figure. Thus the law of distribution would have to vary as the surplus exceeded a certain amount determined for each case—surely a remarkable law indeed.

In view of the contract clearly providing that income shares shall receive a certain percentage before any other class shall deserve a return, and of cases holding that the installment shareholders have no vested right in profits apportioned them which may be recaptured by the association at any time, it is difficult to perceive any logical basis for the prorating of the surplus in the principal case. There is no applicable principle of corporation law which could by analogy support the proportionate distribution of the fund. This form of distribution, patently contrary to the express contract of the parties when the surplus fund exceeds a certain figure (determined for each case by the amount of unpaid dividends on income shares), is applicable only to a fund of limited size; and there is no basis in law for differentiating the treatment in the principal case of a smaller fund from the treatment necessarily accorded a larger fund in order to avoid awarding income shareholders more than their proper six per cent. The decision in the principal case, it is submitted, is of questionable benefit to the field of building and loan law.

Crimes — Homicide — Charge to Jury Concerning Powers of Court of Pardons.—The defendant, Willie Leaks, was convicted of murder in the first degree and he brings error. The error assigned relates to that part of the trial judge's charge to the jury in which he stated the power vested in the Court of Pardons in the following words:—

> "I know that there is in your minds some question. You have read in the papers undoubtedly as to whether life imprisonment is life imprisonment and whether there is anything that can come after this court, so far as either of where the death penalty is imposed or the sentence of life imprisonment is imposed, and I feel constrained to read to you a part of the charge in a recent

case that has been approved by the Court of Errors and Appeals. The court said: 'The court charges you in respect to that, referring to the matter of the power of the Court of Pardons, that there is a Court of Pardons constitutionally constituted. I mean by that, provided for by our constitution. The Court of Pardons has the power to modify, change, reduce, abolish or set aside whatever result the jury may arrive at, whether they fix a penalty of death or life imprisonment. It is the power resident in that Court to do that regardless of the penalty, and that Court is constitutionally established.' That is the law in the State of New Jersey in regard to the Court of Pardons, so that no matter what sentence I may impose as the court upon this defendant the power resides in the Court of Pardons to do just what I have read."

Held, affirmed. No reversible error. *State v. Leaks,* 126 N.J.L. 115, 17 A. 2d 550 (E. & A. 1941).

The dissenting opinion, 126 N.J.L. 115, 18 A. 2d 33, by Chief Justice Brogan, points out that that part of the prepared charge relating to the powers of the Court of Pardons constituted prejudicial error and should have led to a reversal of the judgment.

A lawyer reading the majority opinion by Justice Bodine would have no way of knowing that this important question, which split the court ten to four, had ever been considered by the court in reaching its decision. It is strange, indeed unexplainable, that a discussion of this question was not set forth in the majority's opinion. If it had not been for Chief Justice Brogan's dissenting opinion, the bar would have never known that this matter had been assigned as error.

In order to examine this question more accurately, it is necessary to consider the various phases through which the statute passed before it attained its present form.

The statute as originally amended in 1916 provided that:[1]

"Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death *unless the jury at the time of rendering the verdict in such case shall recommend imprisonment at hard labor for life, in which case this and*

1. P.L. 1916, c. 270, sec. 1, p. 576.

no greater punishment shall be imposed; and every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years."

The 1916 amendment was made to give the jury power to make a recommendation of life imprisonment. No provision, however, was made to limit or outline what the jury should take into consideration in making such a recommendation. The Court of Errors and Appeals in the case of *State v. Martin,*[2] decided in March, 1919, construed this portion of the statute in the following words:

"The statute does not make it (the recommendation of mercy) a part of the verdict, for the verdict determines the question of the guilt or innocence of the accused, and that must be arrived at, and be of murder in the first degree, before the question of recommendation arises, which is a distinct matter, for the jury may agree on a verdict that the accused is guilty of murder of the first degree, but not be able to agree to a recommendation. While a jury may be influenced to recommend life imprisonment by the very matters which evidenced the guilt of the accused, and perhaps properly so, still in law the jury are not bound to consider such evidence in determining whether to make or refuse a recommendation. That matter is entirely discretionary with the jury, and does not require the support of evidence, for it is not a finding of fact, . . ."

In consequence of this decision, the statute was amended,[3] to empower the jury, as part of their verdict of murder in the first degree, "*upon and after the consideration of all the evidence,*" to recommend imprisonment of the defendant at hard labor for life. In 1921 the Court of Errors and Appeals in *State v. James,*[4] opinion by Chancellor Walker, stated:

2. State v. Martin, 92 N.J.L. 436, 106 A. 385, 17 A.L.R. 1090 (E. & A. 1919).

3. P.L. 1919, c. 134, sec. 1, p. 303; R.S. 2:138-4; N.J.S.A. 2:138-4.

4. State v. James, 96 N.J.L. 132, 114 A. 553, 16 A.L.R. 1141 (E. & A. 1921).

"The provision for recommendation of life imprisonment first appeared in 1916 (P.L. p. 576) which provided that the jury at the time of rendering a verdict of murder in the first degree might recommend imprisonment at hard labor for life, in which case that punishment should be inflicted. There was no provision that the recommendation should be upon consideration of the evidence; and this court, in *State v. Martin,* 92 N.J.L. 436, 106 A. 385, held that the facts upon which a conviction of murder in the first degree rests had no necessary connection with the recommendation, which was discretionary and required no consideration of the facts, and that an instruction to the jury that they might consider the testimony tending to show this character of the crime, etc., was not permissible comment on the evidence, and was in error. The opinion was filed March 3, 1919. The legislature was then in session and passed the amendment of that year (P.L. 1919, p. 303), which was approved April 12, 1919, and provided that such recommendation as is here being discussed should only be made 'upon and after consideration of all the evidence,' meaning, of course, all of the evidence between the State and the prisoner on the issue of guilt or innocence. Here is discoverable intent to change the law as laid down in the decision of State v. Martin, which construed the amendment of 1916 as not requiring consideration of the facts of a given case in order for a recommendation to be made."

It is a general rule that all acts of the legislature are passed with reference to the construction put upon prior acts by the courts.[5] Therefore, we submit that the legislature, by passing an amendment in 1919, intended that the jury, in determining whether to recommend life imprisonment or not, should be limited strictly to the evidence brought out at the trial.

Chief Justice Brogan, in his dissenting opinion in the principal case,

5. State v. James, *supra,* note 4; Frost v. Barnert, 56 N.J.Eq. 290, 38 A. 956 (Ch. 1897); Moresh v. O'Regan, 122 N.J.Eq. 388, 194 A. 156 (E. & A. 1937); Panico v. Sperry Engineering Co., 113 Conn. 707, 156 A. 802 (1931); Webber v. Granville Chase Co., 117 Me. 150, 103 A. 13 (1918); 25 R. C. L. Statutes, sec. 291.

cites the case of *People v. Johnson*[6] in support of his contention that the verdict against the defendant should be reversed. The defendant in that case was convicted of murder in the first degree. He assigned as prejudicial error the practice of the District Attorney, in examining prospective jurors and within the hearing of many other prospective jurors, of asking them whether they understood that the jury's verdict, if guilty of first degree murder, was not final, but that the law compelled an appeal to the Court of Appeals and that, if the court sustained the verdict, there was still a further appeal to the Governor who had the right to commute the sentence. The Court of Appeals of New York held that it was reversible error for the District Attorney to examine jurors in such a fashion. The ground for the error was that it tended to influence the jury to believe that because the defendant had such rights to appeal no ultimate harm would come to him if they, the jury, through error or intention, relaxed somewhat in the application of those principles which ought to govern their deliberations in his favor. The court said:

> "The vice of the statements and questions of the District Attorney lies in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunities for review."

Here we are faced with a situation in which the Court of Appeals of New York reversed a judgment of conviction because a *District Attorney,* in the *examination* of *prospective jurors,* outlines the right of the defendant to appeal for clemency, while, on the other hand, the Court of Errors and Appeals of New Jersey allows a *trial judge,* from the bench, to *charge a jury* in regard to the powers of the Court of Pardons. The decision of the New York court is a strong argument for Chief Justice Brogan's opinion that a judge should not charge a jury respecting the power of the Court of Pardons.

It is a fundamental rule of modern appellate procedure that, in order to warrant a reversal, the error complained of must have been prejudicial to the substantial rights of the appellant or plaintiff in error.[7]

6. People v. Johnson, 284 N.Y. 182, 30 N.E. 2d 465 (1940).
7. Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (E.

We submit that the charge to the jury in the principal case was sufficiently prejudicial to warrant reversal for the following reasons:

First: Since the amendment of the statute in 1919,[8] the jury, in deciding whether to recommend life imprisonment, is strictly limited to the evidence brought out in the trial.[9] Nowhere in the record of this case is there disclosed any reference, made during the trial, to the powers of the Court of Pardons. The jury has nothing to do with appeals and applications for clemency. They lie in a wholly different field.[10]

Second: Nothing should be permitted to weaken the juror's sense of obligation in the performance of his duties.[11] By reason of the court's charge relating to the powers of the Court of Pardons, a jury might readily infer, particularly in a difficult case, that should they make an error in their deliberations, the defendant would suffer no great harm since there is still a tribunal to which he may appeal. Such a possibility should not be allowed. There is no greater and more difficult duty placed upon a citizen than that of serving on a jury in a murder trial. Nothing should be intruded upon their deliberations to lessen their sense of this duty when the life of a fellow human is in the balance. A defendant being tried for murder should be protected from all possible dangers, no matter how remote they may be and no matter how guilty he may appear to be.

& A. 1917), L.R.A. 1917 F. 206; Sargent v. Realty Traders, 82 N.J.Eq. 331, 88 A. 1043 (E. & A. 1913), Ann. Cas. 1915 C, 44; Boston Club v. Potter, 212 Mass. 23, 98 N.E. 614, Ann. Cas. 1913 C, 397; 3 Am. Jur., Appeal and Error, sec. 1003.

8. *Supra*, note 3.

9. State v. James, *supra*, note 4.

10. People v. Johnson, *supra*, note 6.

11. People v. Sherwood, 271 N.Y. 427, 3 N.E. 2d 581; People v. Santini, 221 App. Div. 139, 222 N.Y.S. 683, *aff'd* 246 N.Y. 612, 159 N.E. 672 (1927).