings Bank*, 213 N. W. 925 (Iowa, 1927).

The instant decision is in line with precedent. *Citizens' Bank v. Needham*, 120 Kan. 523, 244 Pac. 7, 45 A. L. R. 1215 (1926) annotation; *Duke v. Force*, 120 Wash. 599, 208 Pac. 67; see 23 A. L. R. 1367 (1922) annotation; but *cf.* Ann. Cas. 1913 D, 71, annotation. And the same result is reached if the first assessment is ordered rather than recommended. *Broadbent v. McFerson*, 80 Colo. 264, 250 Pac. 852 (1926); *Blackert v. Lankford*, 74 Okla. 61, 176 Pac. 532 (1918). Even a 100% assessment, levied by a state banking commissioner acting ultra vires and paid involuntarily by the shareholders did not excuse subsequent "double liability." *Duke v. Force, supra*. It has been said that assessments prior to liquidation ought never be deducted. See *Chapman v. Hopper*, 261 S. W. 166, 168 (Tex. Civ. App. 1924). But an assessment paid shortly before the bank's failure, and actually used for the benefit of creditors could be so allowed with fairness. It is obviously good policy to require banks to be financially sound. But it is questionable whether such a result can not more justly be achieved by stricter requirements of capitalization at the time of incorporation, than by adopting the rule of the instant case. See *N. Y. Tribune*, Fri. Sept. 23, 1927, 40. And although a small number of local shareholders, intimately connected with the management and affairs of the bank may be justly subjected to the rigorous penalty prescribed by the rule of the instant case, yet where the bank stock is widely scattered and is held on an investment basis, an excessive preference of creditors to shareholders is more questionable. "Double liability" itself in such case has been severely attacked. MacNaghten, *The Double Liability Clause* (1908) 28 CANADA L. T. & REV. 909. The New York court did allow the set off of an assessment paid after liquidation, which was apparently intended to assist the bank in resuming business. *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786 (1913).

BANKS AND BANKING—DEPOSITS—RESPONSIBILITY OF BANK CREDITING TO AGENT'S ACCOUNT CHECKS WRONGFULLY DRAWN TO HIS OWN ORDER.—The respondent's son, with power of attorney given him by his father, drew

checks over a period of two years against his father's account and deposited them to his own private account with petitioner, all but two checks being certified by the drawee bank. The son absconded. The District Court and Circuit Court of Appeals held the petitioner to be on notice from the form of the checks and manner of deposit. *Held*, on appeal, that judgment for respondent should be reversed, since the "court below applied too strict a rule to an ordinary business transaction." *Empire Trust Co. v. Cahan*, 47 Sup. Ct. 661 (U. S. 1927).

The position taken by the court in this decision has been widely favored. See (1926) 10 MINN. L. REV. 611; Note (1926) 75 U. PA. L. REV. 64; Comment (1926) 35 YALE LAW JOURNAL 854. *Contra*: Merrill, *Bankers' Liability for Deposits of a Fiduciary to His Personal Account* (1927) 40 HARV. L. REV. 1077. Although the decision deals only with one of the several ways in which the general problem may be presented, it seems fair from the language of the court to assume that the other variations would be similarly decided in harmony with the trend of decisions in the state courts. See Comment (1926) 35 YALE LAW JOURNAL 854. In particular it may be noted that no distinction for this purpose was made between deposits of certified and uncertified checks. *Cf. Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 138 N. E. 33 (1923). The court, however, intimated that a different rule might, in exceptional cases, apply to deposits of corporate checks drawn by an officer to his own order and deposited to his personal account. Such a result has been reached with regard to corporate receivables indorsed by an officer and deposited in his personal account, although perhaps within the unauthorized indorsement theory. *Wagner Trading Co. v. Battery Park Nat'l Bank*, 228 N. Y. 37, 126 N. E. 347 (1920). The uncertainty prevailing in the federal and state decisions in New York resulted in an amendment to § 56, N. I. L. (Uniform Enumeration) providing in certain circumstances that a bank receiving checks drawn or indorsed by a corporate officer and deposited to his personal credit shall not be on inquiry from such facts. N. Y. Ann. Cons. Laws (McKinney, Quart. Supp. 1927) c. 38, § 95. It is doubtful that this will be of much assistance as § 56, N. I. L. is merely a definition of what constitutes notice for purposes of § 52, the section defining holder in due course. While the rule still is that a bank of deposit is to be viewed as a purchaser, *Metropolitan Nat'l Bank v. Loyd*, 90 N. Y. 530 (1882), the practically universal custom in New York today is to receive items for collection only. 1 Paton, *Digest* (1926) § 1446. Consequently § 52 and with it the amended § 56 would seem to have little bearing. The statute misconceives the real dispute which is as to what facts must be shown in order that the bank of deposit may be held as participating in a breach of trust. Notwithstanding the instant decision it should not be lost sight of that there are yet many circumstances where it is possible for a bank to be held to have had such knowledge. *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916); *Texas H. & I. Mut. Fire Ins. Co. v. Dallas T. & S. Bank*, 295 S. W. 665 (Tex. Civ. App. 1927).

CONSTITUTIONAL LAW—CONTRACTS—RETROACTIVE EFFECT OF STATUTE OF FRAUDS.—*A* and *B* orally agreed that if *B* would get a purchaser for *A*'s land, *A* would pay *B* a certain commission. After *B* had made various attempts to procure a purchaser, a statute was passed making such contracts unenforceable unless in writing. *B* later procured a purchaser and in an action to recover the commission, judgment was entered for the defendant. *Held*, on appeal, that the judgment be affirmed because *B* had no "vested" contractual rights at the time the statute took effect, and if he did, the statute affected only his remedy and might properly be given a retroactive effect. *Cramer v. Patterson*, 157 N. E. 398 (Ohio App. 1926).

An offer which may be accepted by the performance of an act or series of acts becomes irrevocable after the offeree has "substantially" commenced performance. *Braniff v. Baier*, 101 Kan. 117, 165 Pac. 816 (1917); Corbin, *Offer and Acceptance* (1916) 26 YALE LAW JOURNAL 169; McGovney, *Irrevocable Offers* (1914) 27 HARV. L. REV. 644. A generalization as to when performance has proceeded sufficiently far to constitute an "acceptance" is palpably impossible. But the bare assertion of the instant court that the offeree acquired no "vested right" is of little aid in cataloguing the decisions with respect to various fact situations constantly arising. If it be assumed that the plaintiff in the instant case had acquired a contract right, it is well established that the legislature may change the remedies for the enforcement thereof. *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 Sup. Ct. 17 (1912); *Wilson v. Standefer*, 184 U. S. 399, 22 Sup. Ct. 384 (1902). But an adequate remedy must remain whereby such rights could be enforced. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 23 Sup. Ct. 234 (1903); *Bronson v. Kinzie*, 1 How. 311 (U. S. 1843). A statute making the enforcement of existing rights unprofitable because of obstacles imposed is unconstitutional. *Walker v. White*, 16 Wall. 314 (U. S. 1872) (requiring a party to show that all taxes chargeable on the contract had been paid each year since it was made); *McCracken v. Hayward*, 2 How. 603 (U. S. 1844) (preventing a sale of property taken under an execution unless it brought two thirds of a valuation fixed by two householders); *Scibert v. Lewis*, 122 U. S. 284 (1887) (limiting means to be used in raising a tax for paying certain existing bonds). Likewise a statute making the enforcement of a contract almost impossible under the guise of changing a rule of evidence. *Texas-Mexican Ry. v. Locke*, 74 Tex. 370, 12 S. W. 80 (1889) (rendering claims to land issued prior to a certain date inadmissible as evidence in suits for land unless filed at the time of record); *Richardson, Adm'r v. Cook et al*, 37 Vt. 599 (1865) (requiring a promise to pay a debt barred by the Statute of Limitations to be in writing to sustain a suit); *McGahey v. Virginia*, 135 U. S. 685, 10 Sup. Ct. 972 (1890) (requiring that bonds from which coupons were cut be introduced in evidence in suits on the coupons). To say that the instant statute merely affects the "remedy" in that it establishes a "rule of evidence" affecting only the enforcement of the contract is to assume the doubtful proposition that a claim unenforceable through our societal agents is a valuable right. Cf. 1 BL. COMM. 555. It would seem that if the plaintiff did acquire a contract right, the legislation as applied extinguished it by making it unenforceable. And it has been said that such a result would be unconstitutional as impairing the obligation of a contract. *Von Hoffman v. Quincy*, 4 Wall. 535, 552 (U. S. 1861). *Contra: Kingley v. Cousins*, 47 Me. 91 (1860).

CONSTITUTIONAL LAW—TAXATION—DISCRIMINATION AGAINST NON-RESIDENTS UNCONSTITUTIONAL.—A non-resident testatrix devised certain real property to the plaintiffs. The succession tax law imposed a flat rate on property of non-resident decedents, without the exemptions and deductions allowed resident decedents. The effect of the flat rate feature was to tax the plaintiffs \$589.93, whereas the amount that would have been assessed in the case of a resident decedent was \$95.90. In an action to recover the amount of the tax paid under protest, judgment was for the defendant. *Held*, on appeal, that the judgment be reversed, on the ground that the statute in imposing the tax upon non-residents violated the "privileges and immunities" clause of the federal Constitution. *Smith v. Loughman*, 245 N. Y. 486, 157 N. E. 753 (1927).

The "privileges and immunities" clause of the Constitution has been limited in the extent of its protection to so-called "fundamental privileges."

Haavik v. Alaska Packers Ass'n, 263 U. S. 510, 44 Sup. Ct. 177 (1924) (law valid placing license tax on non-resident fisherman); *Canadian Northern Ry. v. Eggen*, 252 U. S. 553, 40 Sup. Ct. 402 (1920) (statute valid making exception in favor of residents respecting limitations of actions arising outside of the state); *Ferry v. Spokane Co.*, 258 U. S. 314, 42 Sup. Ct. 358 (1922) (act valid discriminating against non-residents as to dower). And statutes have also been upheld, though making a superficial discrimination, when their practical operation was to place non-residents and residents on the same footing. *Hess v. Pawloski*, 47 Sup. Ct. 632 (U. S. 1927); *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30 (1916) (act constituting state officer agent of non-resident motorist for purpose of service); *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221 (1920); (act permitting residents to deduct total losses from income, but crediting non-residents only with losses sustained within the state); cf. *General American Tank Car Corp. v. Day*, 270 U. S. 367, 46 Sup. Ct. 234 (1926) (tax on non-residents doing business within the state in lieu of local taxes on resident concerns); *Travelers' Ins. Co. v. Conn.*, 185 U. S. 364, 22 Sup. Ct. 673 (1902); (tax on shares of corporations, allowing resident corporations to deduct from their assessments the value of their local real estate already subject to tax by the state). But other types of discriminatory statutes have been held to violate the "privileges and immunities" clause. Thus, those which prohibit non-residents from carrying on legitimate business within the state, or impose a license tax on non-resident traders exclusively. *Ward v. Maryland*, 12 Wall. 418 (U. S. 1871); *Minn. v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862 (1890); *Chalker v. Birmingham R. R.*, 249 U. S. 522, 39 Sup. Ct. 366 (1919). So, too, statutes giving priority to resident creditors of an insolvent corporation. *Blake v. McClung*, 176 U. S. 59, 20 Sup. Ct. 307 (1900); Cf. *Sully v. Nat'l Bank*, 178 U. S. 289, 20 Sup. Ct. 935 (1900). Likewise an income tax law denying non-residents personal exemptions accorded to residents. *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228 (1920); cf. *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 47 Sup. Ct. 179 (1926). Although the flat rate feature of the instant legislation offered a convenient administrative reform, yet the decision in the present case can hardly be criticized. It is probable, moreover, that the desired reform can be in large measure effected by amendments providing for rebates to offset the amount of the discrimination.

CORPORATIONS — CRIMINAL RESPONSIBILITY — HOMICIDE. — The defendant corporation was indicted for manslaughter and for a crime involving personal violence. Held, on appeal, that the corporation could not be indicted for these crimes. *Rev. v. Cory Bros. Ltd.*, 136 L. T. R. 735 (1927).

Corporations in early times were not considered indictable. *Anon.*, 12 Mod. 560 (1701); *State v. Great Works Milling Co.*, 20 Me. 41 (1841); *Judge Lynch International Book & Pub. Co. v. State*, 84 Tex. Cr. App. 459, 208 S. W. 526 (1919). The list of crimes for which they have become indictable has steadily grown. It was early held that they could be indicted only for crimes of "non-feasance." *State v. Ohio & Miss. R. R.*, 23 Ind. 362 (1864). And later for crimes of "misfeasance." *U. S. v. John Kelso Co.*, 86 Fed. 304 (N. D. Cal. 1898). The modern trend is to impose criminal responsibility even for culpable homicide. *State v. Lehigh Valley R. R.*, 90 N. J. L. 372, 103 Atl. 685 (1917), *aff'd* 94 N. J. L. 171, 111 Atl. 257 (1920); 10 Fletcher, *Cyclopedia of Corporations* (Supp. 1921) § 3370; 1 Bishop, *New Criminal Law* (8th ed. 1892) § 423; (1920) 5 MINN. L. REV. 74; cf. *United States v. VanSchaick*, 134 Fed. 592, 602 (N. Y. 1904). But most cases are to the contrary. *Commonwealth v. Punxsutawney Ry. Co.*, 24 Pa. Co. Ct. 25 (1899); *Reg. v. Great West Laundry Co.*, 13 Man. 66, 3 Can. Cr. Cas.

514 (1900) (no provision of law to impose punishment); *People v. Rochester Ry. & Light Co.*, 195 N. Y. 102, 88 N. E. 22 (1909) (words "person" and "another" in statute so construed as not to apply to corporations); *Commonwealth v. Ill. Central R. R.*, 152 Ky. 320, 153 S. W. 459 (1913); 7 Thompson, *Corporations* (3d ed. 1927) § 5606. The reason usually submitted, as in the instant case, is that a corporation, being a fictitious entity, has no mind and therefore no capacity for intent. *State v. First Nat. Bk. of Clark*, 2 S. D., 568, 51 N. W. 587 (1892); Clark, *Corporations* (3d ed. 1916) 249; Canfield, *Corporate Responsibility for Crime* (1914) 14 COL. L. REV. 469. But this use of the concept of "corporate entity" has been criticized. See Comment (1926) 36 YALE LAW JOURNAL 254. Most authorities hold that a corporation may have a specific intent. *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445 (1899); *U. S. v. Young & Holland Co.*, 170 Fed. 110 (R. I. 1909); *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910); Clark, *Criminal Law* (3d ed. 1915) 82. This is so inasmuch as whenever a corporation "acts," the act of some specific human being is imputed to the corporation, and if an "act" can be imputed, so also can a mental process or "intent." See Edgerton, *Corporate Criminal Responsibility* (1927) 36 YALE LAW JOURNAL 827. There is therefore no legal impossibility in holding a corporation responsible for any given crime. While the innocent shareholder would be the sufferer in inflicting corporate punishment, corporate responsibility for acts of agents is desirable, in view of the modern tremendous corporate growth, for the deterrent effect it might have. In the instant case, Justice Finlay practically bases his decision on precedent. The decision would seem undesirable as being out of line with modern thought and failing to carry the doctrine of corporate responsibility to a logical end. But see (1927) 163 LAW TIMES 223.

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CRIMINAL LAW—EVIDENCE—WITHDRAWN PLEA OF GUILTY INADMISSIBLE IN SUBSEQUENT TRIAL.—The defendant pleaded guilty to a charge of using the mails to defraud. After conviction, he filed a petition alleging that his plea was induced by the promise of the prosecuting attorney and asking that the punishment be changed in accordance with that promise. The court denied the petition, but allowed the petitioner to withdraw his plea of guilty and plead not guilty. The former plea of guilty was introduced as evidence in the subsequent trial and the accused was convicted. *Held*, on appeal, that the judgment be reversed, since the withdrawn plea was a nullity and its use in evidence was in conflict with a judicial determination. *Kerecheval v. United States*, 47 Sup. Ct. 582 (1927).

Of the few cases on the point the majority hold that a withdrawn plea of guilty is inadmissible as a confession. *Hcim v. United States*, 47 App. Cas. D. C. 485 (1918); *People v. Ryan*, 82 Cal. 617, 23 Pac. 121 (1890); *Heath v. State*, 214 Pac. 1091 (Okla. Cr. App. 1923). Those courts that refuse to admit the plea do so because of the undue weight likely to be attached to it by the jury. *People v. Ryan, supra*. And further because the plea is often relied on actually as a tactical move. But some courts have held otherwise, reasoning that a judicial confession should be conceded at least as much probative value as an extra-judicial confession, since the withdrawn plea of guilty shows conduct on defendant's part inconsistent with his claim of innocence before the jury. *State v. Carta*, 90 Conn. 79, 96 Atl. 511 (1916); *People v. Steinmetz*, 240 N. Y. 411, 148 N. E. 597 (1925); *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132 (1905). A judicial confession is of itself conclusive evidence of guilt and proof of *corpus delicti* is unnecessary. *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908); *Wall v. State*, 5 Ga. App. 305, 63 S. E. 27 (1908); 2 Chamberlayne, *Modern Law of Evidence* (1911) § 1568. But where there is an extra-judi-

cial confession, corroborating evidence concerning the *corpus delicti* must be proved. See *State v. Willis*, 71 Conn. 293, 308, 41 Atl. 820, 824 (1898); 4 Wigmore, *Evidence* (2d ed. 1923) § 2071. Those courts which admit withdrawn pleas in evidence prescribe the same requirement. *State v. Cartu, supra*; *People v. Boyd*, 67 Cal. App. 292, 227 Pac. 783 (1924). In the instant case the effect of the order permitting withdrawal should not necessarily nullify the plea of guilty for the purpose of evidence, but only for the purpose of pleading. Thus its subsequent use as evidence is not in direct conflict with a prior judicial determination. The instant decision settles the federal rule.

DAMAGES—APPEAL AND ERROR—SETTING ASIDE VERDICT AS INADEQUATE.—

In an action for causing the death of the plaintiff's decedent, the evidence relating to damages was that the decedent was 49 years old, in good bodily health, earning \$42 per week, and had a life expectancy of 21.95 years. The trial court set aside the jury's verdict for \$1000 as being inadequate. Held, on appeal, (two judges dissenting) that this was error. *Ratushny v. Punch*, 106 Conn. 329, 138 Atl. 220 (1927).

In some states damages for death are measured by capitalizing the amount of earnings the decedent would have contributed to his beneficiaries had he survived. *Duke v. St. Louis & S. F. R. Co.*, 172 Fed. 684 (Ark. 1909); cf. Employers' Liability Act (U. S. Comp. Stat. (1916) §§ 8657-8665). In others, the measure is the net amount he would have saved from his earnings. *Rorvik v. Northern Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331 (1920). A third method is based on the loss to the estate by the destruction of decedent's earning power. *Big Hill Coal Co. v. Abney*, 125 Ky. 355, 101 S. W. 394 (1907). An examination of the Connecticut cases would indicate an adoption of the last theory. Cf. *Broughel v. So. New Eng. Tel. Co.*, 73 Conn. 614, 48 Atl. 751 (1901); *Nelson v. Branford L. & W. Co.*, 75 Conn. 548, 54 Atl. 303, (1903); *McCann v. McGuire*, 83 Conn. 445, 76 Atl. 1003 (1910); *Lane v. United Electric L. & W. Co.*, 90 Conn. 35, 96 Atl. 155 (1915). Inadequacy as to the amount of damages alone is usually no ground for disturbing a verdict. *Montgomery L. & T. Co. v. King*, 187 Ala. 619, 65 So. 998 (1914). But it may be set aside because the jury was prejudiced. *Shead v. Riser*, 136 Wash. 270, 239 Pac. 562 (1925). Or because the rules of law applicable were not followed. *Fell v. Hancock Mut. Life Ins. Co.*, 76 Conn. 494, 57 Atl. 175 (1904); *McCann v. McGuire, supra*. Or where there is evidence of compromise because of disagreement among the jury. *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102 (1912). Many courts hold that the insufficiency of the damages alone is in itself evidence of some such irregularity. *Gibson v. Wineman*, 106 So. 826 (Miss. 1926) (\$500 award for death of husband, aged 37 earning \$2 per day); *Migliaccio v. Smith Fuel Co.*, 151 Iowa 705, 130 N. W. 720 (1911) (verdict of \$49.50 for death of man, 36, earning \$1.80 per day); *Behrens v. Roth*, 204 Ill. App. 328 (1917) (\$500 verdict held inadequate); *McCann v. McGuire, supra* (\$300 award for boy, 14, earning \$3 per week); *Doody v. B. & M. R. R.*, 77 N. H. 161, 89 Atl. 487 (1914) (\$750 verdict held so inadequate as to show compromise by jury); see *Lane v. United Electric L. & W. Co., supra* at 37, 96 Atl. at 156. And setting aside such a verdict does not involve an encroachment on the province of the jury. *Opinion of the Justices*, 207 Mass. 606, 94 N. E. 846 (1911) (holding unconstitutional a proposed statute restricting the power of the presiding judge to set aside a verdict of the jury). The trial court's exercise of discretion is not generally reviewable unless manifestly abused. *Southern Ry. v. White*, 232 Fed. 144 (C. C. A. 6th, 1916); *Jacobs v. Loyal Protective Ins. Co.*, 97 Vt. 516, 124 Atl. 848 (1924). And it has been properly said that such discretion should remain

unhampered. *Settles v. McGinley*, 296 S. W. 846, 848 (Mo. 1927). A verdict which obviously could not have been based on a method of computation followed by the jurisdiction might well have been set aside even under the strict view that inadequacy is in itself not sufficient, since the jury did not properly apply the governing rules of law.

DAMAGES—EVIDENCE OF MONEY VALUE—JURY'S "JUDICIAL NOTICE" OF VALUE.—Evidence of the original cost, the age, use and condition of an auto before an accident was admitted, but, the witnesses not "appearing to be qualified to give an opinion," all testimony of its money value previous to demolition was excluded. *Held*, on appeal, that only nominal damages could be awarded for the car since the jury may not speculate on damage insufficiently shown. *Teets v. Halm*, 137 Atl. 559 (N. J. 1927).

Evidence of a pecuniary estimate of damage is said to be necessary in torts in respect to property. *National Cattle Loan Co. v. Ward*, 255 S. W. 160 (Tex. Comm. App. 1923); *Bigham v. Wabash-Pittsburgh Terminal Ry.*, 223 Pa. 106, 72 Atl. 318 (1909); 2 Sutherland, *Damages* (1916) § 437. Without it, compensatory damages are denied. *Alexander v. Conlon*, 72 Pa. Super. Ct. 1 (1919) (cave-in of land); *Williams v. State*, 106 Misc. 19, 175 N. Y. Supp. 560 (Ct. Claims, 1919) (flooding of land); *Houston & T. C. Ry. v. Cluck*, 31 Tex. Civ. App. 211, 72 S. W. 83 (1903) (use of land and spring water); *N. W. Equipment Co. v. Sofc*, 91 Wash. 118, 157 Pac. 459 (1916) (concrete mixer); *Di Bernardo v. Conn. Co.*, 100 Conn. 612, 124 Atl. 231 (1924) (horse and wagon); *Cincinnati, N. O. & P. Ry. v. Swancy*, 166 Ky. 360, 179 S. W. 214 (1915) (auto, evidence of original price, age, miles run, and value subsequent to accident held insufficient). The only remedy in such case may be a new trial with attendant delay and expense. *Wabash Ry. v. Beach*, 147 N. E. 631 (Ind. App. 1925); *Tingler v. Lahti*, 87 W. Va. 499, 105 S. E. 810 (1921). On the other hand, the magic of a stated money value paves the way for substantial damages, in the case of an auto, *Price v. Newell*, 53 Pa. Super. Ct. 623 (1913); a tree, *Ala. Power Co. v. Christian*, 112 So. 763 (Ala. 1927); a threshing machine, *Thompson v. Union Traction Co.*, 107 Kan. 238, 191 Pac. 278 (1920); and an asparagus bed, *Texas & P. Ry. v. Graffeo*, 53 Tex. Civ. App. 569, 118 S. W. 873 (1909). So if there be a repair bill, the jury may assess damages over and above the amount of the bill. *Hill Grocery Co. v. Caldwell*, 211 Ala. 34, 99 So. 354 (1924); *Burnham v. Williams*, 198 Mo. App. 18, 194 S. W. 751 (1917). And plaintiff's valuation alone, without any showing of market value is sufficient. *Seaboard Air Line v. Peeples*, 12 Ga. App. 206, 77 S. E. 12 (1913). Damages have been assessed in some cases of property loss where there was no evidence of pecuniary value. *Pittman v. Fort Worth Warehouse Co.*, 258 S. W. 1105 (Tex. Civ. App. 1924) (furniture); *Ill. Central Ry. v. Coln*, 110 So. 782 (Miss. 1926) (grass and trees); *Fairfax v. N. Y. Central & Hudson Ry.*, 73 N. Y. 167 (1878) (worn clothing); *Ill. Central Ry. v. Frost*, 124 S. W. 821 (Ky. Ct. App. 1910) (fence); *Behm v. Damm*, 91 N. Y. Supp. 735 (Sup. Ct. 1905) (furniture); *Sanders v. Austin*, 180 Cal. 664, 182 Pac. 449 (1919) (second hand auto, court disapproved verdict but would not disturb); *Haberman v. Kuhs*, 270 S. W. 399 (St. Louis, Mo. Ct. App. 1925) (second hand auto). This seemingly minority rule has been attacked on the ground that the jury should not "guess" at damages but should give a verdict on proof sufficient to "estimate with reasonable certainty." *Cf. Cravens v. Hunter*, 87 Mo. App. 456 (1901); (1927) 7 BOSTON U. L. REV. 227. But even under the majority rule, the jury often does guess. *Lozon v. Leamon Bakery*, 186 Wis. 84, 202 N. W. 296 (1925) (testimony on value of car from \$900 to \$1,800); *Chicago B. & Q. Ry. v. Presby*, 93 Ill. App. 303 (1901) (from 0 to \$1500); *cf.* 5 Wigmore, *Evidence* (2d ed. 1923) § 2570,

n. 5. Moreover the opinion of witnesses on value is not binding. The jury may use their own judgment and find differently. *Monson v. Chicago R. I. & P. Ry.*, 181 Iowa 1354, 159 N. W. 679 (1915); Thayer, *Evidence* (1898) 297-8. In some types of cases the jury may find damages at their discretion, without pecuniary estimate. *Ala. Great So. Ry. v. Flinn*, 199 Ala. 177, 74 So. 246 (1917) (loss of eye); *Hossler, Exec. v. Trump*, 62 Ohio St. 139 (1900) (value of longtime service); *International & G. N. Ry. v. Stewart*, 101 S. W. 282 (Tex. Civ. App. 1907) (for inconvenience from flooded land); *Cederberg v. Robison*, 100 Cal. 93 (1893) (labor and services); *St. Louis Iron Mt. & S. Ry. v. Stell*, 87 Ark. 308 (1908) (physician's services); *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413 (1914) (loss of use of car). Such discretion could well be extended to the instant case subject to the check of reducing or setting aside the verdict. See *Warren v. Cole*, 15 Mich. 265, 273 (1867).

EVIDENCE—AUTOPSY PRIVILEGED AS CONFIDENTIAL COMMUNICATION BETWEEN PHYSICIAN AND PATIENT.—In an action on an insurance policy by the plaintiff as beneficiary, a physician was allowed to testify, over objection, to the result of an autopsy performed by him, which testimony would avoid the policy. The physician was employed by the hospital in which the deceased was a patient at the time of his death, but had never seen or attended him prior to the autopsy. *Held*, on appeal, that the judgment be reversed on the ground that a physician is incompetent to testify under Ind. Ann. Stat. (Burns, 1926) § 550. *Mathews v. Rex Health & Accident Insurance Co.*, 157 N. E. 467 (Ind. 1927).

The few cases on this point hold that the result of an autopsy is admissible, and not within the privilege, if the relation of physician and patient did not exist before death. *Carmody v. Capital Traction Co.*, 43 App. Cas. D. C. 245 (1915); *Harrison v. Sutter St. Ry.*, 116 Cal. 156, 47 Pac. 1019 (1897). But if the physician attended the deceased prior to his death, the autopsy is regarded as part of the treatment and privileged. *Thomas v. Township of Byron*, 168 Mich. 593, 134 N. W. 1021 (1912). In the instant case the court reasons that the deceased was under care of the hospital before death, that the autopsy was part of the treatment, and hence privileged. Commentators agree that any extension of the privilege is to be condemned. 5 Wigmore, *Evidence* (2d ed. 1923) § 2380; Greenleaf, *Evidence* (16th ed. 1899) § 247a. It is submitted that on grounds of policy the instant broadening of the privilege is undesirable since the policy behind the privilege is merely to foster confidence between patient and physician. See *Carmody v. Traction Co.*, *supra* at 249. And of course can not apply where the individual has been attended only after death. Thus it has been recently held that the result of an autopsy was not privileged because the information was not obtained for purposes of treatment. *Borosich v. Metropolitan Life Ins. Co.*, 191 Wis. 239, 210 N. W. 829 (1926); *Chadwick v. Beneficial Life Ins. Co.*, 54 Utah 443, 181 Pac. 448 (1919) (autopsy not privileged unless clearly only to supplement information acquired during previous treatment). Since most cases where the privilege is claimed are actions on insurance policies where deceased's misrepresentations as to health are involved or actions for corporal injuries where bodily condition is involved, the medical testimony would seem most highly probative. In such cases there would seem to be no reason for withholding facts except to conceal fraud.

JUDGMENTS—DEFAULT—REOPENING.—The defendant sought to reopen a default judgment suffered through reliance on a co-defendant who undertook to defend but, becoming sick, overlooked the matter. The motion was

granted. *Held*, on appeal, that the judgment be affirmed since the matter was within the discretion of the trial court. *Chamber of Commerce v. Thomas*, 214 N. W. 57 (Minn. 1927).

The question of relief from a default judgment rests largely in the discretion of the trial court and depends on the peculiar facts and circumstances of the case. Where the default has resulted from the failure of a co-defendant to attend to the defendant's interests, courts are more apt to grant relief if the relationship between the defendants justified the confidence so reposed. *Medicine Co. v. Oppliger*, 124 Minn. 535, 144 N. W. 743 (1914) (wife-husband); *Barlow v. Burns*, 70 N. J. L. 631, 57 Atl. 262 (1904) (daughter-mother); *Soper v. Manning*, 158 Mass. 381, 33 N. E. 516 (1893) (nephew-uncle); *Pye v. Robinson*, 203 S. W. 96 (Tex. Civ. App. 1918) (purchaser-vendor); *Montijo v. Shercer*, 5 Cal. App. 736, 91 Pac. 261 (1907) (employee-employer); *Morrell Hardware Co. v. Princess Gold-Min. Co.*, 16 Colo. App. 54, 63 Pac. 307 (1901) (lessor-lessee); *Schoonmaker v. Albertson Mach. Co.*, 51 Conn. 387 (1833) (brothers); *Hull v. Chapel*, 77 Minn. 159, 79 N. W. 669, (1899) (surety-principal); *Bearman v. Brackeen*, 112 Okl. 237, 240 Pac. 713 (1925) (business partners). While the relationship of the parties is evidence as to the reasonableness of the defendant's faith, other facts and circumstances may easily outweigh it, such as signs of delay, *Picher v. Hornaday*, 202 S. W. 410 (Mo. App. 1918) (wife-husband); or where the co-surety relied on was not served in the suit, *Elramy v. Abeyounis*, 189 N. C. 278, 126 S. E. 743 (1925) (surety-co-surety). Even where defendant relied on one not a party to the suit but who assumed to defend because of duty or interest relief has been granted. *Wells v. Andrews*, 133 Mo. 663, 34 S. W. 865 (1896) (purchaser-vendor); *New York v. Reibstein*, 127 N. Y. Supp. 239 (Sup. Ct. 1911) (owner-contractor); *Ward v. Burley State Bank*, 38 Idaho 764, 225 Pac. 497 (1924) (bank officials-commissioner in charge); *Cammarano v. Longmire*, 99 Wash. 360, 169 Pac. 806 (1918) (sheriff-real party in interest); *Newton v. de Armond*, 60 Cal. App. 231, 212 Pac. 630 (1923) (vendor-insurer of vendee); *Scmpier v. Goemann*, 165 Wis. 103, 161 N. W. 354 (1917) (insured-insurer). Although strictness in the matter of defaults might serve to expedite court business, the instant court seems justified by precedent in acting leniently.

LICENSE—BLUE SKY LAW—APPLICATION TO CONTRACTS FOR SALE OF LAND.

—In a suit by the appellant to enjoin interference by the Commissioner of Securities with a sale of vineyard land contracts, a demurrer to the complaint, on the ground that no cause of action was stated, was upheld. The contracts in question gave to each purchaser the use and possession of his particular land subject to a restriction that the appellant control and manage it for five years, a trustee being appointed by the appellant to collect returns, pay expenses, and divide the profits equally between the appellant and the purchaser during that period. The purchasers' full control, to be acquired after such five years, would be practically useless unless worked in conjunction with the entire vineyard development promoted by the appellant. *Held*, on appeal, that the order be affirmed since the contracts are investment contracts within the meaning of the Blue Sky Law. *Kerst v. Nelson*, 213 N. W. 904 (Minn. 1927).

The Minnesota Statute reads: "An act to prevent fraud in the sale of securities . . . by requiring registration of such securities and licensing of persons selling . . . securities." Minn. Laws 1925, c. 192, § 1. A security is defined as "any stock, share, bond, . . . investment contract . . . interest in profit sharing scheme. . ." § 1, par. 3. Minnesota has perhaps gone farthest in extending to the investor the protection of such a Blue Sky Law against many questionable get-rich-quick investment schemes, by in-

interpreting such terms as "security" and "investment contract" very liberally. *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937 (1920) (sale of certificates entitling the buyer to a share in the profits in return for promoting sale of seller's goods); *State v. Summerland*, 150 Minn. 266, 185 N. W. 255 (1921) (sale of "units" in oil syndicate giving buyer share in the profits); *State v. Ogden*, 154 Minn. 425, 191 N. W. 916 (1923) ("statement and purchase" instruments entitling buyer to a share in profits of oil land development). The addition in 1925, to the statute, of the clause "interest in profit sharing scheme" codifies this policy of the Minnesota courts. Minn. Laws 1925, c. 192, § 1, par. 3. Other jurisdictions, too, have interpreted their statutes broadly and apply them to schemes purporting to give the investor some pro-rata share in the profits. *Groby v. State*, 109 Ohio St. 543, 143 N. E. 126 (1924) (membership receipts in oil land syndicate); *Agnew v. Dougherty*, 189 Cal. 446, 209 Pac. 34 (1922) ("interest certificates" in mining property development); *People v. McCalla*, 63 Cal. App. 783, 220 Pac. 436 (1923) (deed to part of oil land with certificate giving a right to share in the profits); *Schmidt v. Stortz*, 208 Mo. App. 439, 236 S. W. 694 (1922) ("interests" in oil company development); *State v. Whiteaker*, 118 Or. 656, 247 Pac. 1077 (1926) ("unit of interest" in mineral lands). In following the modern tendency to protect the investor, the instant case reaches a very desirable result.

PAYMENTS—APPLICATION TO A RUNNING ACCOUNT PART OF WHICH IS SECURED.—Items were purchased by a party, now insolvent, partly on open account and partly under conditional sale contracts. Payments made thereon were indiscriminately applied by the seller to the entire account. In reclamation proceedings by the seller against the receiver, the lower court applied the payments to the debt items in the order in which they had fallen due. Held, on appeal, that the decree be affirmed. *McMullin Machinery Co. v. Grand Rapids Trust Co.*, 214 N. W. 110 (Mich. 1927).

In the absence of direction by the debtor, the creditor may apply the payments as he sees fit. See 3 Williston, *Contracts* (1920) §§ 1795, 1796. But only provided that the application does not work injustice to the debtor. *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857 (1890) (debtor's title to land would be perfected if undirected payment were applied to small balance); 3 Williston, *op. cit. supra*, § 1797. The creditor may even make application to a debt barred by the Statute of Limitations. *McBride v. Noble*, 40 Colo. 372, 90 Pac. 1037 (1907). As to whether this revives the whole debt, there is conflict. (1915) 3 VA. L. REV. 149. A mere book entry, uncommunicated to the debtor, has been held not to be a binding application. *Simson v. Ingham*, 2 B. & C. 65 (1823); 3 Williston, *op. cit. supra*, § 1799. *Contra: Mo. Central Lumber Co. v. Stewart*, 78 Mo. App. 456 (1899). If, however, neither party has made application, the court will infer an "intention," where possible, and make application accordingly. *Miller v. White*, 264 S. W. 176 (Tex. Civ. App. 1924); (1908) 21 HARV. L. REV. 623. Where such inference is not made, payments are generally applied to the oldest item in chronological order of maturity, whether or not secured. *Moses v. Noble*, 86 Ala. 407, 5 So. 181 (1888); *So. Construction Co. v. Haliburton*, 149 Tenn. 319, 258 S. W. 409 (1924) (surety); *Mauro v. Davie*, 236 Mich. 309, 210 N. W. 308 (1926); 3 Williston, *op. cit. supra*, § 1801. But other cases hold that application must be made first to the unsecured debts, though maturing later. *Schuelenburg v. Martin*, 2 Fed. 747 (Kan. 1880); *State v. U. S. Fidelity & Guaranty Co.*, 81 Kan. 660, 106 Pac. 1040 (1910); (1917) 31 HARV. L. REV. 311. There may be some question as to the application of the latter rule where a surety or guarantor is involved. See Tiedeman, *Commercial Paper* (1889) § 377. In the absence of an as-

certainable intent, such as might appear from a prior course of dealing, the chronological rule, applied in the instant case, appears to be the most satisfactory in that it consciously favors neither party.

REAL PROPERTY—COVENANT TO SUPPLY WATER RUNS WITH LAND.—Plaintiff's assignor, a land company, conveyed to defendant's assignor, a power company, certain lands and equipment for pumping water. Defendant's assignor covenanted for itself and assigns to distribute all the water necessary for the irrigation of the land appurtenant, which the plaintiff's assignor retained. Defendant's failure to furnish plaintiff with the necessary water resulted in a loss of crops. To the complaint of the plaintiff, the defendant demurred specially on the ground that it could not be ascertained whether the defendant had assumed the obligation in question. From a judgment for the plaintiff, defendant appeals. *Held*, that the judgment be affirmed. *Chrisman v. Southern California Edison Co.*, 256 Pac. 618 (Cal. App. 1927).

There is some conflict of authority as to when the burden of a covenant runs with the land at law, even where the particular requirements of form, intent, and privity of estate are satisfied, and the burden "touches and concerns" the land. *Clark, Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 YALE LAW JOURNAL 123, 126. Thus some jurisdictions also require the benefit to "touch and concern" the land. *Cal. Packing Corp. v. Grove*, 51 Cal. App. 253, 196 Pac. 891 (1921); *cf. Murphy v. Kerr*, 296 Fed. 536 (D. N. M. 1923), *aff'd* 5 F. (2d) 908 (C. C. A. 8th, 1925). *Contra: American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (C. C. A. 6th, 1897); *Granite Bldg. Corp. v. Grecne*, 25 R. I. 86, 57 Atl. 649 (1904); *cf. White v. Hotel Co.* [1897] 1 Ch. 767. Some will not enforce an affirmative burden. *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913) (stating as the only exceptions covenants of fencing, covenants to repair private ways, and covenants in leases). *Contra: Bolles v. Pecos Irr. Co.*, 23 N. M. 32, 167 Pac. 280 (1917); *Holthoff v. Joyce*, 294 S. W. 1006 (Ark. 1927); *Miller & Lux v. San Joaquin Agr. Co.*, 58 Cal. App. 753, 209 Pac. 592 (1922); *New York Central R. R. v. Clark*, 228 Mass. 274, 117 N. E. 322 (1917); *cf. Lawrence Park Realty Co. v. Crichton*, 218 App. Div. 374, 218 N. Y. Supp. 278, (2d Dept. 1926). And in England the rule, with certain well defined exceptions, is that no burden will run at law. *Haywood v. Brunswick Bldg. Society*, 8 Q. B. D. 403 (1881); *cf. Austerberry v. Oldham*, 29 Ch. D. 750 (1885). Courts of equity will often enforce a burden, unenforceable at law, against a subsequent purchaser with notice, where such was the intent, express or implied, of covenantor and covenantee. *Tull v. Moxhay*, 2 Phil. 774 (1848); *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877); *Renfroe v. Alden*, 137 S. E. 831 (Ga. 1927); *Lavcrack v. Allen*, 130 Atl. 615 (N. J. Eq. 1924). But there is conflict here too. Thus some courts require the presence of a dominant tenement. *Formby v. Barker* [1903] 2 Ch. 539; *Ives v. Brown* [1919] 2 Ch. 314; *Shade v. O'Keefe*, 156 N. E. 867 (Mass. 1927); *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (1919). *Contra: Smith v. Gulf Refining Co.*, 162 Ga. 191, 134 S. E. 446 (1926); *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913); *Bald Eagle Valley Ry. v. Nittany Valley Ry.*, 171 Pa. 284, 33 Atl. 239 (1895). Some courts will enforce a negative restriction, but not an affirmative burden. *Austerberry v. Oldham*, *supra*; *Hall v. Erwin*, 37 Ch. D. 74 (1887); *cf. Miller v. Clary*, *supra*. No sufficient basis for such a distinction exists, however, and there is a strong tendency in this country to disregard it. *Randall v. Latham*, 36 Conn. 48 (1869); *Murphy v. Kerr*, *supra*; *Pioneer San Co. v. Seattle Constr. Co.*, 102 Wash. 608, 173 Pac. 508 (1918); *Cunningham v. Buel*, 287 S. W. 683 (Tex. Civ. App. 1926); *Whittenton Mfg.*

Co. v. Staples, 164 Mass. 319, 41 N. E. 441 (1895). The instant decision seems correct. But it was unnecessary for the court to rest its decision on an equitable rule in an action for damages for breach of contract, since the burden in the instant case would clearly run with the land at law. *Bolles v. Pecos Irr. Co.*, *supra*.

REAL PROPERTY—PARTY WALL AGREEMENTS—COVENANT RUNS WITH LAND.—A and B were adjoining land-owners. A covenanted for himself and assigns to pay one half the value of a party wall to be erected by B whenever the wall should be utilized by A or his successors. A assigned the reversion to the defendant in error and the term to the plaintiff in error. The wall was used and in an action by the reversioner against the tenant to be saved harmless in accordance with a covenant in the lease, judgment was entered in favor of the reversioner. *Held*, on appeal, that the judgment be affirmed since the party wall agreement was a covenant running with the land, cross-easements of support having been created. *Fair Bldg. Co. v. Wineman Realty Co.*, 156 N. E. 433 (Ind. 1927).

The chief difficulties in justifying the treatment of party wall agreements as running covenants lie in satisfying the requirements of "privity of estate" and "touching and concerning the land." Varying results are reached in such cases in accordance with the adoption of diverse theories of ownership with respect to the wall. One view, adopted by the instant case, is that immediately the wall is built, each party owns that portion situated on his land and that the covenant operates to convey cross-easements of support commonly called "reciprocal easements." *Kim v. Griffin*, 67 Minn. 25, 69 N. W. 634 (1896); 2 Tiffany, *Real Property* (2d ed. 1914 § 393; Jones, *Easements* (1898) § 632. The conveyance of such interest supplies "privity of estate." Sims, *Covenants* (1901) 198 *et seq.* The promise to pay restricts the original non-builder's privilege of user and thereby affects his legal relations with respect to the land. Hence the burden "touches and concerns" the land. Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, 640. And likewise the benefit, since the builder's right to reimbursement matures only upon his land sustaining the additional burden of support caused by the non-builder utilizing the party wall for his own building. Bigelow, *op. cit. supra*, at 640. Some courts, however, refuse to give the cross-easements this effect and therefore hold that only a debtor-creditor relationship exists, both the benefit and the burden therefore being "personal." *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282 (1885). Another theory, more generally followed, is that the builder owns the entire wall, having been granted an easement of support by the non-builder, the latter having a power to acquire ownership of the half on his land. *Jones v. Monroe*, 285 S. W. 1055 (Tex. Comm. App. 1926); *Berry v. Godfrey*, 198 Mass. 228, 84 N. E. 304 (1908); *Aigler Agreements to Pay For Party Walls* (1911) 10 MICH. L. REV. 187. Both the benefit and burden would clearly run under such a theory. The rule against perpetuities ought not be a bar as it should only be applied where some strong reason in public policy requires. See Gray, *Rule Against Perpetuities* (3d ed. 1915) §§ 329, 330, 603a. Thus covenants to renew leases, rights of entry and rights of reverter, are all exempt from the rule. Gray, *op. cit. supra*, §§ 230, 309, 41, 312. It has been suggested, however, that if such an obstacle exists it could be avoided by considering that the non-builder acquires all the legal relations connoting ownership of one half the wall minus the right of possession and privilege of user. Clark, *Party Wall Agreements as Real Covenants* (1923) 37 HAR. L. REV. 301; *cf. Bank v. Merriweather*, 166 Ark. 39, 265 S. W. 642 (1924). It would seem that the first of the theories above mentioned is most in accord with the understanding of the parties.

STATUTORY CONSTRUCTION—REPEAL BY IMPLICATION—TIME OF TAKING EFFECT WHEN PROVISIONS OF AMENDMENT ARE IN FUTURO.—The statutory compensation for legislators in Indiana was six dollars a day during session. Ind. Ann. Stat. (Burns, 1914) § 7561. In 1925 an amendment, to take effect January 1, 1929, substituted "ten" dollars for "six" dollars in the original provision. Ind. Acts 1925, c. 109. The 1927 legislature passed an emergency act over the governor's veto making the compensation for that session ten dollars a day. Ind. Acts 1927, c. 1, § 6. In an action to compel payment, this statute was found unconstitutional by the trial court as violating the state constitution, Ind. Const., Art. 4, § 29, (forbidding an increase of compensation to take effect during the session at which it was made). *Held*, on appeal, (two judges *dissenting*) that the judgment be reversed on the ground that the Amendment of 1925 by implication repealed upon its publication the former statute, and that since there was no provision for compensation for the 1927 legislature, the act was valid. *State v. Bowman*, 156 N. E. 394 (Ind. 1927).

If the amendment of 1925 had been an independent statute, its repealing effect would not operate until its own provisions went into effect. *Lynch v. State*, 8 Ind. 490 (1856); *State v. Paul*, 87 Wash. 83, 151 Pac. 114 (1915); 1 Sutherland, *Statutory Construction* (Lewis ed. 1904) § 246. Likewise in England. Craies, *Statute Law* (3d ed. 1923) 324. This repeal could be either express or implied. Sutherland, *loc. cit. supra*. Or the amendment might have expressly provided that the old statute remain in effect. 1 Sutherland, *op. cit. supra*, § 181. But the failure to use either method was held by the instant court to indicate a legislative intent that the repeal take immediate effect. Nevertheless, as suggested in the dissenting opinion, the amendment of 1925 by fixing the time of increase would seem clearly to manifest an intent to preserve the old law until such time. The Indiana court cites the proposition that such portions of an act as are replaced by an amendment are thereby abrogated. *McDowell v. Warden of Mich. Reformatory*, 169 Mich. 332, 135 N. W. 265 (1912). But the question here involved is the time of such abrogation. The general rule is that an amended statute is construed as if the amendment had been enacted in the original. *Drew v. Tift*, 79 Minn. 175, 81 N. W. 839 (1900); 1 Sutherland, *op. cit. supra*, § 237. But due regard is usually given to the legislative intent. *Blake v. Board of Education*, 112 Kan. 266, 210 Pac. 351 (1922). Rules of construction are designed to ascertain such intent. 2 Sutherland, *op. cit. supra*, § 364. And it has been further suggested that in cases of genuine ambiguity judicial construction should be used to arrive at desirable results rather than the "supposed legislative intent." Freund, *Interpretation of Statutes* (1917) 65 U. of PA. L. REV. 207, 231. It is submitted that it is undesirable to permit a legislature to increase its own salary, and that the instant court could properly have prevented such a result. An amendment does not repeal an inconsistent statute until the constitutional time for taking effect. *McArthur v. Franklin*, 16 Ohio St. 193 (1865). Seemingly, if the legislature postponed the time of taking effect of the amendment, the repeal should likewise be delayed, in absence of express provision to the contrary. *Spaulding v. Alford*, 1 Pick. 33 (Mass. 1822).

TAXATION—TRUSTS—CHARITABLE PURPOSES—GIFT FOR CEMETERY CHAPEL NOT EXEMPT.—A sum was bequeathed to a cemetery corporation for the erection of a chapel suitable for burial services. A legacy and succession tax assessed on the gift was paid under protest. Petition was made for the abatement of such taxes. From the decree dismissing the petition, the plaintiff appealed. *Held*, that the decree be affirmed since a chapel is not

a "charity" within the Mass. statute exempting from taxation gifts for charitable uses, because the beneficiaries of said chapel were definite. *Bullock v. Long*, 156 N. E. 743 (Mass. 1927).

The problem of charitable trusts may arise in either of two ways: (1) in a controversy between claimants of the trust and heirs of its donor; (2) in a claim for tax exemption. The decisions however do not seem to use this classification as a basis for decision. Religious purposes are generally recognized in America as charitable. Zollman, *Religious Charities in American Law* (1922) 7 MARQUETTE L. REV. 131. A charitable trust may be for the benefit of religion in one of many ways. Thus, a bequest for the erection of a church has been held charitable. *Sages Ex'rs v. Conn.*, 196 Ky. 257, 244 S. W. 779 (1922). Likewise for the "advancement of Christ's kingdom on earth." *In re Durbrow*, 245 N. Y. 469, 157 N. E. 747 (1927). And for a course of sermons. *Att'y Gen'l v. Trinity Church*, 9 Allen 422 (Mass. 1864). In the United States trusts for the propagation of various religions have been supported as charitable trusts. *Glover v. Baker*, 76 N. H. 393, 83 Ala. 916 (1912) (bequest to Christian Science); *In re Kramph*, 228 Pa. 455, 77 Atl. 814 (1910) (bequest to Swedenborgian religion); Bogert, *Trusts* (1921) 207. It is generally stated that the beneficiaries of a "charity" must be indefinite. Bogert, *op. cit. supra*, at 192. But how small this group may be is not well defined. Thus, a trust for the benefit of widows and orphans of future ministers of a given church has been held a valid charitable trust although the beneficiaries would be few. *Scars v. Parker*, 193 Mass. 551, 79 N. E. 772 (1907). And a bequest for erecting an Episcopal chapel for seamen was held valid although "few persons would attend." *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558 (1902). Likewise, a bequest for the support of a single person (minister) has been held charitable because it assisted in "spreading Christian teaching." *Bank v. Longfellow*, 96 Mo. App. 385, 70 S. W. 372 (1902). And a bequest for personal masses was held valid as constituting a "public benefit." *In re Didion*, 54 Misc. 201, 105 N. Y. Supp. 924 (Surr. Ct. 1907). Two opposing notions seem to underlie the cases on charitable trusts: (1) that exemptions from taxation result in adding to the burden of the other tax payers. *Milford v. County Commissioners*, 213 Mass. 162, 100 N. E. 60 (1912); (2) that such exemptions encourage philanthropy, thus relieving the state of many social burdens. *Salt Lake Lodge v. Groesbeck*, 40 Utah 1, 120 Pac. 192 (1911). The English and American tendencies have been said to favor the latter notion. See *Benignant Construction for Charities* (1908) 43 L. J. 87, 88; see note (1910) 58 U. PA. L. REV. 298, 299. Had the instant court not been influenced by the former notion, it could well have held that the elements of "indefiniteness" and "religious purpose" were present.

VERDICTS—JOINT TORT FEASORS—APPORTIONMENT OF DAMAGES.—A joined B Ry. and C, an engineer, as parties defendant in an action for negligently causing the death of A's son. The jury returned a verdict of \$16,000 against each defendant. Held, on appeal, that the verdict be set aside as an attempt to apportion damages despite the plaintiff's contention that the verdict imposed a joint duty to pay \$16,000 only. *Ross v. Pennsylvania Ry.*, 138 Atl. 383 (N. J. 1927).

In the absence of statute, a verdict apportioning damages is generally held irregular, though not necessarily inoperative. *Hall v. McClure*, 112 Kan. 752, 212 Pac. 875 (1923); *Rhame v. City of Sumpter*, 113 S. C. 151, 101 S. E. 832 (1919). Courts, however, are inclined to be liberal in sustaining verdicts. Cf. *Sanders v. Sheets*, 287 S. W. 1069 (Mo. App. 1926). The attempt to apportion is usually disregarded as surplusage and judgment entered against the defendants jointly for the total sum awarded.

Hall v. McClure, *supra*; *Lake Erie & W. Ry. v. Halleck*, 78 Ind. App. 495, 136 N. E. 39 (1922); *Central Petroleum Co. v. Lewis*, 98 Okl. 26, 224 Pac. 186 (1924); *Leach v. Helm*, 114 Or. 405, 235 Pac. 687 (1925). But in some cases the plaintiff may elect to take the largest sum charged against any of the individual defendants. *Halsey v. Woodruff*, 9 Pick. 555 (Mass. 1830); *Dougherty v. Dorsey*, 4 Bibb 207 (Ky. 1815). The theory being that the sum assessed against any defendant represents at least part of the plaintiff's loss for which a joint responsibility should be imposed. *O'Shea v. Kirker*, 8 Abb. Pr. 69 (N. Y. 1859). Other courts allow the verdict against either defendant to stand provided the action against the other is dismissed. *City of Birmingham v. Hawkins*, 196 Ala. 127, 72 So. 25 (1916); *Warren v. Westrup*, 44 Minn. 237, 46 N. W. 347 (1890); *Crawford v. Morris*, 5 Gratt. 90 (Va. 1848); *Halley v. Mix*, 3 Wend. 350 (N. Y. 1829). It has been held that the plaintiff may have a new trial at his option. *Layman v. Hendrix*, 1 Ala. 212 (1840). The ruling of the instant case is supported in one jurisdiction. *Whitaker v. Tatem*, 48 Conn. 520 (1881) (two judges dissenting). This, because of a belief that no part of the verdict would have been rendered unless the defective portion had been included. *Whitaker v. Tatem*, *supra*. The present general attitude toward procedural delays would seem opposed to such a view.