

RECENT CASE NOTES

ADMIRALTY—MARITIME LIENS—WAIVER.—The petitioner delivered coal to a ship under written agreement with her owners that payment be in trade acceptances endorsed by third parties, and there was no stipulation for a lien. Some of the acceptances being dishonored, the petitioner asserted a maritime lien, but the libel was dismissed. *Held*, on *certiorari*, that the dismissal be affirmed, on the ground that the petitioner had waived his lien by failing to rely upon the credit of the vessel. *The President Arthur*, 49 Sup. Ct. 420 (U. S. 1929).

Accepting collateral security for a claim against a vessel does not of itself constitute a waiver of lien. See *The Crescent*, 88 Fed. 298, 299 (D. N. J. 1898). Thus, taking a mortgage on a vessel to secure future advances of supplies does not waive the lien for such supplies. *The Thomas Morgan*, 123 Fed. 781 (D. S. C. 1903). There is likewise no waiver where promissory notes are given as security and the petitioner has surrendered or is willing to surrender the notes when he files his libel. *Reppert v. Robinson*, Fed. Cas. No. 11,703 (C. C. D. Md. 1851); *The Fairhope*, 235 Fed. 1007 (E. D. La. 1916); *The Kochalkine*, 25 F. (2d) 503 (E. D. S. C. 1928). *Contra: The Yankton*, 7 F. (2d) 384 (D. Mass. 1925). The same result is reached even though the notes are secured by a mortgage on the ship. *The D. B. Steelman*, 48 Fed. 580 (E. D. Va. 1880); *The Cimbrina*, 214 Fed. 128 (D. N. J. 1914). The majority view allows the taking of an accepted draft as collateral security without waiving the lien. *The Chelmsford*, 34 Fed. 399 (C. C. E. D. Pa. 1888). *Contra: The Coastwise*, 291 Fed. 166 (D. Mass. 1923). And a claim may be charged to the shipowner, credit may be extended to him, and he may even be sued, without bringing about a waiver of lien. *The Grand Republic*, 138 Fed. 615 (E. D. N. Y. 1905); cf. *The Hattie Thomas*, 262 Fed. 943 (C. C. A. 2d, 1920); *The Falcon*, Fed. Cas. No. 5078a (S. D. N. Y. 1859); *The Leine Rock*, 49 Fed. 382 (D. N. J. 1892). Where, however, the security in question is taken not merely as collateral but as the very thing upon which the claimant primarily relies for payment, the lien is said to be waived. See *The Sea Flower*, Fed. Cas. No. 12,577 (C. C. S. D. N. Y. 1848). Thus, where the supply man deals with the charterer of a vessel, and looks only to him for payment, the lien is waived. *The Eastern*, 257 Fed. 874 (D. Mass. 1919); *The Millinocket*, 266 Fed. 392 (E. D. N. Y. 1920). But cf. *The Gen. Meade*, 20 Fed. 923 (C. C. D. Neb. 1884). It is likewise waived where repairs are made on security of the owner's name, and his secured notes are taken in payment. *The Lucille*, 208 Fed. 424 (S. D. Ala. 1913). Nor can a lien be claimed where there is a definite agreement to look to the earnings of a vessel alone for payment. *The Jennie Middleton*, 94 Fed. 683 (D. N. J. 1890). A lien was held waived where the contract called for part payment in cash and an endorsed note for the remainder, on the theory that in stipulating for such security as an endorsed note the claimant can not be said to have relied on the security of the vessel. *Taylor v. The Commonwealth*, Fed. Cas. No. 13,787 (C. C. E. D. Mo. 1875). In the instant case the wording of the contract of sale and the definite stipulation for endorsed trade acceptances may very well indicate a failure to rely on the credit of the vessel and so a waiver of the maritime lien. But see (1929) 77 U. OF PA. L. REV. 408.

APPEAL AND ERROR—CONNECTICUT PRACTICE—SPECIAL INTERROGATORIES.

—The plaintiff sought to recover from the defendant for death caused by an automobile accident on the grounds of wanton misconduct, negligence at common law and in violation of a statutory provision governing the operation of automobiles, and supervening negligence. A special interrogatory with reference to supervening negligence was requested but denied because not quite properly framed. All three grounds were submitted to the jury and a general verdict was returned for the plaintiff, judgment being entered thereon. The defendant appealed, claiming that the trial court erred as the verdict was not justified on any one of the three grounds. *Held*, that there was no error. Without regard to the other two assignments of error, the court found the verdict justifiable on the single ground of wanton misconduct. *Ziman v. Whitley*, 147 Atl. 370 (Conn. 1929).

Connecticut has always followed the rule that a general verdict imports that all issues were found in favor of the prevailing party. *Wladyka v. Waterbury*, 98 Conn. 305, 119 Atl. 149 (1922). And if any one count or ground of recovery is upheld on appeal, the general verdict is thereby supported. *Aaronson v. New Haven*, 94 Conn. 690, 110 Atl. 872 (1920); (1920) 30 YALE L. J. 197; *Wladyka v. Waterbury*, *supra* (since, if there were an invalid cause of action among the two or more alleged, it cannot be known that the verdict was based thereon). A contrary rule governs elsewhere. *Grant v. Astle*, 2 Doug. 722 (1781); *Goldstein v. Cornwall*, 215 App. Div. 402, 213 N. Y. Supp. 713 (1st Dep't 1926) (since the court cannot tell on which theory the jury's verdict was based); see *Staten v. Famularo*, 81 Colo. 121, 123, 253 Pac. 1066, 1067 (1927). In Connecticut, the basis of the jury's verdict cannot be discovered by taking the testimony of the jurors. *Whipple v. Fardig*, 146 Atl. 847 (Conn. 1929). And it is doubtful if the judge can interrogate the jurors after verdict rendered as to the basis of their verdict. However, the adverse party can protect himself against the implications of a general verdict by seeking special verdicts on each count, or, as required by more modern practice, where there are several causes of action or, for example, several specifications of negligence in one count, by requesting the submission of special interrogatories as to each one. See *Wolcott v. Coleman*, 2 Conn. 324, 338 (1817); *State v. Stebbins*, 29 Conn. 463, 471 (1861); *Aaronson v. New Haven*, *supra* at 697, 110 Atl. at 874. According to the rules of practice, their submission is discretionary with the court. CONN. PRACTICE BOOK (1922) § 236. But in view of the rule as stated in the *Aaronson* case, it is pointed out that a party must have a right so to protect himself and, if a timely request for proper interrogatories is made, their submission is mandatory on the court. See *Callahan v. Jursek*, 100 Conn. 490, 493, 124 Atl. 31, 32 (1924). As the rule stood before the instant case, appeal could be taken from error in the trial of one of several independent issues only when proper interrogatories had been offered for submission to the jury. See *Spring v. Nagle*, 104 Conn. 23, 28, 131 Atl. 744, 745 (1926); (1926) 35 YALE L. J. 1008. Since each interrogatory must be technically framed to express a cause of action, there arise complications for court, counsel, and jury in cases where there are several specifications of negligence for injury, as in an automobile accident case. In view of this the court in the instant case declares, by way of dictum, that the rule in such cases as cause complications is to be modified so that an appellant can take advantage of errors affecting one specification of negligence only, even though no interrogatories have been submitted. *Ziman v. Whitley*, *supra* at 373, 374. Thus, if there were no wanton misconduct alleged in the instant case, and error were assigned and found on either

ground of negligence, appellant would have been protected without having requested interrogatories.

ARBITRATION AND AWARD—EX PARTE PROCEEDINGS.—A disagreement arose under a sales contract containing a clause providing for the arbitration of future disputes. The seller demanded an arbitration and, the defendants having ignored the notice, proceeded, without application to the court, to secure an *ex parte* hearing and award under § 4a of the New York Arbitration Law. The section provides that "where pursuant to a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract. . . an award has been . . . rendered, without previous application to the supreme court . . . such an award shall . . . be valid and enforceable according to its terms, subject, nevertheless to the provisions of this section. At any time before a final judgment shall have been given in proceedings to enforce any such award . . . any party to the arbitration who has not participated therein may apply to the supreme court . . . to have all or any of the issues hereinafter mentioned determined and if . . . the court . . . shall determine that no written contract providing for arbitration was made . . . or that such party was not at fault by failing to comply with the terms thereof . . . the award shall thereupon become invalid and unenforceable. . . ." [N. Y. Laws 1927, c. 352, § 4a] From an order confirming the award, the defendants appealed, alleging that this section was unconstitutional. *Held* (one justice *dissenting*), that the statute violated due process in that it denied to the defendants the opportunity of contesting the jurisdiction of the arbitrators unless they refrained from appearing at the hearing to contest the plaintiffs' claim on the merits. Judgment reversed. *Finsilver, Still, Moss, Inc. v. Goldberg, Maas, & Co.*, N. Y. L. J. Nov. 14, 1929 at 791 (N. Y. App. Div. 1st Dep't).

The fact that an award is rendered on *ex parte* proceedings does not *ipso facto* render it unenforceable. Such awards have been sustained at common law and under arbitration statutes having no relevant provisions. *Couch v. Harrison*, 68 Ark. 580, 60 S. W. 957 (1901); *Modern System Bakery v. Salisbury*, 215 Ky. 230, 284 S. W. 994 (1926); *Mitsubishi v. Cartens*, 116 Wash. 630, 200 Pac. 327 (1921). Some statutes make express provision for *ex parte* hearings. CONN. GEN. STAT. (1918) § 5994; IOWA CODE (1927) § 12701; LA. REV. CODE OF PRAC. (Marr, 1927) art. 460; MASS. CUM. STAT. (1927) c. 251, § 18; MINN. STAT. (Mason, 1927) § 9513. In New York it had been held, prior to the addition of § 4a to the Arbitration Law, that where a defendant appeared at an arbitration hearing but withdrew in protest to the overruling of his objection to the jurisdiction of the arbitrators, and an award was nevertheless rendered, such an award was unenforceable. *Bullard v. Grace*, 240 N. Y. 398, 148 N. E. 559 (1925). The result of this decision was to require an order from the court before an enforceable award could be secured in any arbitration proceeding. *Cf. Bankers' and Shippers' Ins. Co. v. Liverpool Ins. Co.*, 24 Lloyds' List Rep. 85 (1926) (House of Lords construed New York Arbitration Law *contra*). Section 4a was passed to obviate the rule of *Bullard v. Grace*, and sought at the same time expressly to protect a party not appearing at the hearing. It is to be regretted that a provision inserted to protect the right of an absent party to contest jurisdiction should be interpreted as denying the same right to a party appearing. *Cf. Christman v. Moran*, 9 Pa. 487 (1848). It is worthy of mention that the court's attention does not appear to have been called in the instant case to a recent decision in the same Department where a defendant who contested the claim

on the merits after objecting to the jurisdiction of the arbitrators was allowed to raise the question of jurisdiction in defense to subsequent enforcement proceedings. The issue of the constitutionality of § 4a was not raised in that case. *Marchant v. Mead-Morrison*, 226 App. Div. 397, 235 N. Y. Supp. 370 (1st Dep't 1929), *aff'd*, 252 N. Y. 284 (1930). *Cf. Kent v. French*, 76 Iowa 187, 40 N. W. 713 (1888). If the interpretation of the Appellate Division is sustained and the rule of *Bullard v. Grace* thus restored, it remains to be seen whether the Court of Appeals will extend that rule to the facts of the instant case. In the situation involving non-appearance after due notice received, an *ex parte* award made without a previous determination of the issue of jurisdiction might be held enforceable even without statutory aid.

BANKS AND BANKING—INSOLVENCY—EXTENT OF PREFERENTIAL CLAIM.—The plaintiff sent a note for \$2,500 plus interest to the A bank for collection. The A bank forwarded the note to the defendant bank. While in a hopelessly insolvent condition, the defendant bank collected the proceeds from the maker in the form of a check drawn on the defendant bank. Three days later it was forced to close having \$1,118.70 in actual cash on hand and balances in other banks amounting to \$7,676.90. The plaintiff claimed a preference for the full amount of his note. The lower court decided that the plaintiff's preference was not limited to the amount of cash on hand, but extended to the credits of the defendant bank in other banks. *Held*, on appeal, that the judgment be affirmed. *Lane v. First National Bank of Vale*, 281 Pac. 172 (Ore. 1929).

The authorities are agreed that when a bank with knowledge of its insolvency receives deposits or makes collections, it is held to be a constructive trustee of such funds. *Board of Sup'rs v. Prince Edward-Lunenburg Co. Bank*, 138 Va. 333, 121 S. E. 903 (1924); *Austin v. Lacy*, 2 S. W. (2d) 876 (Tex. Civ. App. 1928); **TIFFANY, BANKS AND BANKING** (1912) 349. Assuming that there was a valid trust in the instant case, to establish a preference by the rule in the federal and in some state courts, not only must the trust funds be traced into the hands of the receiver, but it must be shown that the assets received by him were augmented by the funds sought to be declared trust funds. *Mechanics and Metals Nat. Bank v. Buchanan*, 12 F. (2d) 891 (C. C. A. 8th, 1926); *Kirby v. Wait*, 120 Kan. 400, 243 Pac. 1058 (1926); *Comment* (1927) 36 YALE L. J. 682, 685. There is no augmentation if the trust funds were used to pay debts or other obligations of the bank. *Farmer's Nat. Bank v. Pribble*, 15 F. (2d) 175 (C. C. A. 8th, 1926); *Andrew v. Stato Bank*, 217 N. W. 250 (Iowa 1928). *Contra: Thomson v. Bank of Syracuse*, 278 S. W. 810 (Mo. App. 1926). The courts are divided on the question whether or not a deposit of a check drawn on the insolvent bank is an augmentation of assets. *Union State Bank v. People's Stato Bank*, 211 N. W. 931 (Wis. 1927) (held augmentation); *First Stato Bank v. O'Bannon*, 266 Pac. 472 (Okla. 1928) (same); *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478 (1898) (no augmentation); *Rorebeck v. Benedict Flour & Feed Co.*, 26 F. (2d) 440 (C. C. A. 8th, 1928) (same). Assuming that there was an augmentation in the instant case, should the preference have been extended to the credits of the defendant bank in other banks? There is authority to that effect. *Johnson v. Farmer's Bank*, 11 S. W. (2d) 1090 (Mo. App. 1928); *Cent. Nat. Bank v. First Nat. Bank*, 216 N. W. 302 (Neb. 1927); *cf. Stato v. Bank of Commerce*, 61 Neb. 181, 85 N. W. 43 (1901) (preference extended to deposits of insolvent bank in other banks but not to other assets

of insolvent bank). The Supreme Court of Iowa, most often confronted by this problem due to the great number of local bank failures, has repeatedly limited the preference to the amount of cash on hand at the closing of the bank. *Leach v. Battle Creek Sav. Bank*, 219 N. W. 59 (Iowa 1928); *Leach v. Farmer's Trust & Savings Bank*, 217 N. W. 445 (Iowa 1928). That view has been followed in other jurisdictions. *Hitt Fireworks Co. v. Scandinavian Amer. Bank*, 121 Wash. 261, 209 Pac. 680 (1922); *Grand Forks County v. Baird*, 209 N. W. 782 (N. D. 1926); cf. *Farmer's Bank v. Bailey*, 221 Ky. 55, 297 S. W. 938 (1927). Since the balance with a correspondent bank generally is not cash, but a debt built up by the deposit of commercial paper, by borrowing, and by the discount of bills receivable, the plaintiff should have been held to be a general creditor as to the amount of the excess of the trust fund over the cash on hand. Cf. *Skinner v. Porter*, 263 Pac. 993 (Idaho 1928).

BANKS AND BANKING—RESPONSIBILITY OF COLLECTING BANK FOR ACCEPTING DRAFT IN PAYMENT—EFFECT OF STATUTE AUTHORIZING PAYMENT IN EXCHANGE.—The plaintiff deposited with the defendant bank for collection a check drawn on bank A. The defendant forwarded it to bank A for payment, and received a draft drawn on bank X. This was dishonored when presented because A had no funds with X. Meanwhile A had become insolvent. The check was charged by the defendant to the plaintiff's account. The plaintiff thereupon brought suit for negligence in receiving payment by draft. A statute provided, ". . . all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable in exchange drawn on the reserve deposits of said banks, when any such check is presented by or through any Federal Reserve Bank, post office, or express company or any respective agent thereof." [N. C. CODE (1927) § 220 (aa)] The lower court gave judgment for the defendant. *Held*, on appeal, that the judgment be affirmed. *Braswell v. Citizens' Nat. Bank*, 197 N. C. 229, 148 S. E. 236 (1929).

In the absence of statute it is generally held that a bank accepts at its peril anything other than money in payment of checks or drafts deposited for collection. *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 44 Sup. Ct. 296 (1924). But in a number of jurisdictions, the collecting bank is not responsible if it can show a general custom to receive drafts instead of cash. *Cattaruzza v. Bank*, 146 S. E. (W. Va. 1929); *Barnes v. People's Bank*, 194 N. C. 371, 139 S. E. 689 (1927); cf. *Adams County v. Meadow Valley Bank*, 277 Pac. 575 (Idaho 1929). This same rule has been applied where checks are presented through the clearings to a bank in the same city. *U. S. Fidelity & Guaranty Co. v. Forest City State Bank*, 227 N. W. 27 (Wis. 1929). But cf. *First & Merchants Nat. Bank v. Hampton Bank*, 148 S. C. 381, 146 S. E. 219 (1929). In some jurisdictions it is provided by statute that the collecting bank is not responsible for accepting a draft in payment. N. Y. CONS. LAWS (McKinney, 1929) N. I. L. § 350 (h). But such a provision would not relieve the collecting bank of responsibility to its depositor where it permits the drawee bank to credit its account and make semi-weekly remittances by draft. *Stone v. Wachovia Bank & Trust Co.*, 145 S. C. 166, 143 S. E. 27 (1928). The statute in the instant case was not intended to relieve a collecting bank from responsibility for accepting drafts in payment, but was instead intended to prevent the Federal Reserve Banks from forcing par clearance upon the southern state banks. See Comment (1924) 33 YALE L. J. 752, 756. The court in the instant case, however, construed the statute as being applicable and interpreted the phrase "through the

post-office" broadly to include presentment by mail by banks other than the Federal Reserve Banks. *Cf. Qualls v. Farmers' & Merchants' Bank*, 197 N. C. 438, 440, 149 S. E. 546, 548 (1929); see Comment (1929) 8 N. C. L. REV. 55. Had the opposite result been reached, the banks, no doubt, would obtain the same result by stipulating against responsibility. Such stipulations have generally been upheld. *Fergus County v. Federal Reserve Bank*, 75 Mont. 582, 244 Pac. 883 (1926). These decisions illustrate a remarkable uniform adverse reaction to the common law rule adopted in the *Malloy* case.

CONSTITUTIONAL LAW—POLITICAL AFFILIATION AS A PREREQUISITE TO HOLDING OFFICE.—A taxpayer brought an action to restrain the city comptroller from paying the salary of certain justices appointed to the Municipal Court under a statute which required "any temporary justice appointed . . . (to be) . . . a member of the same political party as the justice to whose office he has been appointed." [N. Y. Laws 1929, c. 430] The state constitution, after setting forth the form of oath of office, provides: "And no other oath, declaration or test shall be required as a qualification for any office of public trust." [N. Y. CONST. art. 13, § 1] The lower court denied the injunction. *Held*, on appeal, that the statute was unconstitutional in that it made political party membership a qualification for appointment to an office of public trust. Judgment reversed. *Schieffelin v. Goldsmith, Fontanelli & Berry*, 237 N. Y. Supp. 248 (App. Div. 1st Dep't 1929).

In accord with the instant decision, it has been held that a statute is unconstitutional which requires the office of police commissioner to be filled on the recommendation of the members of the municipal council of the same party as the retiring commissioner. *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15 (1896). Similarly, statutes requiring an equal number of persons from both leading parties on police and election commissions have been held invalid. *Att'y General v. Detroit Common Council*, 58 Mich. 213, 24 N. W. 887 (1885); *Evansville v. State*, 118 Ind. 426, 21 N. E. 267 (1889). But *cf. People v. Hoffman*, 116 Ill. 587, 8 N. E. 267 (1886). On the other hand, a statute prohibiting more than two members from one party on the civil service commission has been upheld. *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274 (1890) (perhaps distinguishable from *Rathbone v. Wirth*, *supra*, in that it did not require any member of the commission to be a member of any political party). It has been suggested that the constitutional prohibition of any additional "test" applies only to tests of religious belief. *Ibid.* at 189, 25 N. E. at 280. Such an interpretation appears historically sound. *Cf.* 25 CAR. II, c. 2; 9 GEO. II, c. 26; 4 BLACKSTONE, COMMENTARIES (Hammond's ed. 1890) 58. Moreover, it seems to have been assumed in New York that a provision requiring a vacancy in the board of aldermen to be filled by a person of the same political party as the member whose place has become vacant is constitutional. *Cf. People v. Hogan*, 214 N. Y. 216, 108 N. E. 459 (1915). Even though the statute in question is unconstitutional, it does not necessarily follow that the defendant justices may not recover the compensation regularly provided for the period of their performance. *Standard Oil Co. v. Henry*, 192 Ind. 171, 133 N. E. 742 (1922). *Contra: Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736 (1903); *Hill v. Rector*, 161 Ark. 574, 256 S. W. 848 (1923). Particularly where one has rendered the services required under an honest belief in his right to the office, it is frequently held that as a *de facto* officer he may recover the prescribed compensation. *Erwin v. Jersey City*, 60 N. J. L. 141, 37 Atl. 732 (1897) (board which appointed plaintiff city attorney subsequently de-

clared invalid); *Windom v. Duluth*, 137 Minn. 154, 162 N. W. 1075 (1917). *Contra: Legerton v. Chambers*, 32 Cal. App. 601, 163 Pac. 678 (1917); cf. *Dolan v. New York*, 68 N. Y. 274 (1877) (de jure clerk of district court awarded compensation for services rendered by the de facto clerk who had previously ousted him from office and who had not yet been paid); see *People v. Howe*, 177 N. Y. 499, 503, 69 N. E. 1114, 1115 (1904) (approving *Dolan v. New York*, *supra*).

CONTRACTS—RECOVERY ON IMPLIED PROMISE—PROMISE TO PURCHASE ALL REQUIREMENTS OF BUSINESS CONSTRUED TO INCLUDE PROMISE TO CONTINUE IN BUSINESS.—A contract provided that the plaintiff, an Ohio manufacturer of caustic soda products, should lend \$100,000 to the defendant, which used these products in its Philadelphia factory, for erection by the defendant in Ohio of a plant capable of taking care of its entire business. The contract also stipulated that the plaintiff should furnish and the defendant should buy from the plaintiff all the soda products required in the defendant's business for a period of five years, within which period the defendant's debt was to be repaid. Before the defendant had moved its business to Ohio, it sold its Philadelphia plant to another company and contracted not to compete with it for five years. In a suit by the plaintiff to cancel this contract, and for other relief, the lower court dismissed the bill for want of equity. *Held*, on appeal, that the plaintiff was entitled to damages for the defendant's breach of an implied promise to continue in business for five years. Judgment reversed. *Diamond Alkali Co. v. Tomson and Co.*, 35 F. (2d) 117 (C. C. A. 3d, 1929).

The courts will generally imply into a contract those promises and conditions which, though not expressed, were obviously within the intention of the parties as determined by the terms of the contract and the circumstances surrounding its execution. See *Ross v. Morrimac Veneer Co.*, 129 Miss. 693, 704, 92 So. 823, 824 (1922); 3 WILLISTON, CONTRACTS (1920) § 1293. An apparent obligation will not be implied where it conflicts with an express provision of the contract. *Walter R. Cliffe Co. v. DuPont Engineering Co.*, 298 Fed. 649 (D. Del. 1924). And some courts seem to imply a negation of implication where the terms of the contract are set forth in great detail. Cf. *Prest v. Inhabitants of Farmington*, 117 Me. 348, 104 Atl. 521 (1918); *McPherson v. Gullett Gin Co.*, 134 Miss. 771, 100 So. 16 (1924). But even in a detailed contract an omission which is obviously an oversight will be supplied by implication. *Brumley v. McCormack*, 17 S. W. (2d) 597 (Mo. 1929). A promise not to hinder or prevent the plaintiff's performance is frequently implied. *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472 (1912); *Kroop v. Scala*, 5 N. J. Misc. 89, 135 Atl. 501 (1927). Similarly, against a defense of impossibility, the courts will imply a promise by the defendant not to make his own performance impossible. *Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th, 1917); *Proctor v. Union Coal Co.*, 243 Mass. 428, 137 N. E. 659 (1923); cf. *Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353 (C. C. A. 2d, 1914) (court implied promise by defendant not to make impossible of occurrence a condition on which rested the defendant's duty to perform). In many instances, the promise is implied on the part of the plaintiff, as consideration for the defendant's express promise, in order to make the contract binding. *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917); *Phelps v. La Salle Hotel Co.*, 209 Ill. App. 430 (1918); cf. *Parrish Coal Co. v. Waid*, 21 Ala. App. 593, 110 So. 321 (1926) (promise by defendant implied in order to make contract binding). Where, as in the instant case, the promise implied is instead the basis of the

action, it would seem that the necessity of accurately estimating the damages would require that the implied promise be constructed as strictly as possible without precluding a reasonable recovery. Thus the instant court, in an otherwise commendable decision, might well have implied a promise by the defendant to buy from the plaintiff for at least five years raw materials equal in amount to the normal requirements of its business, rather than so indefinite and personal a promise as to continue in business for five years. *Cf. Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142 (1891) (contract to buy and sell coal necessary to run certain steamboats for one year held breached by sale of boats, court implying promise "to take the coal which the ordinary and accustomed use of the steamers required").

CORPORATIONS—ASSESSMENTS ON FULL-PAID SHARES OF NON-PROFIT CORPORATIONS.—The share certificates of a mutual non-profit corporation engaged in distributing water for irrigation purposes to its several shareholders recited that the shares were subject to the by-laws and to assessments for construction and maintenance. The by-laws provided for the levying of assessments by the directors, and for the sale of delinquent shares upon failure to pay such assessments within six months after they were due. In an action by the corporation to recover assessments levied, the lower court allowed a personal judgment against the defendant, an owner of four full-paid shares. *Held*, on appeal, that the judgment be affirmed. *Big Creek Ditch Co. v. Hulick*, 280 Pac. 492 (Ore. 1929).

It is generally held that there can be no valid levy of assessments on full-paid shares in the absence of a promise by a shareholder to pay, or of a provision therefor in a statute or in the articles of incorporation. *Schueth v. Farmers' Union Mill & Grain Co.*, 116 Neb. 14, 215 N. W. 458 (1927); 6 THOMPSON, CORPORATIONS (1927) § 4820. Similarly non-stock corporations cannot enforce assessments in excess of the amount promised, or called for by the charter or articles of association. *Duluth Club v. MacDonald*, 74 Minn. 254, 76 N. W. 1128 (1896); see *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396, 398, 75 N. W. 837, 838 (1898). This is true even though the corporation's very existence depends upon the funds to be so raised. *Duluth Club v. MacDonald*, *supra*; *cf. Sullivan Club v. Butler*, 26 Misc. 306, 56 N. Y. Supp. 1 (Sup. Ct. 1899). And where the state has not reserved power to amend the corporation's charter, a statute authorizing the levying of assessments on existing full-paid shares is unconstitutional as impairing the obligation of contracts. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 79 N. W. 560 (1899); *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554 (1907). But a shareholder is subject to assessment where provision is made therefor in the certificate of incorporation. *Forsyth v. Selma Mines Co.*, 58 Utah 142, 197 Pac. 586 (1921); *Melville v. Rhodes*, 136 Wash. 200, 239 Pac. 560 (1925). And an agreement between all the shareholders to an assessment is likewise enforceable. *Milton v. Bergstrom*, 71 Fla. 197, 70 So. 1008 (1916); *Jonas v. Frost*, 32 Idaho 214, 179 Pac. 949 (1919). And a shareholder accepting a share certificate containing a provision for such assessment, as in the instant case, is bound thereby. *Blue Mt. Forest Ass'n v. Barrowe*, 71 N. H. 69, 51 Atl. 670 (1901); *Payette-Boise Water Users' Ass'n v. Fairchild*, 35 Idaho 97, 205 Pac. 258 (1922). As to whether a provision for assessments in the by-laws existing at the time of the purchase of shares would be *ipso facto* enforceable, *quaero*. *Cf. Omaha Law Library Ass'n v. Butler*, *supra* at 398, 75 N. W. at 838; *Sullivan Club v. Butler*, *supra* at 309, 56 N. Y. Supp. at 3. The instant court's conclusion that the corporation could recover in a personal action against the defendant, although the by-laws provided for forfeiture

and sale of the shares on nonpayment of the assessment, is not in accord with the holdings of other courts. *Dotson v. Hogan*, 44 Utah 295, 140 Pac. 128 (1914) (similar by-law held to restrict corporation's remedy to sale of the delinquent shares); *Payette-Boise Water Users' Ass'n v. Fairchild*, *supra*; *Quintet Oil Co. v. Big Five Oil Co.*, 205 Pac. 949 (Colo. 1922).

CORPORATIONS—NON-CUMULATIVE PREFERRED SHARES—CLAIM TO DIVIDENDS EARNED BUT UNDECLARED.—The complainants were holders of Class A shares of the defendant railway corporation, which were non-cumulative, participating, with voting rights equal to the Class B and common shares, and "entitled to receive preferential dividends in each fiscal year up to the amount of five per cent before any dividends shall be paid" on the junior shares. From 1915 to 1925 net earnings amounting to \$16,000,000 were used for working capital and improvements, at the discretion of the directors, no dividends being paid. In 1927 and 1928, the directors proposed to declare a dividend to the junior shareholders out of the current earnings alone, in addition to the full five per cent on the Class A shares. The complainants sued to enjoin this declaration on the ground that the amount of the preferential dividends earned but not declared in the previous years must first be distributed. A decree dismissing the bill, was reversed by the Circuit Court of Appeals. *Barclay v. Wabash Ry.*, 30 F. (2d) 260 (C. C. A. 2d, 1929). *Held*, on *certiorari*, that the decree be reversed. The Court said that "if profits are justifiably applied . . . to capital improvements and no dividend is declared within the year, the claim for that year is gone" under "the common and reasonable understanding" of the word non-cumulative, regardless of the opportunity for abuse of the preferred shareholders by biased directors. *Wabash Ry. v. Barclay and Willoughby Co.*, U. S. Daily, Jan. 9, 1929, at 7 (U. S. Sup. Ct.).

The problem of the legal incidents of non-cumulative preferred shares has been extensively commented upon. Berle, *Non-Cumulative Preferred Stock* (1923) 23 COL. L. REV. 358; Comment (1925) 34 YALE L. J. 657; Note (1926) 74 U. OF PA. L. REV. 605; Note (1925) 23 MICH. L. REV. 779; Note (1925) 11 VA. L. REV. 553. And the decision of the lower court in the instant case, together with the precedents and the opposing view, has been the subject of additional recent discussion. (1929) 38 YALE L. J. 820 (approving the view adopted by the Supreme Court as being "more consistent with the usual conception of non-cumulative stock"); Note (1929) 42 HARV. L. REV. 805; Note (1929) 14 CORN. L. Q. 341. The lower court, in holding that until dividends of prior earnings have been declared to the non-cumulative shareholders, the common shareholders may not receive dividends of current earnings to which they would otherwise be entitled, seems to have gone further than the previous cases. Note (1929) 14 CORN. L. Q. 341. It is to be noted that the directors of the defendant corporation were as extensively interested in the Class A shares as in the common, thus eliminating any personal desire to abuse their discretion as to payment of dividends to the advantage of the common shareholders. This latter possibility seems to have been uppermost in the minds of the lower court and those who support its result. Berle, *op. cit. supra*. In addition, it is possible that the right of the Class A shareholders to participate in earnings with the common, by enabling them to benefit directly from capital improvements and wise administration, presents a stronger case against them in this action. The instant decision may have the desirable result of preventing, as a practical matter, the creation of non-cumulative shares without express provision for the incidents thereof.

CORPORATIONS—PURCHASE OF SHARES FROM SHAREHOLDER BY DIRECTOR—DUTY TO DISCLOSE KNOWLEDGE OF PROBABLE INCREASE IN VALUE.—The defendant was a director, president and chairman of the executive committee of a corporation in which the complainant was a shareholder and director. The complainant brought a bill in equity for an accounting and other relief, alleging that the defendant, knowing that a merger was imminent which, if consummated, would increase the value of the shares to at least \$2500 each, purchased the holdings of the complainant for \$1400 a share; that the defendant did not disclose his knowledge of the proposed merger, concerning which the complainant was ignorant; and that upon completion of the merger the value of the shares increased to more than \$3000. *Held*, that a motion to strike out the bill be granted. *Connolly v. Shannon*, 147 Atl. 234 (N. J. 1929).

It is frequently stated that a director owes no duty to a shareholder to disclose to the latter, before purchasing his shares, facts which the director may know affecting their value. Walker, *The Duty of Disclosure by a Director Purchasing Stock From His Stockholders* (1923) 32 YALE L. J. 637; (1925) 10 CORN. L. Q. 509; (1927) 25 MICH. L. REV. 459. This strict rule has been applied in a few cases. *Board of Comm. v. Reynolds*, 44 Ind. 509 (1873); *Grant v. Attrill*, 11 Fed. 469 (C. C. S. D. N. Y. 1882); *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, 177 S. W. 479 (1915). In some cases which express adherence to the strict rule, the decision can readily be justified by the peculiar facts involved. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445 (1905) (director offered to return shares at price paid, with interest); *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384 (1912) (parties bitter enemies); *Stout v. Cunningham*, 33 Idaho 464, 196 Pac. 208 (1921) (plaintiff's claim barred by statute of limitations). Recent cases disclose a tendency to depart from the rule. Thus in many cases the courts, although denying relief, take pains to demonstrate either that the purchasing director had no peculiar knowledge, or that his silence did not in fact prejudice the shareholder. *Krumbsaar v. Griffiths*, 151 Pa. 223, 25 Atl. 64 (1892); *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251 (1893); *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879 (1913); *Percival v. Wright*, [1902] 2 Ch. 421; *cf. Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941 (1912). Furthermore, some courts have made exceptions to the rule on the grounds that the director was acting as the "agent," or "trustee" of the seller, or was engaged with him in a joint undertaking. *Dutton v. Barnes*, 162 Minn. 430, 203 N. W. 414 (1925); *Gadsden v. Bennetto*, 9 D. L. R. 719 (1913); *Allen v. Hyatt*, 17 D. L. R. 7 (1914); *cf. Mulvane v. O'Brien*, 58 Kan. 463, 49 Pac. 607 (1897); *Commonwealth Trust Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77 (1910). It may be questioned whether such a fiduciary relation would have been discovered in the absence of the director's duplicity. Some courts, while recognizing the rule that no duty of disclosure exists, grant relief where there is a failure to disclose "exceptional" facts not appearing on the books of the company. *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521 (1909); *Gammon v. Dain*, 238 Mich. 30, 212 N. W. 957 (1927). But *cf. Board of Comm. v. Reynolds*, *supra*. Finally, in some jurisdictions there has been a clear repudiation of the old rule. *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232 (1903); *Stewart v. Harris*, 69 Kan. 498, 77 Pac. 277 (1904); *Jacquith v. Mason*, 99 Neb. 509, 156 N. W. 1041 (1916); *Dawson v. National Life Ins. Co.*, 176 Iowa 362, 157 N. W. 929 (1916); *cf. Poole v. Camden*, 79 W. Va. 310, 92 S. E. 454 (1917); *Colo. Laws* 1927, c. 81, §7(b).

COSTS—COUNTERCLAIMS.—In an action at law the defendant was found indebted to the plaintiff in the sum of \$8,994.35. In a counterclaim the plaintiff was found indebted to the defendant for \$9,422.61. Judgment was entered in favor of the defendant for \$428.26. In entering final judgment the question of taxation of costs arose. *Held*, that the plaintiff pay all costs and that the defendant be reimbursed for the costs he expended. *Harlan Coal Co. v. North American Coal Co.*, 35 F. (2d). 211 (N. D. Ohio 1929).

The prevailing party in an action at law is entitled to costs as of right. *United States v. Schurz*, 102 U. S. 378, 407 (1880); U. S. REV. STAT. § 983 (1889), 28 U. S. C. § 830 (1926). Where the suit includes more than one cause of action, the prevailing party is the one in whose favor the decision or verdict is rendered and judgment entered. *United States v. Minneapolis, St. P. & S. S. M. Ry.*, 235 Fed. 951 (D. Minn. 1916). All costs, whether incurred in the successful cause of action or not, are taxed against the losing party. *Tefft v. Stern*, 74 Fed. 755 (C. C. A. 6th, 1896); *Sears, Roebuck Co. v. Pearce*, 253 Fed. 960 (C. C. A. 7th, 1918). But cf. *United States v. Minneapolis, St. P. & S. S. M. Ry.*, *supra*. Such costs cannot be apportioned by the court between the parties. *Ex parte Peterson*, 253 U. S. 300, 40 Sup. Ct. 543 (1920); *Trinidad Asphalt Co. v. Robinson*, 52 Fed. 347 (E. D. Mich. 1892); *Wheeler v. Taft*, 261 Fed. 978 (C. C. A. 5th, 1920); *Bartels v. Redfield*, 47 Fed. 708 (S. D. N. Y. 1891). In the instant case the defendant's disbursements for the independent cause of action which he lost were taxed against the plaintiff. Cf. *Williams v. Morrison*, 32 Fed. 682 (E. D. Mo. 1887); *In re Peterson*, *supra*. The state practice is the same. *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 850 (1911); *Lykins v. Hemrick*, 144 Ky. 80, 137 S. W. 852 (1911); *Ozias v. Haley*, 141 Mo. App. 637, 125 S. W. 556 (1910); *Beaton v. Radford*, 40 Ohio St. 106 (1883); *Gordon v. Steinmetz*, 71 Ohio St. 372, 73 N. E. 512 (1905); *Rohrs v. Rohrs*, 72 Misc. 108, 130 N. Y. Supp. 1093 (Sup. Ct. 1911). *Contra: Louisville Ry. v. Cofer*, 110 Ala. 491, 18 So. 110 (1895). The losing party in the suit thus pays the costs not only of the litigation for which he is thus declared "responsible," but also of that in which he is in the right. The inarticulate theory of the American courts is the English theory that costs should be a penalty and a deterrent to litigation. See *United States v. Minneapolis, St. P. & S. S. M. Ry.*, *supra* at 953; *Stevens v. Central Nat. Bank*, 168 N. Y. 566, 61 N. E. 904, 906 (1901). But the haphazard rule that costs follow the judgment as a matter of course does not exist in England. Goodhart, *Costs* (1929) 38 YALE L. J. 849. Full discretion is there allowed the judge where the case is tried without a jury. RULES OF COURT (1883) Order 65, rule 1. And even in jury trials where costs ordinarily follow the judgment, costs may at the discretion of the judge be apportioned otherwise "for good reason." Order 65, rule 1; cf. *American National Bank v. Commercial National Bank*, 268 Fed. 688 (S. D. Ga. 1920) (American equity practice similar). Where the case includes independent causes of action, the costs specifically incurred in each action may go to the party who succeeds in it, although the losing party pays the "general" costs of the entire action. *Reid, Hewitt and Co. v. Joseph*, [1918] A. C. 717. The harshness of the instant decision illustrates the necessity in this country of a consciously planned system of costs. See Goodhart, *op. cit. supra*.

FUTURE INTERESTS—DEVISE OVER ON DEATH WITHOUT ISSUE.—Testatrix made a devise of real property to her grandson and in the event of his "dying without leaving issue to survive him," to her heirs at law. After the death of the testatrix her administrators were compelled to sell the

property to pay some of her debts. They then filed a bill in equity for instructions as to disposition of the proceeds. The grandson defended, claiming absolute title to the proceeds on the ground that the devise gave him an estate in fee simple in the property and that the limitation over was void for remoteness. *Held*, that the words "dying without leaving issue to survive him" refer to a definite, not an indefinite, failure of issue, and that the defendant takes the proceeds subject to a limitation over contingent on his dying without issue living at the time of his death. *Delaware Trust Co. v. Elliott*, 147 Atl. 244 (Del. 1929).

At common law, where there was a devise to "A and if he should die without issue, over to B," the words "die without issue" were presumed to mean an indefinite failure of issue and the remainder to B did not vest until A's issue became extinct. This arbitrary interpretation was adopted to further the creation of estates tail, which restricted the alienation of land in the interests of the feudal landholders, after the passage of the statute *De Donis Conditionalibus* in 1285. Later an executory devise over after an indefinite failure of issue was held to violate the rule against perpetuities. GRAVES, REAL PROPERTY (1912) § 221; GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§ 153-158; 1 TIFFANY, REAL PROPERTY (1920) §§ 23, 26; Warren, *Gifts Over on Death Without Issue* (1929) 39 YALE L. J. 332. Statutes in England and many of the states have since made the words "die without issue" presumptive of a definite and not an indefinite failure of issue. 1 VICT. c. 26, § 29 (1837); MASS. GEN. LAWS (1921) c. 184, § 6; MICH. COMP. LAWS (Cahill, 1915) § 11540; N. J. COMP. STAT. (1910) p. 5870; N. Y. ANN. CONS. LAWS (2d ed. 1917) p. 7306; R. I. GEN. LAWS (1923) § 4290; VA. GEN. LAWS (1923) § 5151. In only six states are estates tail recognized today. *Hazzard v. Hazzard*, 28 Del. 502, 94 Atl. 905 (1915); *Lisman v. Marks*, 126 Kan. 345, 267 Pac. 963 (1928); *McCarthy v. Walsh*, 123 Me. 157, 122 Atl. 406 (1923); *Gillie v. Marsh*, 186 Mass. 336, 71 N. E. 703 (1904); *Sackett v. Paine*, 46 R. I. 439, 128 Atl. 209 (1925); WYO. COMP. STAT. ANN. (1920) c. 382, art. 4. And in at least two of these states, Delaware and Maine, the common law presumption that an indefinite failure of issue is intended still prevails. *Caulk v. Caulk*, 3 Pennew. 528, 52 Atl. 340 (Del. 1902); *Fisk v. Keene*, 35 Me. 349 (1853); *McCarthy v. Walsh*, *supra*. Where entails have been abolished there remains no justification for the common law presumption, but in some instances the old rule is still blindly adhered to. *Quilliam v. Union Trust Co.*, 194 Ind. 521, 142 N. E. 214 (1924). Since entails tend to restrict alienation, they are not to be favored and the old presumption, without serving any useful purpose, subjects executory devises contingent on "death without issue" to the rule against perpetuities. By giving to the words "die without issue" an ordinary rather than a fictitious meaning, the law of wills will be simplified without any deleterious results. The difficulty which the instant court appears to have experienced in reaching its decision illustrates the misunderstanding of this subject, because even at common law a gift over on death "without leaving issue surviving" the first taker was considered a definite failure. *Porter v. Bradley*, 3 T. R. 143 (1789); *Nicholson v. Bettie*, 57 Pa. 384 (1868).

LANDLORD AND TENANT—ACTS CONSTITUTING CONSTRUCTIVE EVICTION.—In an action for rent, the tenant set up a defense of constructive eviction, alleging that from the landlord's rooms directly below his own there issued regularly from 10 P. M. to 1 A. M. noises of rattling dishes and garbage cans, and loud talking; and that the plaintiff had mimicked and insulted his wife and daughter. After five months on the premises, the defendant notified the plaintiff of his intention to vacate on account of the noise,

which he did two months later, having paid the rent for eight of the thirteen months of the lease. *Held*, that the disturbances were not sufficiently "grave and permanent" to constitute a constructive eviction, and that the tenant's continued occupancy following the acts complained of would, in any event, have been a waiver of his "privilege" to quit. *Ellis v. McDermott*, 147 Atl. 236 (N. J. 1929).

Acts done or suffered to be done by the landlord by which the lessee's premises are rendered "untenantable" are said to constitute a constructive eviction, relieving a tenant who immediately vacates of further duty to pay rent. *North Pacific S. S. Co. v. Terminal Co.*, 43 Cal. App. 182, 185 Pac. 205 (1919); see *Schulte Realty Co. v. Pulvina*, 179 N. Y. Supp. 371, 372 (Sup. Ct. 1919). Unless his abandonment of possession ensues very shortly upon the disturbances complained of, however, the tenant is frequently held to have waived the privilege. *Eagle v. Matthews*, 98 Kan. 715, 160 Pac. 211 (1916) (11 months too long); *Mallard v. Duke*, 131 S. C. 175, 126 S. E. 525 (1925) (13 months too long). But cf. *Batterman v. Levenson*, 102 Misc. 92, 168 N. Y. Supp. 197 (1917) (rats of which tenant had complained increased in number); *Perry-Freeman v. Murphy*, 164 N. Y. Supp. 74 (Sup. Ct. 1917) (eviction through failure to furnish heat held renewed after each monthly payment by tenant); *Hartenbauer v. Brumbaugh*, 220 Ill. App. 326 (1920) (tenant allowed lessor several months to remove prostitutes on floor above). The acts required to constitute a constructive eviction are by no means uniformly defined. Failure to furnish heat, hot water, power, or elevator service—where these are to be expected by the terms of the lease—usually constitutes eviction. *Russell v. Olson*, 22 N. D. 420, 133 N. W. 1030 (1911); *Conroy v. Toomay*, 234 Mass. 384, 125 N. E. 568 (1920); *Hayden Co. v. Kchoe*, 177 App. Div. 734, 164 N. Y. Supp. 686 (2d Dep't 1917); *Buchanan v. Orange*, 118 Va. 511, 88 S. E. 52 (1916); cf. *Morgan v. Cook*, 213 Ill. App. 172 (1919). Leaking roofs, plumbing which permits water and filth to seep into the premises, and vermin, have been similarly considered. *Smith v. Greenstone*, 208 S. W. 628 (Mo. App. 1918); *Krausi v. Fife*, 120 App. Div. 490, 105 N. Y. Supp. 384 (2d Dep't 1907); *Barnard Realty Co. v. Benwit*, 155 App. Div. 182, 139 N. Y. Supp. 1050 (1st Dep't 1913). Personal affronts by the lessor to the tenant or members of his family have frequently been held to amount to a constructive eviction. *Purcell v. Lemon*, 83 Misc. 5, 144 N. Y. Supp. 348 (1st Dep't 1913); *Weighley v. Muller*, 51 Pa. Super. Ct. 125 (1912). But cf. *Greenwald v. Schustek*, 169 N. Y. Supp. 98 (Sup. Ct. 1918) (insulting language to tenant's daughter by elevator boy ceased after complaint). Where the acts complained of are those of third persons, generally only such as are instigated by the landlord will amount to an eviction. See JONES, LANDLORD AND TENANT (1906) § 354. But if lewd or immoral activities are carried on in halls or neighboring apartments which are under the lessor's control, the tenant may consider himself evicted. *Milheim v. Baxter*, 46 Colo. 155, 103 Pac. 376 (1909); *Phyfe v. Dale*, 72 Misc. 383, 130 N. Y. Supp. 231 (Sup. Ct. 1911). The cases seem divided on the issue of whether mere noise on premises under the landlord's control may amount to an eviction. *Blaustein v. Pincus*, 47 Mont. 202, 131 Pac. 1064 (1913) (eviction: lessor constructed public garage next to tenant); *Hannan v. Harper*, 189 Wis. 588, 208 N. W. 255 (1926) (eviction: landlord rented floor above tenant to college fraternity); *Woods Theatre v. North. Am. Union*, 246 Ill. App. 521 (1927) (no eviction: tenant's employees distracted when lessor leased adjoining rooms to music publisher); *McKinny v. Browning*, 126 App. Div. 370, 140 N. Y. Supp. 562 (2d Dep't 1908) (no eviction: landlord allowed tenant above to keep dog which barked frequently). It seems apparent that the type of

neighborhood must play an unusually large part in the determination of these cases. A reconciliation of the decisions on a basis of the printed reports is scarcely to be expected.

PLEADING—AMENDED COMPLAINTS—STATUTE OF LIMITATIONS.—The defendant was made a party in an action brought under the Jones Act for injuries resulting from the defendant's negligence, within three years after the cause of action arose but after the two year period of limitations prescribed by the Jones Act had elapsed. [41 STAT. 1007 (1920), 46 U. S. C. § 688 (1926)] The plaintiff filed an amended complaint more than three years after the injury setting up an action at common law, on which the limitation period was three years. [N. Y. C. P. A. § 49] The defendant moved to dismiss the amended complaint. *Held*, that the amendment stated a new cause of action against the defendant and was barred. *D'Allesandro v. United Marine Contracting Corp.*, 30 F. (2d) 718 (E. D. N. Y. 1928).

The usual theory is that where an amended complaint sets up a new cause of action, the statute of limitations continues to run until the amendment is filed. 2 WOOD, LIMITATION OF ACTIONS (4th ed. 1916) 1526. It has been held that a recovery under the Federal Employers' Liability Act may be had without amendment though the statute was not pleaded, so long as the allegations of fact in the complaint are sufficient to meet the requirements of the statute. *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 32 Sup. Ct. 790 (1912). And the same result has been reached even though the necessary facts were not all alleged but were merely brought out on the trial. *Toledo, St. Louis and Western Ry. v. Slavin*, 236 U. S. 454, 35 Sup. Ct. 306 (1915); *St. Louis, San Francisco & Texas Ry. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651 (1913). Where, as in the above cases, it is deemed unnecessary for the plaintiff to amend and allege the theory of his action, but a plaintiff does so amend, there is no apparent reason for penalizing the plaintiff or protecting the defendant by continuing the running of the statute of limitations. Most of the cases are in accord with this reasoning. *Lammers v. Chicago, Gt. W. Ry.*, 187 Iowa 1277, 175 N. W. 311 (1919) (original complaint sought common law recovery; did not set up Federal Employers' Liability Act but did allege sufficient facts thereunder; amendment asked judgment under the act; held not new cause of action for purpose of statute of limitations); *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567 (1916) (original complaint alleged facts sufficient only for common law action; amendment sought recovery under Federal Employers' Liability Act; held not new cause of action for purpose of statute of limitations); *N. Y. Central v. Kinney*, 260 U. S. 340, 43 Sup. Ct. 122 (1922) (same); *Kinney v. Hudson River Ry.*, 98 Misc. 11 (N. Y. Sup. Ct. 1916) (same); *Smith v. Atlantic Coast Line Ry.*, 210 Fed. 761 (C. C. A. 4th, 1913) (same). *Contra: Hogarty v. Phila. and Reading Ry.*, 255 Pa. 236, 99 Atl. 741 (1916) (original complaint alleged facts sufficient only for common law action); *Borrow v. Chicago etc. Ry.*, 206 Ill. App. 287 (1917) (same); *Carpenter v. Central Vt. Ry.*, 93 Vt. 357, 107 Atl. 569 (1919) (same). And such reasoning would produce a contrary result in the instant case. *Cf. Wabash Ry. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729 (1914) (complaint sought recovery under Federal Employers' Liability Act; plaintiff failed to prove necessary facts at trial; held, that common law recovery could be had without amending). It has been held that an amended complaint sets up a new cause of action if the new allegation deprives the defendant of some substantive defense which he had to the original complaint. *Card v. Stowers Pork-Packing & Provision Co.*, 253 Pa. 575, 98 Atl. 728 (1916). Since most employers' liability statutes abolish some

of the common law defenses, a change from a common law to a statutory proceeding might frequently under this test be considered the commencement of a new cause of action. But even such a test would not justify a similar holding in the converse situation presented in the instant case.

MARRIAGE AND DIVORCE—FOREIGN DECREE AS BAR TO SUIT FOR ALIMONY.—While an action for alimony was pending in Ohio, the plaintiff's husband obtained a divorce in Nevada, both parties appearing in that action. The defendant husband set up the Nevada decree as a bar to the action for alimony; but the lower court gave judgment for the plaintiff on the ground that the issue of alimony had not been raised in the prior action. *Held*, on appeal, that the judgment be affirmed. *Metzger v. Metzger*, 167 N. E. 690 (Ohio Ct. of App. 1929).

A divorce, obtained on constructive service by a wife, is generally no bar to a subsequent suit for alimony in the same or a sister state since the divorce court had no jurisdiction to render a personal judgment for alimony. *Spradling v. Spradling*, 74 Okla. 276, 181 Pac. 148 (1919); *Hutton v. Dodge*, 58 Utah 228, 198 Pac. 165 (1921); see *Weidman v. Weidman*, 57 Ohio St. 101, 103, 48 N. E. 506, 507 (1897). *Contra*: *McCoy v. McCoy*, 191 Iowa 973, 183 N. W. 377 (1921); *Darby v. Darby*, 152 Tenn. 287, 277 S. W. 894 (1925). And where the husband secured a divorce in like manner, a later suit for alimony by the wife was allowed. *Toncray v. Toncray*, 123 Tenn. 476, 131 S. W. 977 (1910) (wife had no opportunity to apply for alimony); *Davis v. Davis*, 70 Colo. 37, 197 Pac. 241 (1921). *Contra*: *Hughes v. Hughes*, 211 Ky. 799, 278 S. W. 121 (1925); see *Hazard v. Hazard*, 197 Ill. App. 612, 614 (1916). But some jurisdictions bar the subsequent alimony action, even where only one party appeared in the divorce action, arguing that after the marriage relation is severed the wife is in the position of a stranger. *Hughes v. Hughes*, *supra*; *Watson v. Watson*, 148 S. E. 386 (Ga. 1929). And where both parties appeared and the issue of alimony was determined, a later suit for alimony is barred whether the action is brought in the same state or in a sister state. *Phillips v. Phillips*, 69 Kan. 324, 76 Pac. 842 (1904); *Gilbert v. Gilbert*, 83 Ohio St. 265, 94 N. E. 421 (1911); see *Eldred v. Eldred*, 62 Neb. 613, 616, 87 N. W. 340, 341 (1901). Likewise, where the question of alimony was not passed upon, it has been held *res judicata* in a later action in the same state on the ground that it is an issue which could have been raised in the previous action. *Weidman v. Weidman*, *supra*; *Cameron v. Cameron*, 31 S. D. 335, 140 N. W. 700 (1913); see *Petersino v. Thomas*, 28 Ohio St. 596, 601 (1876); *cf. Sweeney v. Sweeney*, 42 Nev. 431, 438, 179 Pac. 638, 639 (1919). Where the second suit is in another state, this question appears to be treated as one governed by the law of the forum. But the United States Supreme Court has suggested that if alimony is *res judicata* in the state of the divorce suit, it must also be *res judicata* in a sister state which recognizes the divorce. See *Bates v. Bodie*, 245 U. S. 520, 526, 38 Sup. Ct. 182, 184 (1918). And, as a rule, judgments secured in a sister state are held *res judicata* as to matters of defense and counterclaim that might have arisen in the prior action. *Holman v. Tjosevig*, 136 Wash. 261, 239 Pac. 545 (1925); *Greenebaum Son's Bank & Trust Co. v. Porth*, 116 Kan. 310, 326, 226 Pac. 747 (1924). Moreover, inasmuch as both Ohio and Nevada appear to hold a subsequent suit for alimony *res judicata*, it is suggested that the instant court should have done likewise, despite the fact that the pleadings were not sufficiently full.

TAXATION—APPLICABILITY OF SUCCESSION TAX TO IRREVOCABLE TRUSTS CREATED BEFORE ENACTMENT OF TAX STATUTE.—An irrevocable trust was established in which the income was reserved for the lives of the settlors, the remainder to be divided among their five sons, or, if a son predeceased the surviving settlor, his share to go to his heirs. The trust was established before a statute went into effect levying an excise tax on the passing of property by such a trust "made or intended to take effect in possession or enjoyment after [the settlor's] death." [MASS. GEN. LAWS (1921) c. 65, § 1] Upon the death of the last settlor the lower court held the trust subject to the tax then in force. *Held*, on appeal, that the judgment be affirmed. *Coolidge v. Commissioner of Taxation and Corporations*, 167 N. E. 757 (Mass. 1929).

In the case of a revocable trust it is said that the succession does not take place until the death of the settlor, and tax statutes enacted after the creation of the trust but in force at the death of the settlor are applicable. *Saltonstall v. Saltonstall*, 276 U. S. 260, 48 Sup. Ct. 225 (1928); *Matter of Dana*, 215 N. Y. 461, 109 N. E. 557 (1915); *Lines' Estate*, 155 Pa. 378, 26 Atl. 728 (1893); (1928) 41 HARV. L. REV. 916. The instant court, in applying the same rule to an irrevocable trust, runs counter to the prevailing doctrine. *Brown v. Penn. Co.*, 2 Harr. 525, 126 Atl. 715 (Del. 1924). The rule of the majority cases is based on the theory that an irrevocable grant of a remainder interest is a present "transfer" and the tax law applicable is the one in force at the time when the trust is created. *Blodgett v. Union and New Haven Trust Co.*, 97 Conn. 405, 116 Atl. 908 (1922); *Matter of Webber*, 151 App. Div. 539, 136 N. Y. Supp. 83 (2d Dep't 1912); *In re Houston's Estate*, 276 Pa. 330, 120 Atl. 267 (1923); *Keeny v. New York*, 222 U. S. 525, 32 Sup. Ct. 105 (1912). It has even been suggested that the tax could be collected at the time of the transfer instead of at the settlor's death. See *Matter of Meserole*, 98 Misc. 105, 106, 162 N. Y. Supp. 414, 415 (Surr. Ct. 1916). The instant court says that the tax is on the "succession" and that the "succession" does not take place until the beneficiary gains full and unrestricted control of the fund. The test of "possession and enjoyment after [settlor's] death" is thus used not only to determine that the trust is one which is subject to the tax but also to determine the time, for purposes of taxation, when the property passes. See Comment (1929) 38 YALE L. J. 657. But the decisions cannot be reconciled on the ground that one is a "succession tax" and the others are "transfer taxes" since in all the cases the statutory language defining the tax is practically the same. Cf. 29 DEL. LAWS (1917) c. 7, § 1; CONN. GEN. STAT. (1918) § 1261. The Massachusetts rule closes one loophole of escape from taxes left open by the prevailing rule. It prevents evasion of taxes by the creation of trusts in anticipation of increasing inheritance taxes, although it subjects the settlor who desires to create an irrevocable trust to the hazard of heavy increased taxes.

TAXATION—PAYMENTS MADE AFTER EXPIRATION OF LIMITATION PERIOD—EFFECT ON RECOVERY OF FILING OF CLAIM IN ABATEMENT.—In 1920 the plaintiff filed a claim in abatement of taxes for the year 1917. In 1922 the claim was rejected. The taxes were paid under protest in 1924 after the five-year period of limitations had run. The plaintiff then brought suit to recover the taxes so paid, under a statute providing for the refund of taxes paid after the expiration of the limitations period. [19 STAT. 248 (1877), 40 STAT. 1145 (1919), 26 U. S. C. §§ 149, 156 (1926)] While the action was pending a statute was enacted prohibiting such a recovery where a claim in abatement had been filed and where as a result collection had been "stayed." [45 STAT. 875 (1928), 26 U. S. C. § 2611 (1926)]

The lower court gave judgment for the plaintiff. *Held*, on appeal, that mere delay in collection is a "stay" within the meaning of the statute. Judgment reversed. *Goodcell v. Graham*, 35 F. (2d) 586 (C. C. A. 9th, 1929).

The retroactive feature of the instant statute has been held invalid. *Erie Coal & Coke v. Heiner*, 33 F. (2d) 135 (C. C. A. 7th, 1929). But see *Huntley v. Gile*, 32 F. (2d) 857, 859 (C. C. A. 9th, 1929). "Stay" has been construed to mean only delay due to legal prohibition against collection. *United States v. Burden, Smith & Co.*, 33 F. (2d) 229 (C. C. A. 5th, 1929); see *Pepsin Syrup Co. v. Schwaner*, 35 F. (2d) 197, 199 (S. D. Ill. 1929). But, as a rule, suits to enjoin the collection of federal taxes will not be sustained. *Graham v. Dupont*, 262 U. S. 238, 43 Sup. Ct. 567 (1923) (bar of statute of limitations held not ground for injunction); 4 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) § 1849; 14 STAT. 475 (1867), 26 U. S. C. § 154 (1926). A few exceptions, however, have been made. *Lipke v. Lederer*, 259 U. S. 557, 42 Sup. Ct. 549 (1922) (collection of tax imposed as a penalty enjoined); *Peerless Woolen Mills v. Rose*, 28 F. (2d) 661 (C. C. A. 5th, 1928) (collection by distraint enjoined pending appeal to Board of Tax Appeals); see *Dows v. City of Chicago*, 11 Wall. 108, 110 (U. S. 1870). (cases of "special equity"); (1928) 38 YALE L. J. 122. The report of the Ways and Means Committee of the House of Representatives, moreover, indicates that Congress intended "stayed" to mean mere delay. See *Huntley v. Gile*, *supra* at 859; KLEIN, FEDERAL INCOME TAXATION (1st ed. 1929) 1599n; cf. *Duplex Printing Co. v. Deering*, 254 U. S. 443, 447, 41 Sup. Ct. 172, 179 (1921). As the instant court suggests, the fact that collection is rarely if ever prohibited by statutory or injunctive compulsion should lead to the interpretation of "stay" as meaning mere delay, if the instant statute is to be of any practical utility. Cf. *Oak Worsted Mills v. United States*, U. S. Daily, Dec. 18, 1929, at 2794 (U. S. Ct. Cl. 1929).

TAXATION—TRUSTS—TAX ON INTANGIBLE TRUST PROPERTY AT DOMICILE OF BENEFICIARY WHEN TRUSTEE IS NON-RESIDENT.—The plaintiff, a Maryland corporation, held certain securities in trust for two beneficiaries domiciled in Virginia. The securities were in the possession of the trustee in Maryland and had been duly assessed for taxes in that state. The cestuis had no present right to receive the income from the trust nor the power to alter the situs of the securities. The trustee alone was empowered to control and reinvest the funds. A tax assessment imposed by Virginia upon the corpus of the trust estate was sustained by a Virginia court. *Held*, on appeal (one justice dissenting), that the judgment be reversed. *Safe Deposit and Trust Co. v. Virginia*, 50 Sup. Ct. 59 (U. S. 1929).

Trust funds are frequently subject to a property tax in several states. See 2 COOLEY, TAXATION (4th ed. 1924) § 455-469. Thus, if the trustee has assigned the securities to the use of an agent for business purposes, they acquire a taxation situs in the state of the agent's domicile. *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. 110 (1899); see *Mackay v. City of San Francisco*, 128 Cal. 678, 686, 61 Pac. 382, 385 (1910). Furthermore, the securities may also be subject to a property tax in the state of the trustee's residence. *Welch v. Boston*, 221 Mass. 155, 109 N. E. 174 (1915); *Mackay v. City of San Francisco*, *supra*; see *De Ganay v. Lederer*, 250 U. S. 376, 381, 39 Sup. Ct. 524, 526 (1919). In addition, when the securities happen to be held by a non-resident trustee some state courts hold that the state of the cestui's domicile may levy against the cestui a property tax based upon his interest in the trust. *City of St. Albans v. Avery*, 95 Vt. 249, 114 Atl. 31 (1921); *Hunt v. Perry*, 165 Mass. 287, 43

N. E. 103 (1896); (1921) 35 HARV. L. REV. 94 (the Supreme Court in the instant case declined to commit itself on this point since this tax was levied against the trustees). The Constitution does not prohibit "double taxation." Cf. *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 40 Sup. Ct. 558 (1920). But had the instant tax not been declared unconstitutional as an attempt to reach property outside the jurisdiction, it might also have been declared invalid as imposing a burden disproportionate to the protection afforded. Cf. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36 (1905); *Goodsite v. Lane*, 139 Fed. 593 (C. C. A. 6th, 1905).

USURY—INJUNCTIONS—POWER OF STATE TO MAINTAIN ACTION TO ENJOIN CARRYING ON OF USURIOUS LOAN BUSINESS.—In lending money to laboring men, the defendants had adopted the practice of obtaining formal assignments of the borrower's wages. By threatening garnishment proceedings against the employer, they were able to collect interest at rates far in excess of the maximum set by the usury statute, since to involve an employer in garnishment proceedings would result in the discharge of the employee. The State of Kansas instituted a proceeding to enjoin and wind up the defendants' business. The lower court sustained demurrers to the plaintiff's petitions. *Held*, on appeal, that the judgment be reversed. *State v. McMahon*, 280 Pac. 906 (Kan. 1929).

Under facts similar to those of the instant case formal assignments of wages have been treated as usurious loans. *Wilmarth v. Heine*, 137 App. Div. 526, 121 N. Y. Supp. 677 (3d Dep't 1910) (borrower not responsible for failure to pay over wages under an assignment attempting to conceal a usurious loan); *McWhite v. State*, 143 Tenn. 222, 226 S. W. 542 (1921). But the power to attack a transaction for usury has generally been considered to be personal to the borrower and his "privies." *Zimmerman v. Boyd*, 275 Pac. 509 (Cal. 1929) (chattel mortgagor sued by mortgagee's creditor cannot take advantage of the usury between creditor and mortgagee); cf. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943 (1916) (assignee of property pledged to secure a loan can raise the question of usury). Statutes, however, have sometimes extended this power of attack to persons not in privity with the contracting parties. RYAN, USURY AND USURY LAWS (1924) 28-31. Thus in Delaware "anyone who shall sue for the same" may recover from the usurer a sum equal to the money lent, one half to go to the person suing, one half to the county in which suit is brought. DEL. REV. CODE (1915) c. 77, § 2621. Many states have provided for criminal prosecution of usurers. CAL. CODES AND GEN. LAWS (Supp. 1917-1919) act 1675; N. M. ANN. STAT. (1915) § 3528; N. Y. CONS. LAWS (Cahill, 1923) c. 41, § 2400; R. I. GEN. LAWS (1923) c. 228, § 8; S. D. REV. CODE (1919) § 4382; TENN. ANN. CODE (1918) § 6733; UTAH COMP. LAWS (1917) § 3322. And in one jurisdiction where there is no criminal statute, a direct proceeding by the state against usurious money lenders has been allowed in the form of an indictment for keeping a "disorderly house." *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286 (1905); *State v. Martin*, 77 N. J. L. 652, 73 Atl. 548 (1909). But cf. *Commonwealth v. Mutual Loan and Trust Co.*, 156 Ky. 299, 160 S. W. 1042 (1913). Apparently no state has before sought to enforce its usury laws by injunction. In view of the fact that the necessitous borrower is frequently unable to take advantage of the remedies provided by statute for his protection the instant decision seems justifiable. But see (1930) 43 HARV. L. REV. 499.

WILLS—ADMINISTRATION—TIME FROM WHICH INTEREST ON LEGACY BEGINS TO RUN.—A will provided that a legacy of \$1,000 be paid to each

of the testator's four daughters and that the estate be divided among them in equal shares on the death of the mother. The bequest of \$1,000 to the only daughter not of age was payable when she became twenty-one. In a petition by the executors to settle their accounts, *held*, that, the testator's intention to provide equally for his four daughters being evident, the bequest to the infant daughter should bear interest from the date the legacies to her adult sisters became payable. *Matter of Berbling*, 134 Misc. 730, 236 N. Y. Supp. 367 (Surr. Ct. 1929).

As a general rule, in the absence of a contrary intention in the will and of statutory authority, a legacy bears interest from the date it becomes payable. *Matter of Littman's Estate*, 132 Misc. 646, 229 N. Y. Supp. 639 (Surr. Ct. 1928) (legacy payable at marriage or on coming of age); *Estate of Boyce*, 173 Wis. 575, 181 N. W. 735 (1921) (legacy payable out of proceeds of sale of land); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 458. Where no time for payment is clearly indicated by the will, according to the common law rule the legacy is payable within a year from the testator's death, and interest ordinarily commences to run at the end of the year. *Will of Barrott*, 173 Wis. 313, 181 N. W. 220 (1921). This rule has been followed even where the common law date of payment of the legacy has been changed by statute. *Davidson v. Rake*, 45 N. J. Eq. 767, 18 Atl. 752 (1889). Likewise directions in the will to pay the legacy "as soon as possible" or when deemed "convenient" have been held not sufficiently definite to take the case out of this rule. *Warwick v. Ely*, 59 N. J. Eq. 44, 44 Atl. 666 (1899); *Shepard v. Bryan*, 195 N. C. 822, 143 S. E. 835 (1928). *Contra: Christian v. Catholic Church*, 91 N. J. Eq. 374, 110 Atl. 579 (1920). See 2 PAGE, WILLS (2d ed. 1926) § 1395. But, regardless of how the time for payment is determined, to the general proposition that interest commences at such date, there are a number of exceptions based on a presumption of a different intent by the testator. Thus a legacy to a widow in lieu of dower or to a minor to whom the testator stands *in loco parentis* and for whom no other provision for maintenance is made, carries interest from the death of the testator. *Pollard v. Pollard*, 83 Mass. 490 (1861); *Pearson's Estate*, 251 Pa. 612, 97 Atl. 71 (1916). But *cf. Lyon v. Industrial School Ass'n*, 127 N. Y. 402, 28 N. E. 17 (1891) (no interest allowed where niece of testatrix's husband was maintained by him after death of testatrix); see *Hart v. Williams*, 77 N. C. 426, 428 (1877) (declaring that any legacy for maintenance bears interest from the testator's death). A similar rule applies where the legacy is in satisfaction of a debt. *Landis v. Cumberland Tr. Co.*, 92 N. J. Eq. 689, 116 Atl. 686 (1921). And the same is true in the case of specific legacies which are considered as separated from the general estate and appropriated upon the testator's death. *Matter of Boyer's Estate*, 179 N. Y. Supp. 901 (Surr. Ct. 1915). The exception of the instant case, allowing interest in order to equalize legacies according to the supposed intention of the testator, is not without authority. *Dockery's Exr's v. Dockery*, 170 Ky. 194, 185 S. W. 849 (1916); *cf. Harris v. Harris's Estate*, 82 Vt. 199, 72 Atl. 912 (1909). *Contra: In re Estate of McAllister*, 191 Iowa 906, 183 N. W. 596 (1921). As the rule allowing interest from the time the legacy is payable is largely one of convenience the departure in the instant situation seems entirely proper.