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Crimes--Murder in First Degree--Evidence-- Confessions (People v. Fisher, 249 N.Y. 419 (1928))

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not unreasonable⁹ and does not violate any limitation upon the power of the Legislature. These men consented in advance to anything thereafter accomplished by lawful exercise of that power.

CORPORATIONS—NONCUMULATIVE DIVIDENDS.—The Wabash Railway Company for more than three years applied its surplus earnings to working capital and improvements. During this period no dividends were declared on any of its three classes of stock.¹ When, subsequently, the directors decided to pay a dividend to junior stockholders, the owners of Class A stock, which was entitled to "preferential" but "noncumulative" dividends,² sought to restrain this action, claiming that they must first be paid the stipulated rate for each fiscal year in which there were moneys available for distribution. *Held*, for the plaintiff. *Barclay v. Wabash Ry Co.*, 30 F. (2d) 260 (1929).³

In the absence of bad faith, the wisdom of the directors' decision to defer declaration of dividends to improving the condition of the company cannot be questioned.⁴ But, whenever there are earnings in any fiscal year, credit accrues in favor of the noncumulative preferred stockholders.⁵ They are entitled to receive dividends despite the fact that the profits have since assumed the form of rails, cars and other improvements. But deficiencies (in earnings) in one year cannot be made up from earnings in other years.⁶ Cumulative dividends, on the contrary, must be paid regardless of the time when earned.

CRIMES—MURDER IN FIRST DEGREE—EVIDENCE—CONFESSIONS.—Defendants were indicted and convicted of murder in the first degree, committed in an unsuccessful attempt to burglarize a drug

⁹ *Shields v. Ohio*, 95 U. S. 319, 324 (1877); *People v. O'Brien*, 111 N. Y. 1, 52 (1888); *Chicago Mil. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491, 502, 35 Sup. Ct. 869 (1915).

¹ Preferred stock class A, preferred stock class B, and common.

² The Certificate of Incorporation states: "The preferred stock A shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of this corporation, but such dividends shall be noncumulative."

³ *Rev'g*, 23 F. (2nd) 691.

⁴ "When a corporation has a surplus whether a dividend share be made, and if made how much it shall be * * * rest in the fair and honest discretion of the directors uncontrollable by the courts." *Williams v. Western Union Tel. Co.*, 93 N. Y. 162 [quot. with appr. *Equitable L. Assur. Society v. Union Pac. R. Co.*, 212 N. Y. 360, 373, 106 N. E. 92, L. R. A. 1915 D 1052].

⁵ *New York, etc., R. R. v. Nickols*, 119 U. S. 296, 7 Sup. Ct. 209 (1886); *American Steel Foundries v. Lazard*, 204 Fed. 204 (C. C. A. 1913).

⁶ *Fletcher*, *Cyclopedia of The Law of Private Corporation*, Sec. 3754 (1917); *Elkins v. Camden and Atl. R. R. Co.*, 36 N. J. Eq. 233 (1882).

store. Two of them gave confessions which were used upon the trial, though they protested that they were involuntary. All were tried together after motions for separate trials were denied. Upon appeal from this denial and the alleged error in admitting the confessions. *Held*, granting of separate trials is discretionary with the trial judge and in the absence of abuse of that discretion, his decision will not be disturbed upon review. The question of whether the confessions were voluntary or not was properly submitted to the jury. *People v. Fisher*, 249 N. Y. 419, 164 N. E. 336 (1928).

The correctness of the ruling on admissibility of confessions is so well established that it merits little discussion. Here, as before,¹ it was held that the statute governed.² The trial court, after a preliminary hearing, may admit a confession, final decision as to its probative value being left to the jury. The main ground for appeal in the case rested on the denial of applications for separate trials. At common law, persons jointly indicted could be tried jointly or separately according to the discretion of the court. With enactment of the Revised Statutes of 1826, this rule was changed. A defendant so indicted could demand a separate trial or waive it and stand trial with his co-defendants. In 1926 the common law was restored,³ so that abuse of discretion is the only ground for appeal.⁴ The evidence in this case was so overwhelming that expediency and economy demanded a single trial. A dissenting opinion⁵ disclaims the wisdom of this reasoning in view of one defendant's persistent denial of guilt.

DAMAGES — MENTAL ANGUISH — NEGLIGENCE — TELEGRAPH COMPANIES.—Plaintiff's son was mortally wounded and a telegram stating the seriousness of his condition was sent to her by his wife. It was promptly dispatched and received at the destination office of defendant which failed to deliver it until a time too late to permit her reaching her son before death. Plaintiff brought action for damages resulting from mental anguish. *Held*, for plaintiff. *Gibbs v. Western Union Tel. Co.*, 146 S. E. 209 (Sup. Ct., No. Car., 1929).

The matter of redressing mental anguish was the subject of frequent consideration by common law courts. It is the settled rule of those courts that such anguish, when unaccompanied by bodily injury is too intangible and remote to form a basis of recovery of damages. They are allowable only where there has been bodily injury causing physical pain and mental anguish cannot be dis-

¹ *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (1908); 193 N. Y. 46, 85 N. E. 809 (1908); *People v. Doran*, 246 N. Y. 409, 159 N. E. 379 (1927).

² Code Crim. Proc., Sec. 395.

³ *Ibid.* at 391.

⁴ *People ex rel. Flynn v. Woods*, 218 N. Y. 124, 112 N. E. 915 (1916); *Matter of Whitman*, No. 2, 225 N. Y. 21, 121 N. E. 485 (1918).

⁵ By Lehman, *J.*, 249 N. Y. at 428, 164 N. E. at 339.