RECENT CASE NOTES

APPEAL AND ERROR—REDUCTION OF EXCESSIVE VERDICTS ON APPEAL.—In an action for wrongful death the plaintiff recovered judgment for $20,000. The trial court overruled a motion for a new trial after the plaintiff had agreed to a remittitur of $5,000. The appellate court found that the excessive amount of the judgment had not been due to the influence of passion or prejudice, but, holding that the evidence would not support a verdict of $15,000, further reduced it to $10,000. *Held*, on appeal (three justices *dissenting)*, that the judgment of the appellate court be affirmed. *Chester Park Realty Co. v. Schulte*, 166 N. E. 186 (Ohio 1929).

The power of appellate courts to modify an excessive verdict by ordering a remission is recognized by judicial decision in many jurisdictions. *Fishleigh v. Detroit United Ry.*, 205 Mich. 145, 171 N. W. 549 (1919); *Becker Bros. v. United States*, 7 F. (2d) 3 (C. C. A. 2d, 1925). In others it is conferred by statute. ALA. CIV. CODE (1928) § 6150; FLA. GEN. LAWS (Skillman, 1927) § 7057. And where not specifically provided for, the practice is often sanctioned by judicial interpretation of comprehensive statutory and constitutional provisions authorizing appellate courts to modify judgments. *Silverglade v. Von Rohr*, 107 Ohio St. 75, 140 N. E. 669 (1923); OHIO CONST. art. 4, § 6; ORE. CONST. art. 7, § 3c; CAL. CODES AND GEN. LAWS (Supp. 1927) § 956a. Compulsory remittitur has been held unconstitutional in tort actions as an infringement of the plaintiff's right to a trial by jury. *Kennon v. Gilmer*, 131 U. S. 22 (1889); (1922) 35 HARV. L. REV. 616; (1922) 70 U. OF PA. L. REV. 330. But where the prevailing party is given the option of submitting to the reduction or a new trial, the remittitur is permitted. *Gila Valley Ry. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229 (1914); *Campbell v. Sutliff*, 214 N. W. 374 (Wis. 1927); (1928) 4 WIS. L. REV. 371. The conflicting character of some of the further limitations placed on its use illustrates the lack of uniformity prevailing on this question. *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10 (1905) (allowed only where as a matter of law the damages can be computed accurately from the evidence); *Bishop v. N. Y. Times*, 233 N. Y. 446, 135 N. E. 845 (1922) (only where the trial has been properly conducted); *Baltimore & O. Ry. v. Kast*, 299 Fed. 419 (C. C. A. 6th, 1924) (only where the court erred in admitting or excluding evidence or instructing the jury); *Belt Ry. v. Charters*, 123 Ill. App. 322 (1905) (only where passion and prejudice have not swayed the jury); TEX. REV. CIV. STAT. (1925) art. 1861 (only where bias and partiality have influenced the jury). The standard suggested by the dissent in the instant case, that bias and prejudice requiring a new trial should be inferable from the sheer excessiveness of the verdict, has been adopted by only a few courts. *Brach v. Bird and Wells Lumber Co.*, 116 N. W. 245 (Wis. 1908); *Kresge v. Fader*, 158 N. E. 174 (Ohio 1927). But *cf. Burdict v. Missouri Ry.*, 123 Mo. 221, 27 S. W. 453 (1894). See Austin Scott, *Civil Procedure* (1920) 33 HARV. L. REV. 236, 248. Generally, excessive verdicts have been cured on appeal even in instances similar to the principal case where the trial court has already reduced the verdict. *Standard Growers Exch. v. Martin*, 80 Fla. 864, 87 So. 54 (1921). The argument against scaling down verdicts on appeal is that the court thereby usurps the proper function of the jury. See *Silver King Mining Co. v. Kendall*, 23 Ariz. 39, 48, 201 Pac. 102, 105

(1921); *Hanley v. Great Northern*, 66 Mont. 267, 285, 213 Pac. 235, 241 (1923); SEDGWICK, DAMAGES (9th ed. 1912) § 1330. In view, however, of the present day tendency to give appellate courts more power to dispose of cases without remanding, it seems more practicable, once the defendant's responsibility is established, to entrust to appellate courts the power to correct excessive verdicts than to force the expense and delay of a new trial. See Sunderland, *The Scope of Judicial Review* (1929) 27 MICH. L. REV. 416; Comment (1929) 38 YALE L. J. 971.

APPEAL AND ERROR—WHAT CONSTITUTES PREJUDICIAL ERROR—ERRONEOUS ADMISSION OF PROOF OF FACT ALREADY ESTABLISHED.—The defendant was on trial for murder. A statement by the deceased identifying the defendant as his assailant was admitted as part of the *res gestae*. A similar statement was admitted as a dying declaration. The defendant was convicted. *Held*, on appeal, that the judgment be reversed, on the ground that the dying declaration was erroneously admitted, although the statement offered as *res gestae* was properly in evidence. *Hale v. State*, 16 S. W. (2d) 1068 (Tex. 1929).

A majority of jurisdictions formerly ruled that the presence of any error in the admission of evidence in a criminal case created *ipso facto* the right to a new trial. 1 WIGMORE, EVIDENCE (2d ed. 1923) § 21. The general tendency today, however, is to require that the error be harmful to the defendant to entitle him to a reversal. Note L. R. A. 1918B 390; Note (1924) 22 MICH. L. REV. 591, 592; (1924) 19 ILL. L. REV. 467. Some courts, by presuming any error to be prejudicial, place the burden of showing it to be harmless upon the prosecution. *Moon v. State*, 161 Ark. 234, 255 S. W. 871 (1923); *Booker v. State*, 121 So. 3 (Ala. 1929). Others place the burden of showing prejudice upon the defendant. *State v. Fletcher*, 126 Me. 153, 136 Atl. 908 (1927); *Marron v. United States*, 18 F. (2d) 218 (C. C. A. 9th, 1927). In general, however, the admission of incompetent evidence to prove a given fact will be considered harmless when the same fact is fully established by competent evidence. *Wolfe v. State*, 159 N. E. 545 (Ind. 1928); *People v. Nelson*, 222 N. W. 122 (Mich. 1929); see *Commonwealth v. Bird*, 162 N. E. 900, 902 (Mass. 1928). But where the evidence on the fact sought to be established is almost evenly balanced, any doubt will be resolved in favor of the defendant. *Porter v. State*, 84 Fla. 552, 94 So. 680 (1922); *People v. Infantino*, 224 App. Div. 193, 230 N. Y. Supp. 66 (4th Dep't 1928). Where the declaration of a deceased person has been admitted without objection, the erroneous admission of another similar statement by the same person has been held insufficient to require a new trial. *Cain v. State*, 146 S. E. 340 (Ga. 1929) (dying declaration properly admitted; similar statement erroneously admitted as part of *res gestae;* new trial granted on other grounds). The instant decision might be supported on the ground that a dying declaration will possibly carry more weight with a jury than a statement made as part of the *res gestae*, especially when consisting of a repetition of a former accusation.

CONDITIONAL SALES—DEFAULT BY VENDEE—MAY VENDOR WHO HAS DISAFFIRMED COLLECT NOTE GIVEN AS DOWN PAYMENT.—Under a contract of conditional sale of an auto, the plaintiff vendor received from the defendant as a down payment a note for $127, the balance of the purchase price to be paid in monthly installments. The contract stipulated that in case of default all payments previously made were to be retained by the seller as consideration for use of the car. It acknowledged the receipt of the note as a cash payment and further provided that, in case of default, any note

given should forthwith become due and payable. The defendant having default, the plaintiff took possession of the car and sued on the note. Judgment was given for the plaintiff. *Held*, on appeal, that the judgment be reversed. *Jones-Short Motor Co. v. Bolin*, 279 Pac. 395 (Wash. 1929).

When a buyer defaults in his payments under a contract of conditional sale, the seller may disaffirm the contract and retake the subject matter of the sale, or affirm the agreement and sue for the entire contract price. *Jordan v. Peek*, 103 Wash. 94, 173 Pac. 726 (1918). If he elects to disaffirm the contract, he is not entitled to recover the contract price. *I. X. L. Stores Co. v. Moon*, 49 Utah 262, 162 Pac. 622 (1916); 2 WILLISTON, SALES (2d ed. 1924) § 579. And where no provision for forfeiture is made in the contract a few jurisdictions require the seller to return to the buyer the down payment and subsequent payments, less a reduction for depreciation. *Quality Clothes Shop v. Keeney*, 57 Ind. App. 500, 106 N. E. 541 (1914); *Enterprise Distributing Corp. v. Zalkin*, 154 Ga. 97, 113 S. E. 409 (1922). In a few other jurisdictions, statutes require the seller to resell the article and apply the proceeds of this sale towards the contract price of the article, permitting him to bring suit for any deficiency then remaining. *Keeler v. Goodman*, 296 Fed. 909 (C. C. A. 5th, 1924). The general rule, however, is that the seller may dispose of the article as he wishes and may keep the initial payment and subsequent payments made before the default. *Perkins v. Grobben*, 116 Mich. 172, 74 N. W. 469 (1898); *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023 (1912). In some cases, where the intention of the parties is clearly so expressed, the courts have even gone so far as to permit a recovery not only of the property, but also of the entire contract price. *Bedard v. C. S. Ransom, Inc.*, 241 Mass. 74, 134 N. E. 392 (1922). In the instant case recovery was denied on the ground that the note was not a payment, but merely "a *pro tanto* obligation evidencing so much of the agreed sale price of the property." In so holding the court distinguished the case from one in which the note of a third party, given by the buyer to the seller as the down payment, was held to be a valid payment and enforceable after default. *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78 (1916). But the provisions of the contract in the instant case seem clearly to indicate that the intention of the parties was that the note should, in case of default, be treated as a payment. The decision of the court might therefore seem to represent a strict adherence to principle rather than an attempt to carry out the contract as apparently contemplated by the parties. The decision may perhaps be justified, however, on the ground that the court, looking behind the words in which the agreement was stated, recognized, and in its decision compensated for, an inequality probably existing in the bargaining powers of a large corporate vendor and an individual purchaser.

CONFLICT OF LAWS—TIME WHEN DIVIDENDS ACCRUE AS INCOME OF A TESTAMENTARY TRUST.—A testator, domiciled in Connecticut, created a trust of property including shares of stock in New York corporations. An agreement among all interested parties, accepted by the court as interpretative of the will, provided that except for $5000 annually the income from the trust should be paid to the testator's widow during her life. The New York corporations declared dividends before the widow's death, payable at dates subsequent to her death. The dates of closing the stock books to determine those entitled to the dividends were also subsequent to her death. The Connecticut court considered the New York rule to be that dividends vest in the shareholder at the time of declaration. In

Connecticut, however, dividends apparently vest in the shareholder at the date of closing the stock books. [*Richter v. Light*, 97 Conn. 364, 116 Atl. 600 (1922) (semble); *cf. Nutter v. Andrews*, 246 Mass. 224, 142 N. E. 67 (1923)]. In an action brought to determine who was entitled to the dividends the case was reserved for the advice of the Supreme Court. *Held*, that the dividends were payable to the estate of the widow, on the ground that the law of New York was controlling. *Union and New Haven Trust Co. v. Watrous*, 146 Atl. 727 (Conn. 1929).

In the absence of circumstances indicating a contrary intention, the interpretation of a will creating a trust of personal property is governed by the law of the settlor's domicil. *In re Campbell's Estate*, 53 Utah 487, 173 Pac. 688 (1918); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1927) § 317. On the other hand, matters of internal management of corporations are usually governed by the law of the state of incorporation. *Fisher v. Oak Life Insurance Co.*, 52 N. Y. Super. Ct. 179 (1885); see *Hoglan v. Moore*, 122 So. 824, 828 (Ala. 1929); BEALE, FOREIGN CORPORATIONS (1904) §§ 300, 305. Thus the shareholder's right to a dividend is controlled by the law of the state of incorporation. *Berford v. New York Iron Co.*, 56 N. Y. Super. Ct. 236, 4 N. Y. Supp. 836 (1888); *Leary v. Columbia River and P. S. Nav. Co.*, 82 Fed. 775 (C. C. Wash. 1897); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1927) § 196. The instant court found a sanction for its result in the latter rule, regarding the question of when a dividend from shares of stock becomes income as a question of internal management of the corporation. This seems reasonable, for the legal effect of a declaration of a dividend by a New York corporation should be determined by the laws of that state. It follows that where the trust res comprises shares of stock in corporations of different states having conflicting rules, dividends declared prior to the life tenant's death, payable at a date subsequent thereto, may go in part to the life tenant's estate and in part to the remainderman. In the absence of an expressed intention by the settlor to the contrary, however, such a result is unobjectionable.

CONSTITUTIONAL LAW—SERVICE ON NON-RESIDENT MOTORISTS—REQUIREMENT OF RETURN RECEIPT.—A Connecticut statute provides for acquiring jurisdiction over non-resident motorists by service upon the commissioner of motor vehicles and requires that a copy of such service be sent by registered mail to the last known address of the defendant. Conn. Pub. Acts 1925, c. 122, § 1. The plaintiff's assignor recovered a default judgment in Connecticut after serving process on the defendant, a resident of New York, in accordance with the above statute. In a suit on the judgment in New York the defendant denied the jurisdiction of the Connecticut court. The plaintiff moved to strike the defense and for summary judgment. *Held*, that the motion be denied, on the ground that the statute denied due process in failing to require the plaintiff to show by a return receipt that notice was communicated to the defendant. *Freedman v. Poirier*, 134 Misc. 253, 236 N. Y. Supp. 96 (Sup. Ct. 1929).

A Massachusetts statute requiring that notice of service upon non-resident motorists be sent to the defendant by registered mail, and that a return receipt be appended to the writ together with the plaintiff's affidavit of compliance with the statute, has been held constitutional. *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632 (1927); see (1924) 34 YALE L. J. 415. Under a similar statute it has recently been held in New York to be immaterial that the registered letter containing a copy of the summons is not handed to the defendant himself and that he does not personally sign the receipt therefor. *O'Tier v. Sell*, 235 N. Y. Supp. 534 (App. Div. 4th Dep't 1929). It is clear that the provision for mailing notice may not

be completely omitted. *Wuchter v. Pizzatti*, 276 U. S. 13, 48 Sup. Ct. 259 (1927). Statutes of Wisconsin [WIS. STAT. (1927) § 85.15 (3)] and Minnesota [MINN. STAT. (Mason, 1927) § 2684 (8)], similar to that of Connecticut in requiring no return receipt, have been held constitutional, even though, unlike the Connecticut statute, they do not require the mailed notice to the defendant to be registered. *State v. Belden*, 193 Wis. 145, 211 N. W. 916 (1927), rehearing denied, 214 N. W. 460 (Wis. 1927); *Jones v. Paxton*, 27 F. (2d) 364 (D. Minn. 1928); *Schilling v. Odlebach*, 224 N. W. 694 (Minn. 1929); (1927) 4 WIS. L. REV. 189. The instant court felt that without the requirement of a return receipt there would not be sufficient assurance that the notice had been delivered to someone at the defendant's last known address and was thus reasonably likely to have reached the defendant. The desirability of imposing such strict requirements on the plaintiff is debatable.

CORPORATIONS—EXERCISE OF BANKING POWERS—DISCOUNTING.—A New York statute provides that no non-banking corporation, unless expressly authorized by law, shall engage in "receiving deposits, making discounts, or issuing notes. . . . All notes . . . made or given . . . to secure the payment of any money loaned or discounted . . . contrary to the provisions of this section shall be void." N. Y. BANKING LAW (McKinney, 1916) § 140. The plaintiff, a non-banking corporation, brought suit against the endorsers on notes of a third party which it had discounted for them. The trial court dismissed the complaint. *Held*, on appeal (two justices *dissenting*), that the judgment be reversed, on the ground that the statutory prohibition applies to discounting only when it is carried on in connection with other banking powers. *Meserole Securities Co. v. Cosman*, 226 App. Div. 21, 234 N. Y. Supp. 260 (1st Dep't 1929).

The General Corporation Law of New York provides that non-banking corporations shall not have the power of "carrying on the business of discounting . . . or of engaging in any other form of banking" except as permitted by the banking laws. N. Y. GENERAL CORPORATION LAW (McKinney, 1929) § 18. Similar provisions are common in the laws of other states. DEL. REV. CODE (1915) § 1918. Such statutes have been construed as prohibiting the exercise of any one of the specifically enumerated acts, even though unaccompanied by any other banking function. *Earle v. American Sugar Refining Co.*, 74 N. J. Eq. 751, 71 Atl. 391 (1908) (buying bill of exchange); see *Fidelity Investment Ass'n v. Emmerson*, 235 Ill. App. 518, 524-529 (1924) (receiving deposits), *rev'd*, 318 Ill. 548, 149 N. E. 530 (1925) (on the ground that no deposits were involved); *cf. Logan v. Building & Loan Ass'n*, 8 Tex. Civ. App. 490, 28 S. W. 141 (1894) (statute prohibiting "banking and discounting" held to prohibit mere discounting). The controversy is long-standing in New York as to whether discounting is forbidden when unassociated with other banking powers. See *N. Y. Firemen Ins. Co. v. Ely*, 2 Cow. 678 (N. Y. Sup. Ct. 1824) (opinions of Savage, C. J., at 710, and of Sutherland, J., at 701); *People v. Brewster*, 4 Wend. 498, 499 (N. Y. Sup. Ct. 1830). On its face § 140 of the Banking Law appears to do exactly this. It is entitled *Prohibitions Against Encroachments Upon Certain Powers of Banks*. Discounting is a banking power, though not by itself banking. 1 MORSE, BANKS AND BANKING (6th ed. 1928) §§ 2, 50. Furthermore, the use of the conjunction *or* after the term *making discounts* suggests that the prohibition extends to the exercise of any one of the specified acts. Thus the construction of the statutes urged in the dissenting opinion in the present case seems a proper one. *Cf. N. Y. State Loan & Trust Co. v. Helmer*, 77 N. Y. 64, 68-69 (1879); *Pratt v. Short*, 79 N. Y. 437 (1880). Even if suit on the notes be denied, the

plaintiffs may be able to recover the discount price paid to the defendants in a separate action. *Pratt v. Short, supra; Utica Ins. Co. v. Kip*, 8 Cow. 20 (N. Y. Sup. Ct. 1827). And the notes themselves would be competent evidence in such an action. *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652 (N. Y. Sup. Ct. 1830).

EMINENT DOMAIN—ABANDONMENT OF HIGHWAY—COMPENSATION TO OWNERS OF ABUTTING LAND.—The plaintiff owned a tract of land adjacent to a public highway, a non-abutting portion of which was abandoned by the defendant town. Access to the land over the remainder of the road still remained, but it was necessary to use an inconvenient and circuitous route to reach the nearest town. The plaintiff sought compensation for the inconvenience caused him and for the general diminution in value of his land. The trial court overruled a demurrer to the complaint. *Held*, on appeal, that the judgment be reversed. *Kachele v. Bridgeport Hydraulic Co.*, 145 Atl. 756 (Conn. 1929).

Where compensation is sought for abandonment of a highway it is said to be the general rule that the plaintiff's injury, to entitle him to damages, must be "different in kind and not merely in degree" from that of the general public. *Smith v. Boston*, 7 Cush. 254 (Mass. 1851). The strict application of this rule appears to result, as in the instant case, in refusing compensation except where the plaintiff's land abuts on the abandoned portion of the road. *Warner v. New York, N. H. and H. R. R.*, 86 Conn. 561, 86 Atl. 23 (1913); *cf. Tomaszewski v. Palmer Bee Co.*, 223 Mich. 565, 194 N. W. 571 (1923) (injunction restraining obstruction of road refused). But *cf. Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 178 (1895). Connecticut has recognized an exception to this rule where a portion of a causeway was abandoned, cutting off access in one direction, and the remainder, on which the land abutted, was narrowed, rendering access very inconvenient, though not impossible. *Park City Yacht Club v. Bridgeport*, 85 Conn. 366, 82 Atl. 1035 (1912). In some jurisdictions, interference with the convenience of access to the business center or to the neighboring system of highways, regardless of abutter on the closed portion, has been made a test of the existence of a cause of action. *O'Brien v. Central Iron and Steel Co.*, 158 Ind. 218, 63 N. E. 302 (1902); *Denver Union Terminal Co. v. Glodt*, 67 Colo. 115, 186 Pac. 904 (1920); see *Oler v. Pittsburgh Ry.*, 184 Ind. 431, 440, 111 N. E. 619, 622 (1915); *cf. Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633 (1905) (injunction restraining obstruction granted); *Great Southern Ry. v. Barclay*, 178 Ala. 125, 59 So. 169 (1912) (bill to abate obstruction granted). New York, by statutory interpretation, has apparently adopted the latter test. *Buffalo v. Shreiber Brewing Co.*, 210 App. Div. 328, 206 N. Y. Supp. 103 (4th Dep't 1924), *aff'd*, 240 N. Y. 612, 148 N. E. 727 (1925); N. Y. Laws 1916, c. 576, § 12. A few jurisdictions have granted compensation for a diminution in property value even though convenient access remains. *Re Tate*, 10 Ont. L. R. 651 (1905); *cf. Madden v. Pennsylvania R. R.*, 11 Ohio C. C. 571 (1900), *aff'd*, 66 Ohio St. 649 (1902). Rejecting the rule of the principal case, equitable relief has been granted in cases involving water highways where the injury to the plaintiff has been greater only in degree than that of the general public. *Carver v. San Pedro Ry.*, 151 Fed. 334 (1906); *cf. Union Pac. R. R. v. Hall*, 91 U. S. 343 (1875). The rule of the principal case would seem to afford a rather harsh and perhaps unfair basis for refusing compensation to an injured land owner. But see Comment (1927) 13 VA. L. REV. 334; (1924) 8 MINN. L. REV. 342.

EMINENT DOMAIN—EXCESS CONDEMNATION—CONDEMNATION FOR PURPOSE OF RAISING FUNDS.—The constitution of Ohio authorizes a municipality

acquiring land for a public use to condemn, in furtherance of such use, an excess over that required by the improvement. OHIO CONST. § 10, art. 18. The defendant city, in widening a street, undertook to condemn additional adjacent land, the property of the plaintiffs. This excess was to be sold at a profit and the money applied to paying for the improvement. The plaintiffs brought suit for an injunction restraining such excess condemnation. The lower court granted the injunction. *Held*, on appeal, that the judgment be affirmed. *City of Cincinnati v. Vester*, 33 F. (2d) 242 (C. C. A. 6th, 1929).

Several states have passed excess condemnation statutes which suggest the possibility of condemning excess land in order to sell it at a profit and thereby pay for an improvement. CUSHMAN, EXCESS CONDEMNATION (1917) 218. This method has been used abroad with a varying degree of success for many years. CUSHMAN, *op. cit. supra* at 143-179. The instant case is apparently the first to arise under a constitutional provision for excess condemnation. The constitutionality of this policy of recoupment in the United States depends upon whether or not such use of the condemned land is considered to be a "public use." *Fall-Brook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56 (1896). "Public use" is now broadly interpreted in many jurisdictions to mean "public benefit." *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301 (1905); *Connolly v. Woods*, 13 Idaho 591, 92 Pac. 573 (1907). The purpose of excess condemnation when used, as in the instant case, to obtain a profit from the excess land, is clearly to appropriate to the public the unearned increment in value resulting from the improvement. The accepted American method of making the landowner pay for this increased value of his land is to levy special assessments on the property benefited; but these assessments are limited to the cost of the improvements. *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 (1896); CUSHMAN, *op. cit. supra* at 17. It is submitted that the type of excess condemnation exemplified by the instant case imposes no greater hardship on the individual landowner than other types of condemnation which have been held to be constitutional. *Cf. Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441 (1885) (land condemned in order to erect a dam for a mill); *Hairston v. Danville and W. Ry.*, 208 U. S. 598, 28 Sup. Ct. 331 (1908) (land condemned in order to build spur track to a private business). It would seem that the appropriation to the public benefit of the entire unearned increment in the value of the land resulting from an improvement made by the public might well be considered to be a "public use."

EVIDENCE—IMPEACHMENT OF WITNESSES—PROOF OF PRIOR THREATS TO SHOW BIAS.—On a prosecution for cutting with intent to kill, the defendant offered to show the bias of the prosecuting witness by testimony that the witness had threatened the defendant's life. This testimony was excluded. Subsequently the defendant sought to question the witness with regard to his "hard feeling" against the defendant. Objections to such questions were sustained. The defendant was convicted. *Held*, on appeal (three justices *dissenting*), that the conviction be affirmed, on the ground that, as there was no evidence of any overt act of hostility on the part of the witness, evidence of his threats was inadmissible. *State v. Wilson*, 123 So. 614 (La. 1929).

It is well settled that the bias of an opposing witness may be shown either on cross-examination or by extrinsic testimony. *McGill v. Commonwealth*, 216 Ky. 430, 287 S. W. 949 (1926); *Ross v. State*, 275 Pac. 401 (Okla. 1929); 2 WIGMORE, EVIDENCE (2d ed. 1923) § 1022. When a witness admits his hostility, some courts exclude further evidence on that subject.

Sasser v. State, 129 Ga. 541, 59 S. E. 255 (1907); see *State v. Glynn*, 51 Vt. 577, 580 (1879). *Contra: Lyon v. State*, 42 Tex. Cr. App. 506, 61 S. W. 125 (1901). The extent of the inquiry rests in the discretion of the trial court. Hence details of the quarrel or other circumstances which show hostility may be excluded. *Butler v. State*, 34 Ark. 480 (1879). It would seem, however, that details sufficient to show the nature and degree of the hostility should be admitted. 2 WIGMORE, *op. cit. supra* § 951. By the majority rule, a foundation for evidence of hostile declarations must be laid by asking the witness whether he made them. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843 (1918); *State v. Grba*, 196 Iowa 241, 194 N. W. 250 (1923). It lies in the court's discretion to recall a witness so that the necessary foundation may be laid. *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022 (1890). A minority rule requires no foundation. *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920); *Lass v. Lass*, 52 S. D. 302, 217 N. W. 383 (1927); *cf. Chavigny v. Hava*, 125 La. 710, 51 So. 696 (1910). In a few states a foundation may or may not be required, in the trial court's discretion. *Kay v. Fredrigal*, 3 Pa. 221 (1846); *cf. State v. D'Adame*, 84 N. J. L. 386, 86 Atl. 414 (1913). In requiring that overt acts be shown, the court in the instant case seems to have confused the foundation necessary for evidence of bias, with that required for evidence of prior threats, offered to support a plea of self-defense. See 1 WIGMORE, *op. cit. supra* § 111 (3, b).

INSURANCE—MEASURE OF RECOVERY BY SUB-LESSOR FOR LOSS OF RENTS—GROSS RENTS AS CONTRASTED WITH NET RENTS.—The plaintiff was lessee of certain business property and sublet it at a higher rental. The premises were rendered untenantable for five months by a fire, and under the terms of the leases no rent was paid either by the plaintiff or by his sublessee. In a suit brought on a policy insuring the plaintiff against "the loss of rents caused by fire . . . actually sustained" the lower court allowed recovery for the gross amount of rents lost without deduction for the rental the plaintiff was relieved from paying. *Held*, on appeal, that the judgment be affirmed. *American Ins. Co. v. Mattox*, 120 So. 912 (Ala. 1929).

It is a general principle of fire insurance law that a contract of insurance is one of indemnity only and that to allow the insured to profit from a fire is contrary to public policy. VANCE, INSURANCE (1st ed. 1904) 52. So, under a policy insuring against "the loss of profits on a lease," damages have been computed on the basis of the net rather than the gross rents. *Lite v. Firemen's Ins. Co.*, 119 App. Div. 410, 104 N. Y. Supp. 434 (1st Dep't 1907); *O'Brien v. North River Ins. Co.*, 212 Fed. 102 (C. C. A. 4th, 1914); Note L. R. A. 1917 C 722. But *cf. States Import and Export Corp. v. Hartford Fire Ins. Co.*, 210 App. Div. 374, 206 N. Y. Supp. 323 (2d Dep't 1924). And where, in a suit on a policy insuring against "loss by fire on the rents" of a building, it appeared that the rents which the insured was relieved from paying equalled the rents due him, it was held that the insured could recover nothing. *Moving Picture Co. of America v. Scottish Union and National Ins. Co.*, 244 Pa. 358, 90 Atl. 642 (1914); *cf. Chronicle Building Co. v. New Hampshire Fire Ins. Co.*, 21 Ga. App. 687, 94 S. E. 1043 (1918); *Carey v. London Provincial Fire Ins. Co.*, 33 Hun 315, 316 (N. Y. 1884). In certain cases, however, deviations from the general principle have been justified on the ground that the loss to the insured cannot be accurately determined. Thus one with less interest than complete ownership has often been allowed to recover the full replaceable value of the building insured. *Kludt v. German Mutual Fire Ins. Co.*, 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131 (1913). *Contra: Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394

(1902); *Royal Exchange Assurance v. Almon*, 206 Ala. 45, 89 So. 76 (1921). And where a building would have been worth considerably less to a lessee because of the necessity of removing it at the expiration of the lease shortly after the fire, he has nevertheless been held to be entitled to its full value. *Laurent v. Chatham Fire Ins. Co.*, 1 Hall 41 (N. Y. 1828); see McClain, *Insurance of Limited Interests Against Fire* (1898) 11 HARV. L. REV. 512; Note (1929) 27 MICH. L. REV. 683. Likewise, in the case upon which the instant decision chiefly relies, the court interpreted a policy insuring against the "actual loss of rent" as providing for a method of computing the loss on the basis of the gross rents. *Whitney Estate Co. v. Northern Assurance Co.*, 155 Cal. 521, 101 Pac. 911 (1909), 23 L. R. A. (N. S.) 123 (1910). In the instant case, however, there would seem to be no difficulty in determining the amount of the insured's loss. And, at least in the absence of any showing that the plaintiff would suffer further loss from inability to obtain new tenants, the departure from the principle that insurance is a contract of indemnity seems unjustified.

INSURANCE—SUIT BY INJURED PERSON AGAINST LIABILITY INSURER—BREACH OF CONDITION BY INSURED AS DEFENSE.—The plaintiff was injured through the negligence of a motorist protected by a policy of automobile liability insurance. His judgment against the insured being unsatisfied, he sued the defendant insurance company under a statute allowing such an action where the insured himself is insolvent. LA. REV. STAT. ANN. (Marr, 1926) 955. A defense that the policy had been forfeited by the failure of the insured to give notice of the accident as required by the policy was upheld in the trial court. *Held*, on appeal, that the judgment be reversed, on the ground that the breach of condition by the insured subsequent to the accident is not available as a defense to an action by the injured party. *Edwards v. Fidelity and Casualty Co.*, 123 So. 162 (La. 1929).

At common law an injured party cannot recover from the insurer of a tort-feasor on the theory of a third party beneficiary contract. *Hawkins v. McCalla*, 95 Ga. 192, 22 S. E. 141 (1894); *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414 (1902); (1925) 25 COL. L. REV. 661. But many states have statutes permitting such an action. N. Y. INSURANCE LAW (1917) § 109; Conn. Pub. Acts 1919, c. 331. These statutes have been construed as subrogating the injured party to the right which the insured would have had against the insurance company had he paid the judgment. *Lundblad v. New Amsterdam Cas. Co.*, 163 N. E. 874 (Mass. 1928); *Miller v. Met. Casualty Co.*, 146 Atl. 412 (R. I. 1929). Hence it has been uniformly declared that in such an action the insurance company may assert any defense which it could have set up against the insured, the statutes neither enlarging nor modifying its responsibility. *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185 (1917); *Coleman v. New Amsterdam Cas. Co.*, 247 N. Y. 271, 160 N. E. 367 (1928). Thus, failure by the insured to comply with any of the conditions of the policy is generally fatal to the injured party's cause of action. *Guerin v. Indemnity Ins. Co.*, 107 Conn. 649, 142 Atl. 268 (1928) (failure to coöperate); *Weatherwax v. Royal Indemnity Co.*, 250 N. Y. 281, 165 N. E. 293 (1929) (failure to give notice). Notice by the injured party instead of by the insured has been held to satisfy the formal requirement of the policy. *Slavens v. Standard Acc. Ins. Co.*, 27 F. (2d) 859 (C. C. A. 9th, 1928). But, as suggested in the instant case, the injured party will rarely be in a position to know whether the wrongdoer is insured or not. Where the terms of the policy specifically provide that the injured party may sue, it has been held that the policy creates a dual obligation and that the injured party's

right can not be defeated by anything the insured may do subsequent to its accrual. *Metropolitan Cas. Ins Co. v. Albritton,* 282 S. W. 187 (Ky. 1926). *Contra: Merriman v. Maryland Cas. Co.,* 147 Wash. 543, 266 Pac. 682 (1928), overruling *Finkelberg v. Continental Cas. Co.,* 126 Wash. 543, 219 Pac. 12 (1923). The decision of the instant case might be justified on the analogy of life and fire insurance cases holding that notice by the beneficiary as soon as he knows of the existence of the policy is sufficient though the stipulated period has long since elapsed. *Concordia Fire Ins. Co. v. Waterford,* 145 Ark. 420, 224 S. W. 953 (1920); *Trieger v. Com. Travelers Mut. Acc. Assoc.,* 122 Misc. 159, 202 N. Y. Supp. 410 (Sup. Ct. 1923). The instant case points to a more satisfactory tendency in rendering the statutory right of the injured party more substantial than under the rule heretofore declared by a majority of the courts called upon to consider the question.

LANDLORD AND TENANT—LESSOR'S OPTION TO RENEW LEASE OR PURCHASE BUILDINGS—APPRAISAL AS A CONDITION PRECEDENT TO ELECTION.—In a twenty-one year lease, the plaintiff lessor covenanted that at the end of the term it would either renew the lease or pay for a building erected by the defendant lessee, the new rental and the value of the building to be determined by appraisers selected four months before the lease should expire. Without fault of either party the appraisers failed to report by the expiration of the term, and the lessor refused to elect until such report was forthcoming. Twelve days after the end of the term, the defendant served notice on the landlord that its failure to elect prior to the end of the term operated as a renewal. The plaintiff sought a declaratory judgment that its option still existed and the defendant counterclaimed for a declaration that it was entitled to a new lease. The defendant had judgment on the pleadings in the lower court. *Held,* on appeal (one judge *dissenting*), that the judgment be reversed. *Trustees of Columbia University v. Kalvin,* 250 N. Y. 469, 166 N. E. 169 (1929).

An express provision that appraisal shall operate as a condition precedent to the duty of the landlord to elect will be enforced. *Zorkowski v. Astor,* 156 N. Y. 393 (1898). Even in the absence of such express stipulation, the court may regard appraisal as a condition precedent. *Hood v. Hartshorn,* 100 Mass. 117 (1868). Generally, however, the courts tend to regard appraisal as a mere "collateral agreement." *Enquist v. McGowan,* 121 Wash. 695, 209 Pac. 1091 (1922); *Coles v. Peck,* 96 Ind. 333 (1884). Furthermore time is generally construed as being of the essence of an option agreement. *Bullock v. Grinstead,* 95 Ky. 261, 24 S. W. 867 (1894). *Contra: Fountain Co. v. Stein,* 97 Conn. 619, 118 Atl. 47 (1922); *cf.* (1923) 32 YALE L. J. 409. Ordinarily, where a contract provides for an election between several alternatives, if the party with the privilege to elect fails to do so, the privilege passes to the other party. 2 TIFFANY, LANDLORD AND TENANT (1912) 271, n. 30. The lower court applied this doctrine to the instant case. *Trustees of Columbia University v. Kalvin,* 132 Misc. 601, 230 N. Y. Supp. 386 (N. Y. Co. 1928). Decisions in which appraisal has not been construed as a condition precedent to the duty to elect are often capable of differentiation from the instant case in that the lessee bound himself to perform in accordance with the landlord's choice. *Coles v. Peck, supra; cf. Zorkowski v. Astor, supra.* Others can be distinguished on the ground that the appraisers were not to be appointed before the end of the term. *Bullock v. Grinstead, supra.* But in view of the fact that leases of this nature are drawn to encourage a tenant to improve the leased premises, the parties in the instant case probably intended by their appraisal agreement, made twenty-one years

ago, rather to provide for a fair evaluation of an unpredictable change in the real estate market than to allow the lessor to gamble at the expense of the lessee on the outcome of the appraisal and by such action tie up property for the uncertain and possibly protracted period of arbitration. *Cf. Van Beuren v. Wotherspoon*, 164 N. Y. 368, 369, 57 N. E. 633, 634 (1900) (appraisal dragged out for five years); *Doyle v. Hamilton Fish Corp.*, 144 App. Div. 131, 133, 128 N. Y. Supp. 898, 899 (1st Dep't 1911) (lessee anxious for prompt action since he had sublet); *Kaufmann v. Liggett*, 209 Pa. 87, 96 (1904) (uncertainty would seriously jeopardize lessee's business). Although such a construction may seem to work an injustice on the landlord, still the lessor can readily approximate a fair renewal rent and the value of the tenant's building. See dissent in instant case, *supra* at 475.

MARRIAGE AND DIVORCE—ANNULMENT OF SECOND MARRIAGE—EFFECT ON FIRST HUSBAND'S DUTY TO PAY ALIMONY.—A divorce decree incorporating a previous separation agreement provided that the defendant should pay the plaintiff alimony in monthly installments "so long as she remained unmarried." The plaintiff remarried, but after three years obtained an annulment on the ground of fraud. Six months thereafter she brought suit for alimony covering both the period of her second marriage and the subsequent months. The trial court denied the defendant's motion for judgment on the pleadings. This was reversed in the Appellate Division and the complaint dismissed. *Sleicher v. Sleicher*, 224 App. Div. 529, 231 N. Y. Supp. 538 (3d Dep't 1928). *Held*, on appeal (two judges *dissenting*), that the defendant's motion for judgment be denied, but that he be required to pay alimony only for the months subsequent to the annulment. Judgment reversed. *Sleicher v. Sleicher*, 251 N. Y. 366, 167 N. E. 501 (1929).

It is generally said that an annulment renders a marriage void from the beginning. *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394 (1917), L. R. A. 1918B 415; *Matter of Moncrief*, 235 N. Y. 390, 139 N. E. 550, 27 A. L. R. 1117 (1923). The application of this doctrine has frequently resulted in harsh decisions. *Cf. Matter of Moncrief, supra* (statutory legitimation of children upon subsequent intermarriage of parents held inapplicable where marriage was later annulled); *Heinle v. Heinle*, 115 Misc. 469, 188 N. Y. Supp. 399 (Co. Ct. 1921) (wife seeking annulment held not entitled to counsel's fees or alimony); 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) 608-9. But statutes in most jurisdictions have modified this rule. *Cf.* N. H. PUB. LAWS (1926) c. 287, §§ 15, 16, 20 (legitimating and providing for care of children; allowing alimony). In some situations, also, a few courts have avoided the doctrine's apparent consequences. *Jordan v. Missouri and Kansas Telephone Co.*, 136 Mo. App. 192, 116 S. W. 432 (1909) (second marriage held not validated by subsequent annulment of first); *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069 (1st Dep't 1914) (same). The denial in the instant case of alimony for the period of the second marriage might have been based upon principles of estoppel. See *Cage v. Acton*, 1 Ld. Raym. 515, 521 (1700); 2 BISHOP, *op. cit. supra* §§ 1601, 1603, 1604, 1607. Furthermore, courts will relieve one from paying alimony to support a woman while she is validly married to and presumably supported by another. *Phy v. Phy*, 116 Ore. 31, 236 Pac. 751, 240 Pac. 237 (1925), 42 A. L. R. 588 (1926). And the reason of this rule seems to apply equally to the principal case. But the broader doctrine, here applied for the first time to the annulment of a marriage, that the relating back of rescission *ab initio* "is not . . . without limits prescribed by policy and justice," has advantages beyond the result of the instant case. It will serve to cover decisions not easily based on estoppel

or other technique. *Cf. Jordan v. Missouri and Kansas Telephone Co.; McCullen v. McCullen*, both *supra;* Note (1915) 1 CORN. L. Q. 117. And if in application it reaches the result that hereafter the retroactive effect of an annulment decree shall not be permitted to work inequity as to innocent third parties, it may render remedial legislation unnecessary in the future.

MUNICIPAL CORPORATIONS—POWER OF A BOARD OR COMMISSION TO BIND A MUNICIPALITY FOR ATTORNEYS' FEES.—The plaintiffs were retained by the board of election commissioners of a city to represent it in a suit brought to compel the board of supervisors to allow in the budget an amount deemed necessary by the election commissioners. The city attorney had ruled against the contention of the commissioners and represented the board of supervisors throughout. The plaintiffs brought an action of mandamus to compel the city to pay their fees and costs. The defendant's demurrer was sustained in the lower court. *Held*, on appeal, that the judgment be affirmed. *Glensor, Cleve & Van Dine v. Andriano, Board of Sup'rs*, 278 Pac. 1060 (Cal. 1929).

The power of a corporate city to employ counsel is implied from its creation and purpose. 3 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 1275. And there is considerable authority to the effect that additional or special counsel may be employed by a city even where the charter designates particular officers to attend to all its legal affairs. *Boise City v. Randall*, 8 Idaho 119, 66 Pac. 938 (1901); *Treeman v. City of Perry*, 11 Okla. 66, 65 Pac. 923 (1901). Ordinarily, however, no such power in an officer, board, or department of a city is implied merely from the existence or purpose of such a division. *Wallace v. Mayor and Common Council of San Jose*, 29 Cal. 180 (1865). Even where a board or commission employs counsel, not in a controversy with another department, and for a purpose clearly beneficial to the municipality, the courts seem unwilling to hold the city responsible on the retainer contract. *Reynolds v. Village of Ossining*, 102 App. Div. 298, 92 N. Y. Supp. 954 (2d Dep't 1905) (board of health retained attorney to institute suits against violators of the board's decrees); *Miller County Highway and Bridge District v. Cook*, 134 Ark. 328, 204 S. W. 420 (1918) (attorney retained by improvement board to institute action testing its own validity). Where the attorney has been retained in a controversy within or between city departments, the courts are still less willing to imply a power to bind the city. *Higginson v. City of Fall River*, 226 Mass. 423, 115 N. E. 764 (1917) (fire board seeking to remove chief engineer); *Finlayson v. Gorman*, 117 Minn. 323, 136 N. W. 402 (1912) (power and light commission seeking to compel city treasurer to pay claims incurred by commission). But in certain exceptional situations such a power has been recognized. *Louisville v. Murphy*, 86 Ky. 53 (1887) (counsel retained by mayor to seek injunction restraining city officials from collecting unauthorized tax); *Wiley v. Seattle*, 7 Wash. 576, 35 Pac. 415 (1894); *Barnert v. City of Paterson*, 48 N. J. L. 395 (1886) (counsel retained by mayor to defend mandamus action brought by city council to require him to sign an illegal bond issue, the city attorney having declined to act); *Smedley v. City of Grand Haven*, 125 Mich. 424, 84 N. W. 626 (1900) (counsel retained by mayor to contest transfer of money from one fund to another by city council contrary to charter). The courts seem more ready to imply a power to retain counsel where the purpose of the action is of vital public concern, as distinguished from the instant case, where the contest over the amount to be allowed in the budget for the election commissioners partook more of the nature of a mere departmental controversy.

REAL PROPERTY—CONVEYANCE OF BASE FEE—INTERPRETATION OF "SO LONG AS."—Land was conveyed to the trustees of a church for a small consideration. The only limiting clause in the deed read "to have and to hold . . . so long as said lot is held and used for church purposes." A church was erected upon the land. Subsequently the use for church purposes was abandoned. The trustees petitioned to be allowed to remove the church. The lower court granted the petition. *Held*, on writ of error (one justice *dissenting*), that the judgment be affirmed, on the ground that the limiting clause was operative only as a covenant and not as a limitation upon the grant. *Petition of Copps M. E. Church*, 166 N. E. 218 (Ohio 1929).

The instant decision might, in some jurisdictions, have been based upon the rule that a grant of a fee simple in the granting clause cannot be cut down by limitations in the habendum only. *Carllee v. Ellsberry*, 82 Ark. 209, 101 S. W. 407 (1907). The court, however, placed it on the ground that special limitations on a grant of land in fee simple, especially when relied upon to work a forfeiture, must be created by express terms or clear implication. See *Columbia Ry. v. South Carolina*, 261 U. S. 236, 248, 43 Sup. Ct. 306, 309 (1923). Some text writers have even denied the possibility of rights of reverter after a grant of a determinable fee as repugnant to the statute *Quia Emptores* and to the rule against perpetuities. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 32. American courts, however, have gone no further than the rule of construction applied in the instant case in their opposition to such so-called unreasonable clouds on title. Vance, *Rights of Reverter* (1927) 36 YALE L. J. 593; Powell, *Determinable Fees* (1923) 23 COL. L. REV. 207. Rules of construction apply only in cases of ambiguity, and it is submitted that there is no ambiguity here. The phrase "so long as," if given any effect, must create a special limitation; it cannot import a promise. *Cf. Summit v. Yount*, 109 Ind. 506, 9 N. E. 582 (1886). Similar deeds have been interpreted as creating rights of reverter. *Sperry v. Pond*, 5 Ohio 387 (1832) ("so long as . . . and no longer"); *Pond v. Douglass*, 106 Me. 85, 75 Atl. 320 (1909) (identical with the instant deed). Inasmuch as the consideration paid in the instant case was small the forfeiture would hardly seem unjust and the limitation might well be enforced. See dissent in instant case at 221.

SCHOOLS AND SCHOOL DISTRICTS—LAND HELD SUBJECT TO REVERTER—POWER OF SCHOOL BOARD TO RETAIN BUILDINGS.—The plaintiff granted certain land to a school district, reserving in the deed the right to the reverter when the land should cease to be used for school purposes. The defendants, trustees of the school district, having changed the site of the school, attempted to remove the school building which had been built on the granted land. In an action to enjoin such removal and quiet title to the entire realty, the lower court gave judgment for the defendants. *Held*, on appeal (one justice *dissenting*), that the judgment be affirmed. *Schwing v. McClure*, 166 N. E. 230 (Ohio 1929).

Regardless of the manner in which the question arises, it seems to be well settled that a school building, erected on land subject to the instant type of reverter, passes as part of the realty when the use for school purposes ceases. *Fall Creek Township v. Shuman*, 55 Ind. App. 232, 103 N. E. 677 (1913) (action to quiet grantee's title to land and building); *Taylor v. Bird*, 150 Ga. 626, 104 S. E. 502 (1920) (removal of schoolhouse enjoined); *Malone v. Kitchen*, 79 Ind. App. 119, 137 N. E. 562 (1922) (sale of schoolhouse enjoined); *New Hebron School District v. Sutton*, 151 Miss. 475, 118 So. 303 (1928) (injunction restraining grantor from interfering

with removal of schoolhouse denied). Moreover, where a statute, allowing school districts to keep such buildings when the land reverts, went into effect after such a grant of school land but before the erection of the schoolhouse, it was held that its application in the case would impair the obligation of the contract. *Board of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465 (1917). The instant decision is based on novel grounds. Several earlier decisions of the lower Ohio courts, holding that a school building is a trade fixture and may be removed within a reasonable time, are repudiated. See instant case, *supra* at 232; *cf. May v. Board of Education*, 12 Ohio App. 456 (1920). The court argues that, inasmuch as a school board is prohibited by statute from giving away school property, its acceptance of a restricted grant is ineffectual to make the building pass with the realty on reversion since that would be a gift "by indirection." But if the court considers the reverting itself as a "gift" of the building to the grantor, it is assuming that the schoolhouse was held in fee simple, and overlooking the general view that a building of such character becomes a part of the realty upon its erection, subject to the same contractual restrictions as the land. See dissent in instant case, *supra* at 233. The court gives no satisfactory explanation for its deviation from this general view.

TAXATION—ESTATE TAX—TENANCY BY THE ENTIRETY.—The federal estate tax taxes a transfer of the net estate of every decedent, expressly including therein any interest held as a tenant by the entirety. [44 STAT. 70 (1926), 26 U. S. C. §§ 1092, 1094 (1926)]. Husband and wife owned property as tenants by the entirety. Upon the death of the husband the tax on the jointly owned property was paid under protest. In an action brought by the administrator in the federal district court of Maryland to recover the amount so paid, the court gave judgment for the plaintiff, on the ground that the statute was unconstitutional in so far as it included estates by the entireties. *Held*, on appeal, that the judgment be reversed. *United States v. Tyler*, 33 F. (2d) 724 (C. C. A. 4th, 1929).

At common law husband and wife, holding as tenants by the entireties, were said to be seized of the whole estate at the time of conveyance. 2 BL. COMM. *182. It is generally true that upon the death of one the survivor is entitled to the whole estate, which right cannot be defeated by the other's conveyance to a third person or by an execution against such other. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 645. The lower court based its decision on the theory that since under the common law rule, followed in Maryland, each spouse was already seized of the entire estate, there was no transfer of interest to the survivor upon the death of one tenant; the tax was therefore unconstitutional as a direct tax without apportionment or as a denial of due process. *Tyler v. United States*, 28 F. (2d) 887 (D. Md. 1928); *Dime Trust and Safe Deposit Co. v. Phillips*, 30 F. (2d) 395 (M. D. Pa. 1929); (1929) 38 YALE L. J. 1156. On similar reasoning the Circuit Court of Appeals for the third circuit has recently reached a result contrary to that of the principal case. *United States v. Provident Trust Co.*, U. S. Daily, Oct. 15, 1929, at 1950. But as the instant court points out the survivor is actually benefited, since the interest of the decedent in the property is terminated and the rights of the survivor are no longer limited by those of the decedent. Similarly, the value of a dower interest allotted by statute has recently been held subject to the federal estate tax. *Allen, Collector v. Henggeler*, 32 F. (2d) 69 (C. C. A. 8th, 1929). These would seem to be transfers of economic interests in property which should properly be subject to taxation. Furthermore, the principal case is in accord with the modern tendency

to modify the common law doctrine of tenancy by the entireties. 1 TIFFANY, *op. cit. supra* 646; *cf. Van Ausdall v. Van Ausdall*, 48 R. I. 106, 135 Atl. 850 (1927); *Wolf v. Johnson*, 145 Atl. 363 (Md. 1929). But *cf. Dutcher v. Van Duine*, 242 Mich. 477, 219 N. W. 651 (1928); *Settle v. Settle*, 8 F. (2d) 911 (Ct. of App. D. C. 1925), 43 A. L. R. 1079 (1926).

TAXATION—EXEMPTION OF CHARITABLE INSTITUTIONS—DEGREE OF OWNERSHIP NECESSARY.—An individual granted land to a charitable institution subject to an option to repurchase for $10 on thirty days notice. A deed reconveying the land to the original grantor was placed in escrow subject to the performance of the option conditions. The grantee institution covenanted not to transfer the land without the grantor's consent. Application for tax exemption was made by the grantee institution under a statute providing for exemption of property "belonging to" a charitable institution and used exclusively for charitable purposes. OHIO GEN. CODE (Page, 1926) § 5353. The lower court denied exemption. *Held*, on appeal (three justices *dissenting*), that the judgment be reversed, on the ground that the land is exempt so long as title remains in the institution and the charitable use continues. *Zangerle v. Gallagher*, 165 N. E. 709 (Ohio 1929).

Some states have exempted from taxation land used exclusively for charitable purposes. KY. STAT. (Carroll, 1922) § 4026; 2 COOLEY, TAXATION (4th ed. 1924) § 744. Others require ownership by the charity in addition to such use. MICH. COMP. LAWS (Cahill, Supp. 1922) § 4001; 2 COOLEY, *loc. cit. supra*. The courts have generally construed such statutes strictly against exemption. See *Sisters of Charity v. Cory*, 73 N. J. L. 699, 706, 65 Atl. 500, 503 (1907); Note (1925) 34 A. L. R. 634, 635. But see *Salt Lake Lodge v. Groesbeck*, 40 Utah 1, 8, 120 Pac. 192, 194 (1911); 2 COOLEY, *op. cit. supra* § 673. Thus under a statute requiring ownership, land was held non-exempt, the title to which was in a Catholic bishop as an individual, unrestricted by any legally enforceable trust for the benefit of the congregation. *Katzer v. Milwaukee*, 104 Wis. 16, 79 N. W. 745 (1899). The words "belonging to" have been construed as not requiring unrestricted ownership. *Borough of Princeton v. State Board of Taxes*, 96 N. J. L. 334, 115 Atl. 342 (1921) (school held to "own" land, although entire purchase price was covered by mortgages). But it seems that "belonging to" connotes a higher degree of dominion over the land and more security of occupancy than is found in the principal case. The instant decision might permit the holding of land for speculative purposes free from taxation, by the subterfuge of transferring a title which in effect creates little more than a tenancy at will.

WORKMEN'S COMPENSATION—CHILDREN COMMITTED TO STATE INSTITUTIONS AS "DEPENDENTS."—A minor child was committed to an industrial school as a delinquent, the father not being ordered to contribute toward his support. Upon the death of the father, the child, by his guardian, filed an application for compensation under the Workmen's Compensation Act. He received an award as a partial dependent. *Held*, on appeal, that compensation be denied, on the ground that the child was not a "dependent." Judgment reversed. *Advance Rumley Co. v. Freestone*, 167 N. E. 377 (Ind. 1929).

Inmates of institutions who are supported solely by the state have been held not "dependents" under the Workmen's Compensation Laws and not entitled to recover thereunder for the death of those normally bound to support them. *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209 (1916); *Eulette v. Zilske*, 222 Ill. App. 128 (1921); *Rees v. Penrikyber Colliery Co.*, [1903] 1 K. B. 259. *Contra: Kelley v. Hopkins*, [1908] 2 Ir. R. 84.

An emancipated child has been held not entitled to compensation for his father's death, on the ground that the father was under no duty to support him. *Iroquois Iron Co. v. Industrial Commission*, 294 Ill. 106, 128 N. E. 289 (1920). But where an emancipated child resumes his former status, both the parent's duty and the child's dependency for purposes of compensation revive. *Peters v. Industrial Commission*, 314 Ill. 560, 145 N. E. 629 (1924). In a few states an absolute decree of divorce, giving custody of a child to the mother without requiring the father to contribute to its support, is held to terminate the father's responsibility for the child's maintenance. *Husband v. Husband*, 67 Ind. 583 (1879); *Creeley v. Creeley*, 258 Mass. 460, 155 N. E. 424 (1927). And such a child cannot recover compensation for his father's death. *Western Indiana Gravel Co. v. Erwin*, 84 Ind. App. 26, 149 N. E. 185 (1925); *Gillander's Case*, 243 Mass. 5, 136 N. E. 646 (1922). Most states, however, hold that an absolute decree of divorce, though the father is not required to contribute to the support of the child, does not terminate his responsibility to support it. *Walder v. Walder*, 159 La. 231, 105 So. 300 (1925); Note (1921) 15 A. L. R. 569. In these states the child is a "dependent" entitled to compensation. *Panther Creek Mines v. Industrial Commission*, 296 Ill. 565, 130 N. E. 321 (1921); *Industrial Commission v. Drake*, 103 Ohio St. 628, 134 N. E. 465 (1921). The situation of children committed to institutions seems analogous. Statutes usually provide that the parents or guardians of such children may be called upon by the court to pay all or part of the cost of the child's maintenance. *Guthrie v. Conrad*, 133 Iowa 171, 110 N. W. 454 (1907); IND. ANN. STAT. (Burns, 1926) § 1705. In the instant case such contribution by the father was not ordered and this the court regarded as a judicial termination of his duty to support the child. It is submitted that the duty of the father is a continuing one, since under this statute the court at any time might have required him to contribute to the child's support and since the child might at any time have been released.

WORKMEN'S COMPENSATION—EMPLOYER'S RESPONSIBILITY FOR INJURY TO MARITIME WORKER THROUGH FOREMAN'S WILLFUL MISCONDUCT.—The plaintiff, a stevedore in the employ of the defendant's testator, sought to recover under the Jones Act [41 STAT. 1007 (1920), 46 U. S. C. § 688 (1926)] for injuries willfully inflicted by a gang boss in an attempt to speed up the work of barge loading. Upon a jury finding that the "assault was committed in the furtherance of the master's work," the trial court allowed the plaintiff to recover. The Appellate Division concluded that the fellow servant rule protected the defendant and it reversed the verdict. *Encarnacion v. Jamison*, 224 App. Div. 260, 230 N. Y. Supp. 16 (2d Dep't 1928). *Held*, on appeal, that the judgment of the Appellate Division be reversed. *Encarnacion v. Jamison*, 251 N. Y. 218, 167 N. E. 422 (1929).

It is doubtful whether the fellow servant rule was ever applicable to cases of injuries to seamen caused by negligence. See *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 487 (1902). But even if the defense could have been invoked in admiralty, the Jones Act had the effect of denying it any future application. 41 STAT. 1007 (1920), 46 U. S. C. § 688 (1926). The instant court rules broadly that since the Supreme Court in construing the Jones Act has declared "seamen" to include "stevedores," it is justified in construing "negligence" to include "willful misconduct" of a brutal foreman "intended and believed to be for the interest of the master." *Cf. International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 Sup. Ct. 19 (1926). But *cf. Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969 (1892). The application of the test of what acts of representatives

are "intended and believed to be for the interest of the master" has resulted in confusion. See *Richard v. Amoskeag*, 79 N. H. 380, 384, 109 Atl. 88, 91 (1920); Note (1921) 8 A. L. R. 1426. The tendency of recent judicial action has been to impose responsibility upon an employer for the results of willful misconduct on the part of an employee placed in a position of authority over other employees, irrespective of the motive which actuates the offending superintendent or foreman. *Indianola Cotton Oil Co. v. Crowly*, 121 Miss. 262, 83 So. 409 (1919) (employer held responsible for manager's assault on accountant where manager attempted to inspect his personal account); *Avondale Mills v. Bryant*, 10 Ala. App. 507, 63 So. 932 (1913) (foreman assaulted mill hand as result of matter outside present employment); *DeLeon v. Doyhof*, 104 Wash. 337, 176 Pac. 355 (1918) (angry logging superintendent committed assault); *Jebeles v. Booze*, 181 Ala. 456, 62 So. 12 (1913) (foreman struck discharged employee before he could leave the room). *Contra: Gabrielson v. Waydell*, *supra* (captain in angry mood assaulted seaman under his command); *Petroleum Iron Works v. Bailey*, 124 Miss. 11, 86 So. 644 (1921) (foreman assaulted employee after an argument). Responsibility is generally not imposed upon an employer where the employee committing the assault does not occupy a position of authority over the injured employee at the time of the act. *Hines v. Cole*, 123 Miss. 254, 85 So. 199 (1920) (both parties were foremen of equal rank); *Smith v. Seaboard Air Line*, 18 Ga. App. 399, 89 S. E. 490 (1916) (brakeman assaulted conductor after his discharge); *Davis v. Green*, 260 U. S. 349, 43 Sup. Ct. 123 (1922) (engineer killed conductor whom he was expected to obey); *Sunderland v. Northern Express Co.*, 133 Minn. 158, 157 N. W. 1085 (1916) (express auditor attacked fellow servant not in his charge). The desirability of the instant holding seems clear, but it appears doubtful whether an insistence that the foreman's act must be intended to be for the interest of the master is of much assistance. A foreman assaulting a fellow servant probably acts from a variety of undefinable motives. Yet the foreman under modern industrial organization has risen to such a place of importance that he literally represents the employer to the men. GARDINER, PRACTICAL FOREMANSHIP (1925) 27; TEAD AND METCALF, PERSONNEL MANAGEMENT (1st ed. 1920) 153-169. Accordingly it would seem better to hold frankly that an employee does not have to assume the risk of the uncontrolled assaults of a foreman placed over him and that an employer who puts a servant in a position of authority over others is responsible when such servant abuses his power through any lack of discretion or infirmity of temper. See *DeLeon v. Doyhof*, *supra* at 342, 343, 176 Pac. at 356, 357.