RECENT CASE NOTES

ADMIRALTY—JURISDICTION—INJURY TO POWER CABLE.—The plaintiff, an electric power corporation, conducted its electricity by means of cables resting on the floor of a bay. The defendant's steamship negligently damaged the plaintiff's power cables by dragging its anchor against them. Plaintiff instituted a libel *in personam* in admiralty for injury to its property. The district court gave judgment for the plaintiff. *Held*, on appeal, that the libel should have been dismissed on the ground of lack of jurisdiction. *Nippon Yusen Kabushiki Kaisha v. Great Western Power Co.*, 17 Fed. (2d) 239 (C. C. A. 9th, 1927).

The test of jurisdiction in admiralty for tort is the locality of the tort. *The Plymouth*, 3 Wall. 20 (1865). The cause of action must be complete on navigable waters. *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25 (1886). By statute, English admiralty courts have jurisdiction over any claim for damage done by any ship. (1861) 24 & 25 Vict. c. 10, § 7. But American admiralty courts hold otherwise with respect to claims arising out of damages inflicted by vessels to structures connected with the shore. *The Panoil*, 266 U. S. 433, 45 Sup. Ct. 164 (1925) (injury to dyke by steamship); *The Plymouth, supra* (fire spreading from ship to adjacent warehouse); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254 (1886) (building on land injured by jib of passing vessel); *Cleveland T. & V. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 28 Sup. Ct. 414 (1908) (damage by ships to dock, bridge, protection piling and pier). But jurisdiction exists to entertain claims for penalties and damages arising out of violations of federal statutes relating to rivers and harbors. *The Scow "6-S,"* 250 U. S. 269, 39 Sup. Ct. 452 (1919); *The O. L. Halenbeck*, 260 Fed. 554 (C. C. A. 2d, 1919) (libels by United States government for illegal dumping in harbor); *The Gansfjord*, 1927 Am. Mar. Cas. 518 (E. D. La. 1927) (libel for negligent damage to United States jetty wall). And for injuries to property lying entirely within the bounds of navigable waters providing that (1) the land connection is purely "technical," and (2) its sole purpose is to aid navigation. *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46 (1904) (injury to government beacon); *The Raithmore*, 241 U. S. 166, 36 Sup. Ct. 514 (1916) (injury to uncompleted beacon and scaffolding). *Doullut & Williams Co. v. United States*, 268 U. S. 33, 45 Sup. Ct. 411 (1925) (damage to piling in river used solely for mooring ships). Courts have not taken jurisdiction, however, for claims arising out of injury to "extensions of the shore." *The Panoil, supra* (injury to dyke whose sole purpose was to change river currents in aid of navigation). But jurisdiction exists for claims arising out of injuries to vessels by land structures, *Dorrington v. Detroit*, 223 Fed. 232 (C. C. A. 6th, 1915); *Greenwood v. Westport*, 53 Fed. 824 (D. Conn. 1893) (vessels injured by negligent operation of bridges); *cf. Stevens v. Western Union Tel. Co.*, Fed. Cas. No. 13,371 (E. D. N. Y. 1876) (propeller damaged by negligently located telegraph cable). Admiralty has no jurisdiction, however, over claims arising out of injury to a platform and boring pipes located in a river. *The Poughkeepsie*, 162 Fed. 494 (S. D. N. Y. 1908), *aff'd* without opinion, 212 U. S. 558, 29 Sup. Ct. 687 (1908); *cf. The R. J. Moran*, unreported, cited in 162 Fed. 494, 496. It has been held that injury to telegraph cables is within admiralty jurisdiction. *United States v. North German Lloyd*, 239 Fed. 587 (S. D. N. Y. 1917); *The Toledo*, 242 Fed. 168 (D. N. J. 1917); *Postal Telegraph Co. v. Ross*, 221 Fed. 105 (E. D. N. Y. 1915). The instant court suggested a distinction between electric power

cables and telegraph cables on the ground that the latter may be used as aids to navigation in directing the course and movements of vessels. It is difficult to see the validity of this distinction. Heretofore the Supreme Court has restricted to crystallized fact-situations the application of the "aid to navigation" test. *Cf. The Blackheath, supra; The Raithmore, supra; Doullut & Williams Co. v. United States, supra.* The instant case seems to be in harmony with the Supreme Court ruling in the *Poughkeepsie* case, *supra.* Query as to the telegraph cable cases.

ARBITRATION—FEDERAL ACT—ARBITRATION TO TAKE PLACE ABROAD.—The respondent shipowner and the libellant, owner of the cargo, both American corporations, had agreed in England, that in case of dispute, they would arbitrate in London under the English Arbitration Act. The libellant brought suit disregarding the agreement and the respondent moved to stay the action relying on the United States Arbitration Act, which provides in effect that an action brought in violation of an arbitration clause shall upon application of the defendant be stayed pending arbitration. 43 Stat. 883 (1925), U. S. Comp. Stat. (Supp. 1925) § 1251 4/5–3. *Held,* that the *motion to stay proceedings* be denied since by the Arbitration Act agreements will be *specifically enforced,* only when "the hearing . . . under such agreement shall be within the district in which the petition for an order directing such arbitration is filed." 43 Stat. 883 (1925), U. S. Comp. Stat. (Supp. 1925) § 1251 4/5–4. *Silverbook,* 1927 Am. Mar. Cas. 584 (E. D. La. 1927).

In New York and in England the courts have stayed actions brought where there was an agreement to arbitrate in, or to submit to the courts of, a foreign jurisdiction. *Matter of Inter-Ocean Food Products, Inc.,* 120 Misc. 840, 200 N. Y. Supp. 775 (Sup. Ct. 1923) (agreement to arbitrate in California); *Kelvin Engineering Co., Inc. v. Blanco,* 125 Misc. 728, 210 N. Y. Supp. 10 (Sup. Ct. 1925) (to submit to Cuban courts); *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society* [1903] 1 K. B. 249 (English company agreed in its policy to submit to courts of Budapest); *Cap Blanco Case* [1913] 1 P. 130 (to submit to courts of Hamburg under German laws). *Cf. Sudbury v. Ambi Verwaltung Kommanditgesellschaft Auf Aktien,* 213 App. Div. 98, 210 N. Y. Supp. 164 (1st Dept. 1925); (1926) 35 YALE LAW JOURNAL, 503. The various state arbitration acts, contain provisions for the specific enforcement of arbitration agreements similar to that of the Federal Act. See (1927) 36 YALE LAW JOURNAL, 866, 867. Such enforcement, as suggested by the instant court, has been limited to cases where the place of enforcement is within the territorial jurisdiction of the court. *Matter of California Packing Corp.,* 121 Misc. 212, 201 N. Y. Supp. 158 (Sup. Ct. 1923). It is submitted, nevertheless, that agreements to arbitrate outside the jurisdiction should be likewise enforced. (1924) 24 COL. L. REV. 204. In the instant case, specific enforcement of the agreement was not sought, there being only a motion to stay the proceedings, and the court appears to have been misled in basing its decision on its assumed inability to direct arbitration. Apparently the cases in point, cited *supra,* were disregarded.

BANKRUPTCY—CONTINGENT CONTRACT RIGHT AS A PROVABLE CLAIM.—The defendant sold shares to the plaintiff agreeing to repurchase them within a stipulated period at the same price upon the plaintiff's written election to sell. The defendant filed a voluntary petition in bankruptcy and was discharged before the plaintiff, who had had notice of the proceedings, had exercised his option. The plaintiff thereafter brought suit for damages upon the defendant's refusal to repurchase in accordance with the contract.

Held, that since the plaintiff's claim was not provable under section 63 of the Bankruptcy Act [30 Stat. 562 (1898), U. S. Comp. Stat. (1916) § 9647] the defendant was not released by his discharge from bankruptcy. *Perry v. Sturdevant*, 218 N. Y. Supp. 678 (Sup. Ct. 1926).

Section 17 of the Bankruptcy Act provides, with certain express exceptions, that the discharge of the bankrupt effects a release of his provable debts. 32 Stat. 798 (1903), U. S. Comp. Stat. (1916) § 9601. Various fact transactions present the question whether one party has a provable claim against another party. This is determined by applying section 63 which enumerates by generic phrases the types of provable claims. In *Central Trust Co. v. Chicago Auditorium Co.*, 240 U. S. 581, 36 Sup. Ct. 412 (1916) the Supreme Court held that a promisee on an executory contract, continued performance of which would necessitate invested capital, had a provable claim against the estate of the bankrupt promisor. This was explained on the ground that the intervening bankruptcy, even though on involuntary proceedings, is an anticipatory breach. In *Williams v. U. S. Fidelity Co.*, 236 U. S. 549, 35 Sup. Ct. 289 (1915) it had been held that a surety, who had not paid, had a provable claim against the bankrupt principal, although it would appear that he had at most only a right of exoneration. See also *In re Gerson*, 107 Fed. 897 (C. C. A. 3d, 1901); *In re Lyons Beet Sugar Refining Co.*, 192 Fed. 446 (W. D. N. Y. 1911). These cases would seem clearly to indicate the purpose of the Supreme Court to recognize as provable, contract claims if they are susceptible of liquidation. It was indicated in the *Auditorium* case, unfortunately, that the question as to leases of land was an open one, and recently future accruing rent has been again held not a provable claim. *Wells v. Twenty-First Street Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926) *rev'g* 5 Fed. (2) 106 (D. Ohio, 1925); but *cf. In re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2d, 1916), (1927) 36 YALE LAW JOURNAL, 418. A case involving a fact situation quite similar to that in the instant case was decided on the ground that the creditor, even if the claim were provable, had an option to wait and sue when the right accrued. *Phenix Nat'l Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435 (1910). No peculiar facts, however, appear in this or the instant case that would seem to take it out of the doctrine of the *Auditorium* case. See Rosenheim, *Adjudication of Bankruptcy as Breach of an Executory Contract* (1917) 12 BENCH & BAR (N. S.) 252; (1916) 1 So. L. Q. 349. The court determined that the claim was not provable because in its opinion it would not be possible to assess damages at the time of the bankruptcy. The damages from the loss of a conditional right that the bankrupt buy a commodity in the future would, however, seem as susceptible of determination as those accruing from the loss of a right to have services performed or a certain commodity delivered in the future. Claims similar to that in the instant case have been proved. *In re Neff*, 157 Fed. 57 (C. C. A. 6th, 1907).

CERTIORARI—STATUTORY LIMITATIONS ON USE STRICTLY APPLIED.—The plaintiff sued out a writ of certiorari to review the ruling of the district court (in an action still pending) directing an answer to the written interrogatories of the defendant presented in accordance with the provisions of the Iowa Comp. Code (1924) §§ 11185-11192. The petition alleged the irrelevancy of the questions, and the irreparable injury that would follow from compliance. *Held*, (three judges *dissenting*) that the writ be dismissed. *Winneskiek County Bank v. District Court*, 212 N. W. 391 (Iowa, 1927).

The writ of certiorari, both at common law and, in general, under modern codes, issues to review only cases where a lower tribunal has acted without jurisdiction or illegally, and where there is no other remedy. *Wood-*

ward Iron Co. v. Bradford, 206 Ala. 447, 90 So. 803 (1921); *Davison v. Court,* 42 S. D. 254, 173 N. W. 737 (1919); *Miller v. Wiseman,* 125 Me. 4, 130 Atl. 504 (1925); SPELLING, EXTRAORDINARY REMEDIES (2d ed. 1901) 1630 *et seq;* (1890) 10 L. R. A. 248, note. The instant statute is of this type. Iowa Comp. Code (1924) § 12456; *Barry v. Court,* 167 Iowa, 306, 149 N. W. 449 (1914). A number of states have effected a change in name only, substituting for certiorari the writ of review. *Garvin v. Chambers,* 195 Calif. 212, 232 Pac. 696 (1924); *MacFarlane v. Burton,* 64 Utah, 41, 228 Pac. 193 (1924); *Hay v. Hay,* 40 Idaho, 159, 232 Pac. 895 (1924). A comparatively few states have extended the scope of the writ for certain purposes making it concurrent with an appeal or a writ of error: (1) to review errors of law, *Coolidge v. Bruce,* 144 N. E. 397 (Mass. 1924); (2) to review errors of fact, *Tolbert v. Kellis,* 34 Ga. App. 49, 128 S. E. 204 (1925); (3) as a direct method of appeal from judgments of quasi-judicial bodies, *Essex County v. Civil Service Commission,* 98 N. J. L. 671, 121 Atl. 695 (1923); *People v. Sayer,* 205 App. Div. 562, 200 N. Y. Supp. 134 (2d Dept. 1923); (4) as a means of harmonizing opinions of lower courts with prior decisions of the Supreme Court, *State v. Allen,* 303 Mo. 608, 267 S. W. 832 (1924). But, whereas the common law writ of certiorari was appropriate to remove a case only before judgment, it is now the general practice to refuse the writ to review an interlocutory order or judgment. See *Witmer v. Dist. Court,* 155 Iowa, 244, 252, 136 N. W. 113, 116 (1912). SPELLING, *op. cit. supra,* at 1635. In the instant case, the jurisdiction of the court was not questioned. Since the order in question was interlocutory, no direct appeal would lie. (1925) 34 YALE LAW JOURNAL, 905. The plaintiff might have had the order reviewed, however, by complying with the order and appealing from the final judgment. See *Witmer v. Dist. Court, supra* at 248, 252, 136 N. W. at 115, 116. Likewise, by refusing to comply thereby, subjecting his petition to dismissal or himself, possibly, to citation for contempt. See *Finn v. Winneshiek Dist. Court,* 145 Iowa, 157, 167, 123 N. W. 1066, 1069 (1909). The ruling objected to concerned the admissibility of evidence, a matter largely within the discretion of the trial court. *Perry v. Heighton,* 26 Iowa, 451 (1868); *School District v. School District,* 148 Iowa, 154, 125 N. W. 184 (1910). The irreparable injury alleged is only that incident to a great deal of evidence ordinarily admitted over objection. The convenience, generally, of leaving such matters to the discretion of the trial court outweighs the increased hardship upon the plaintiff in the particular case.

CONSTITUTIONAL LAW—STATUTES—OPERATION OF STATE STATUTES WHEN CONSTITUTIONAL BAR IS REMOVED.—In accordance with Congressional authority [15 Stat. 34 (1868), U. S. Comp. Stat. (1916) § 9784, U. S. Code, § 548 a Missouri statute provided for an ad valorem tax on national bank shares. Mo. Rev. Stat. (1919) § 12775. Thereafter, in 1917, a Missouri income tax law was passed making no exemption for dividends from national banks. Mo. Rev. Stat. (1919) § 13106–36. In 1923, the federal statute was amended to authorize the states to tax the income, shares, or dividends of national banks, the imposition of any one of these taxes to be in lieu of the others. 42 Stat. 1499 (1923), U. S. Comp. Stat. (Supp. 1923) § 9784, U. S. Code, § 548. The plaintiff bank sought to enjoin the collection of the ad valorem tax as of June 1, 1923. The lower court granted an injunction, holding that the Missouri income tax law, though originally invalid as to income derived from dividends of national banks, was validated by the Congressional Act of 1923 and that as the Missouri statutes subsequent to that date provided for taxes on both shares and dividends, only one of which had been authorized by Congress, neither

could be enforced. On appeal, *held*, that the judgment be reversed and the injunction dissolved on the ground that since either tax was authorized, the tax on the shares of the bank, having been the one first levied, should continue in lieu of the income tax until such time as the legislature made a choice. *Buder v. First Nat'l Bank*, 16 Fed. (2d) 990 (C. C. A. 8th, 1927).

Governmental powers have been divided into three groups: (1) those which may be exercised concurrently by state and federal governments even in the absence of federal legislation. *Willson v. Blackbird Creek Co.*, 2 Pet. 245 (U. S. 1829); *Cooley v. Board of Wardens*, 12 How. 299 (U. S. 1851); *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 32 Sup. Ct. 626 (1912). (2) Those in which the failure of Congress to act raises an implication against the power of the state to exercise a concurrent authority unless Congress affirmatively removes the inhibition. *In re Damon*, 70 Me. 153 (1879) (repeal of Federal Bankruptcy Act revived state insolvency statutes); *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84 (1892) (same); *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865 (1891) (state law regulating sale of liquors became valid as to imported liquors without re-enactment after Congress removed from imported liquor the protection of the interstate commerce clause); *West Virginia v. Adams Express Co.*, 219 Fed. 794 (C. C. A. 4th, 1915) (same); see *Silz v. Hesterberg*, 211 U. S. 31, 44, 29 Sup. Ct. 10, 14 (1908) (game laws); *New York Central R. R. v. Public Service Commission of N. Y.*, 268 Fed. 558 (N. D. N. Y. 1920) (state regulation of railroad rates); *Lionberger v. Rowse*, 43 Mo. 67 (1868) (local tax laws); *Central Pacific R. R. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885 (1895) (same). *Contra: Central Nat'l Bank v. Sutherland*, 202 N. W. 423 (Neb. 1925) (same). The court in the instant case properly refused to apply this doctrine in such a manner as to derogate from the end sought by the amendatory legislation. (1926) 39 HARV. L. REV. 769. (3) Those in which the nature of the power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the exercise of a similar power by the states, so that an attempt by Congress to delegate such power will be held unconstitutional. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 (1920). Query, how far the federal government can go in removing inhibitions from state legislation on matters which are considered, either expressly or impliedly, within the exclusive jurisdiction of the federal government. *Cf. Knickerbocker Ice Co. v. Stewart, supra; Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757 (1898); (1926) 39 HARV. L. REV. 373; THOMPSON, FEDERAL CENTRALIZATION (1923) 123, 167.

CONSTITUTIONAL LAW—VALIDITY OF "BAUMES LAW" REQUIRING LIFE IMPRISONMENT ON FOURTH CONVICTION OF FELONY.—The defendants, who had been previously convicted six times, pleaded guilty to the charge of attempted burglary, and were sentenced under a statute [N. Y. Ann. Cons. Laws (Supp. 1926) c. 41, §§ 1942-3] requiring life imprisonment on a fourth conviction of felony, and providing that the previous convictions need not be alleged in the indictment, but could be shown after conviction. An appeal was taken, *inter alia*, on the ground that the statute was unconstitutional. *Held*, that the sentence be affirmed. *People v. Gowasky*, 244 N. Y. 451, 155 N. E. 737 (1927).

Statutes which impose enhanced penalties on habitual offenders are of long standing and have been uniformly upheld. See *Graham v. West Virginia*, 224 U. S. 616, 623, 32 Sup. Ct. 583, 585 (1912); (1914) 48 L. R. A. (N. S.) 204, note. They do not subject the defendant to double jeopardy. *McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389 (1901); *State v. Findling*, 123 Minn. 413, 144 N. W. 142 (1913). The prior convictions

are merely regarded as historical facts aggravating the last offense. See *Hyser v. Commonwealth*, 116 Ky. 410, 417, 76 S. W. 174, 176 (1903). For the same reason such statutes are not regarded as being *ex post facto*, though enacted after the prior convictions considered. *Jones v. State*, 9 Okla. Cr. 646, 133 Pac. 249 (1913). And since the legislature has great latitude in determining the severity of punishment, they are not objectional as imposing cruel or unusual punishments. *State v. Dowden*, 137 Iowa, 573, 115 N. W. 211 (1908); *cf. Gibson v. Commonwealth*, 204 Ky. 748, 265 S. W. 339 (1924) (death sentence for burglary). Similarly, they cannot be attacked on the ground that they leave no discretion in the trial judge. See *State v. Le Pitre*, 54 Wash. 166, 169, 103 Pac. 27, 28 (1909). The instant statute is not unique in its severity. Or. Laws (1921) c. 70; Wash. Comp. Stat. (Remington, 1922) § 2286; W. Va. Code Ann. (Barnes, 1923) c. 152, § 24 (requiring life sentence on third conviction of felony). Since a defendant is entitled to a jury trial on the issue of his identity with the accused in the previous convictions, it has been held that, in the absence of statute, they must be alleged in the indictment and proved on the trial. *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288 (1898). *Contra: State v. Ferrone*, 96 Conn. 160, 113 Atl. 452 (1921). But the same court admitted, and it has been held, that the investigation may be deferred by statute until after a verdict of guilty on the principal issue. See *People v. Rosen*, 208 N. Y. 169, 173, 101 N. E. 855, 857 (1913); *Graham v. West Virginia, supra*. The latter procedure, authorized by the instant statute, seems highly desirable, since it prevents the jury from on the one hand convicting because of past crimes, or on the other, acquitting because of the severity of the punishment. (1922) 31 YALE LAW JOURNAL, 440.

CRIMINAL LAW—OWNER'S "INTENT" TO PASS "TITLE" PRECLUDES CONVICTION FOR LARCENY.—The defendant, whose lease had expired, by telling A that the lease had two years to run, induced him to take a sub-lease for one month and to pay the rent one week in advance of taking possession. A never acquired possession of the premises. The defendant was indicted for (1) obtaining money under false pretenses, and (2) larceny. The trial court dismissed the first count because under the Rent Law the defendant had the privilege of retaining possession by paying the rent to his landlord, but the defendant was convicted of larceny. *Held*, on appeal, (two judges *dissenting*) that the conviction be quashed since there was no evidence to justify the jury's finding that A had intent to pass possession only. *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927).

One of the essential elements of common law larceny was a "trespassory" taking. BRACTON, 3 De Corona C. 32 Fol. 160 (b); COKE, 3 Inst. 107; HAWKINS P. C. (6th ed. 1788) 134; *Ravens Case*, Kel. J. 24 (K. B. 1662). Common law cheating was indictable only if accomplished by means of a "token" of a public nature calculated to deceive common prudence. *Reg. v. Jones*, 1 Salk. 379 (K. B. 1702); *Wheatly's Case*, 2 Burr. 1125 (K. B. 1761); 2 East P. C. (1803) 816. Thereafter, the scope of the latter category was enlarged by legislation. (1541) 33 Hen. VIII. c. 1 (cheating by means of *private* tokens prohibited); (1757) 30 Geo. II, c. 24, § 1 (obtaining property by false pretenses made misdemeanor); *Young v. King*, 3 Term R. 98 (K. B. 1789) (applying latter statute). Subsequently, the courts developed the doctrine of "larceny by trick." *Rex v. Pear*, 2 East P. C. 685 (K. B. 1779); *Rex v. Patch*, 1 Leach C. C. *273 (K. B. 1782). This, in effect, eliminated the requisite of a "trespassory" taking where the owner "intended" to deliver merely "possession" as distinguished from "title" and the recipient thereafter appropriated the chattel to his own use. But where the owner "intended" to pass "title" the defendant could

be held only for "false pretenses." 2 East P. C. (1803) 816; (1921) 30 YALE LAW JOURNAL, 613. The fact-situations were sometimes very similar. *Rex v. Patch, supra* (larceny—A induced B to give him money as security for safekeeping by B of worthless chattel); *Reg. v. Wilson*, 8 Car. & P. 111 (1837) (no larceny—A induced B to give him money for a worthless chattel). A New York statute provides that "a person who, with intent to deprive the true owner of his property . . . obtains from such [owner] possession by color . . . of false pretenses . . . steals such property and is guilty of larceny." N. Y. Ann. Cons. Laws (2d ed. 1918) c. 41, § 1290. This statute was apparently aimed at the abolition of the distinction. But the New York court held that the owner's "intent" to pass "title" would still preclude a conviction for larceny. *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887); *cf. People v. Cory*, 124 Misc. 532, 208 N. Y. Supp. 768 (King's Co. Ct. 1925). To base such variant results on a supposed distinction as to the owners "intent" would seem to be undesirable in view of the defendant's undoubted culpability in both situations. To attempt to ascertain whether an owner "intends" to pass "possession" rather than "title" is to assume the doubtful proposition that he himself contemplates such metaphysical distinctions.

CRIMINAL LAW—PLEA OF FORMER JEOPARDY—MORE THAN ONE PERSON INJURED BY SAME ACT.—The defendant was acquitted of the manslaughter of A, alleged to have been caused by his negligent operation of an automobile. Thereafter he was indicted for assault and battery of B alleged to have been caused by the identical act. The defendant pleaded prior acquittal to the latter indictment but the plea was dismissed. *Held*, on appeal, that the plea should have been allowed since both alleged crimes were the product of the same act. *State v. Cosgrove*, 135 Atl. 871 (N. J. 1927).

The New Jersey constitution provides that "no person shall, after acquittal, be tried for the same offense." N. J. Const. art. 1, par. 10. The problem involved would seem to be centered about the meaning of the word "offense" within the meaning of this clause. Most courts have held, in accordance with the instant decision, that when a single act causes injuries to more than one person, only one offense is commited. *State v. Cooper*, 96 N. J. L. 376, 115 Atl. 386 (1921) (acquittal for manslaughter barred indictment for assault and battery); *Ruffin v. State*, 29 Ga. App. 214, 114 S. E. 581 (1922) (acquittal of homicide of A barred prosecution for homicide of B); *Commonwealth v. Veley*, 63 Pa. Super. Ct. 489 (1916) (where three people were killed by the breaking of a dam, the acquittal of the owner for the manslaughter of one barred subsequent prosecution for another); see *Aven v. State*, 95 Tex. Cr. App. 155, 253 S. W. 521 (1923). The courts which hold otherwise reason that each consequence is a distinct crime because proof of facts alleged in one indictment would not have supported a conviction under the other. *People v. Brannon*, 70 Calif. App. 225, 233 Pac. 88 (1924); *Commonwealth v. Browning*, 146 Ky. 770, 143 S. W. 407 (1912); see *State v. Corbitt* 117 S. C. 356, 358, 109 S. E. 133, 135 (1921). The principal significance of the consequence of any given act is in determining whether such conduct will be punished and, if so, the amount of punishment to be assessed. No significance should be attached to the consequence in determining whether a second prosecution should be permitted with respect to a given act. It might be argued that the jury would convict him under the second indictment where it would refuse to under the first, because of the less severe nature of the punishment to follow. The answer would seem to be that the defendant could have been indicted for both consequences at the same time and thus could have been tried for them simultaneously.

INSURANCE—BREACH OF WARRANTY—ESTOPPEL AVAILABLE ONLY TO INNOCENT INSURED.—The defendant issued a burglary insurance policy to the plaintiff, both parties knowing that certain statements therein warranted to be true were in fact false. The plaintiff claimed that the defendant was estopped to set up a defense of breach of warranty. The City Court granted the defendant's motion for judgment on the pleadings. *Held*, on appeal, that the judgment of the City Court be affirmed. *Satz v. Massachusetts Bonding & Ins. Co.*, 243 N. Y. 385, 153 N. E. 844 (1926).

With the exception of the federal courts and the courts of Massachusetts and New Jersey, it is generally, if somewhat uncertainly, held that an insurer is estopped, as against an insured accepting the policy in good faith without actual knowledge of its invalidity, to set up a breach of warranty known to it or its agent at the inception of the contract. *Grand View Bld'g Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 102 N. W. 246 (1905); *People's Fire Ins. Ass'n of Arkansas v. Goyne*, 79 Ark. 315, 96 S. W. 365 (1906); *Andrus v. Maryland Cas. Co.*, 91 Minn. 358, 98 N. W. 200 (1904). And this rule applies even when the insured by reading the policy might have learned of the broken warranty, if in fact he did not read it. *N. W. Nat'l Ins. Co. v. Chambers*, 24 Ariz. 86, 206 Pac. 1081 (1922); *Busboom v. Cap. Fire Ins. Co.*, 111 Neb. 855, 197 N. W. 957 (1924). The minority view may be explained by the failure of those courts which adhere to it to distinguish carefully, if at all, between the equitable doctrine of estoppel and the contract principle of waiver. This results in applying the parol evidence rule where it has no application. Estoppel may be shown by parol but not always waiver. *Northern Assurance Co. v. Grand View Bld'g Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133 (1902) which practically overruled *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222 (U. S. 1871); *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568 (1878); *Harris v. No. Amer. Ins. Co.*, 190 Mass. 361, 77 N. E. 493 (1906). See Vance, *Waiver and Estoppel in Insurance Law* (1925) 34 YALE LAW JOURNAL, 834; (1922) 31 YALE LAW JOURNAL, 778; (1921) 5 MINN. L. REV. 136. But estoppel, while provable in an action at law, is essentially equitable in nature and most courts hold that actual knowledge by the insured at the time of the inception of the policy that it is inoperative because of a breach of condition will defeat his claim of estoppel. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837 (1887); *Haapa v. Met. Life Ins. Co.*, 150 Mich. 467, 114 N. W. 380 (1907); *Priest v. Kansas City Life Ins. Co.*, 116 Kan 421, 227 Pac. 538 (1924); (1925) 23 MICH. L. REV. 304. *Contra: Sun Life Ins. Co. v. Phillips*, 70 S. W. 603 (Tex. Civ. App. 1902); *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35 (1875); *Huestess v. So. Atl. Life Ins. Co.*, 88 S. C. 31, 70 S. E. 403 (1911). In any case, it would seem desirable to allow the insured to recover all premiums paid.

INSURANCE—TORTS—MISTAKE IN APPLICATION.—In an application by a husband and wife for a joint life policy, the medical examiner of the defendant company correctly put down the husband's answers, but erroneously recorded an answer of the plaintiff. Both applicants, unaware of the mistake, signed the document without reading it. The error caused the plaintiff to appear a doubtful risk and the policy was withheld pending investigation. In the interim the husband died. In an action for damages for the negligent delay in acting upon the application, the lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed. *Evans v. Int. Life Ins. Co.*, 252 Pac. 266 (Kan. 1927).

The negligent delay of an agent in forwarding an application will sup-

port an action in tort against the insurance company in most jurisdictions. *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 378, 232 Pac. 346 (1925); *Fox v. Volunteer Life Ins. Co.*, 185 N. C. 121, 116 S. E. 266 (1923); (1924) 34 YALE LAW JOURNAL, 102. *Contra: Interstate Business Men's Ass'n v. Nichols*, 143 Ark. 369, 220 S. W. 477 (1920). Where the negligent mistake of its agent in filling out an application causes a similar delay, it would seem reasonable likewise to hold the insurer responsible. See *Meyer v. Central States Life Ins. Co.*, 103 Neb. 640, 641, 173 N. W. 578, 579 (1919). Although the operative facts constitute only an offer, the results suggested finds support in the tendency to regard insurers as having in some measure the status of public service corporations. (1926) 26 COL. L. REV. 203, 207; (1920) 29 YALE LAW JOURNAL, 673. In the instant case it would seem clear that the insurer should be responsible in damages resulting from such delay unless the applicant's failure to detect the error be regarded as negligence. It is generally held that a person is charged with knowledge of the contents of any writing signed by him. 1 WILLISTON, CONTRACTS (1920) §§ 35, 90a. There is developing, however, a tendency to except insurance contracts from the operation of this rule. *Williams v. Pacific States Fire Ins. Co.*, 251 Pac. 258 (Or. 1926); 3 COOLEY, BRIEFS ON THE LAW OF INSURANCE (1905) 2572, 2573; (1924) 24 COL. L. REV. 95. *Contra: Southern Surety Co. v. Benton*, 280 S. W. 551 (Tex. 1926); *Layton v. New York Life Ins. Co.*, 55 Calif. App. 202, 202 Pac. 958 (1921); (1924) 22 MICH. L. REV. 274. Accordingly, knowledge of a mistake in the application or a variance in the policy is not imputed to the insured from the fact of possession of the policy with the application attached. *Schmidtt v. Massachusetts Protective Ass'n, Inc.*, 212 N. W. 5 (Minn. 1927); Vance, *Waiver and Estoppel in Insurance Law* (1925) 34 YALE LAW JOURNAL, 859, n. 98. It would seem desirable to protect the insured in his expectation that the insurer's examiner will perform his duties accurately. *Cf. Mutual Life Ins. Co. of New York v. Brown*, 34 Ga. App. 301, 129 S. E. 307 (1925).

INSURANCE—TOTAL DISABILITY CLAUSE—FAILURE TO NOTIFY INSURER EXCUSED.—The plaintiff was the beneficiary of her husband's life insurance policy with the defendant company. The policy contained a total disability clause excusing payment of premiums but requiring notice before default. An additional premium was charged for said clause. The insured became insane and defaulted. Subsequently he died. The plaintiff thereupon notified the company of these facts and demanded the proceeds. The defendant refused to pay because of the omission to notify as required by the policy. The trial court gave judgment for the plaintiff. *Held*, on appeal, (one judge *dissenting*) that the judgment be affirmed because the requirement of notice was excused by the insured's inability to give it. *Levan v. Metropolitan Life Ins. Co.*, 136 S. E. 304 (S. C. 1927).

In the absence of a provision in the policy to the contrary, total disability will not excuse the payment of the premium. *N. Y. Life Ins. Co. v. Alexander*, 122 Miss. 813, 85 So. 93 (1920); *Rocci v. Mass. Acc. Co.*, 222 Mass. 336, 110 N. E. 972 (1916). But it is otherwise when total disability is relied on only to excuse failure to give notice. *Metropolitan Life Ins. Co. v. Carroll*, 209 Ky. 522, 273 S. W. 54 (1925); *Reed v. Loyal Protective Ass'n*, 154 Mich. 161, 117 N. W. 600 (1908); Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 COL. L. REV. 425; VANCE, INSURANCE (1904) 503; 4 COOLEY, BRIEFS ON LAW OF INSURANCE (1905) § 3462. Some courts reach the same result as the instant case by

denying that the giving of notice as required is a condition precedent in that the purpose of such a requirement is to supply the company with evidence and to prevent fraudulent claims, which is as well accomplished by later notification. *Southern Life Ins. Co. v. Hazard,* 148 Ky. 465, 146 W. 1107 (1912); *State Life Ins. Co. v. Fann,* 269 S. W. 1111 (Tex. Civ. App. 1925). *Contra: Hanson v. Northwestern Life Ins. Co.,* 229 Ill. App. 15 (1923). Other courts declare such acts are "conditions subsequent" and as a result will not permit non-fulfillment thereof to extinguish "accrued" rights. *Pacific Mutual Life Ins. Co. v. Adams,* 27 Okla. 496, 112 Pac. 1026 (1910); *Watson v. Ocean Acc. & Guarantee Corp.,* 238 Pac. 338 (Ariz. 1925). Most courts, however, hold that such acts are conditions precedent but that performance is *excused* by total disability. *Woodman Acc. Ass'n v. Pratt,* 62 Neb. 674, 87 N. W. 546 (1901); *Hayes v. Continental Cas. Co.,* 98 Mo. App. 410 (1903); *cf.* ANSON, CONTRACTS (Corbin's ed. 1924) § 359. Thus, if the omission to give the requisite notice is due to the fault of the insured, the provision is enforced. *Woodward v. Security Ins. Co. of New Haven,* 201 Iowa, 378, 207 N. W. 351 (1926). It would appear difficult, if not impossible, to ascertain what the parties "intended" with respect to the necessity of performing under the circumstances of the instant case. But where the failure to perform is the result of impossibility, it would seem fair to excuse non-performance inasmuch as the insurance company has been paid for its additional obligation and is only slightly, if at all, prejudiced by the omission to notify. *Cf. London Guarantee & Acc. Co. v. Officer,* 78 Colo. 441, 242 Pac. 989 (1925) (plaintiff not appointed in requisite capacity until after stipulated period); *Concordia Fire Ins. Co. v. Waterford,* 145 Ark. 420, 224 S. W. 953 (1920) (the only person knowing of the provision was killed).

JOINT TENANCIES—RIGHT OF SURVIVORSHIP DENIED JOINT DEPOSITOR.—The plaintiff and her deceased husband both worked and contributed their earnings to a bank account, made payable to either or survivor. The plaintiff contended that a joint tenancy was created and that the balance passed to her by right of survivorship, thus avoiding the necessity of administrative proceedings. The plaintiff excepted to the instructions of the probate court as to the nature of a joint tenancy. *Held,* on appeal, that the exceptions be overruled because some of the four unities essential to a joint tenancy were lacking, and in addition joint tenancies are disfavored. *Appeal of Garland,* 136 Atl. 459 (Me. 1927); *cf. Portland Nat'l Bank v. Brooks,* 136 Atl. 458 (Me. 1927).

At common law a conveyance to husband and wife, unless explicitly limited, created an estate by entireties. *Kung v. Kurtz,* 8 Del. Ch. 404, 68 Atl. 450 (1899); Ann. Cas. 1912 C, 927, note. A tenancy by entireties is essentially a joint tenancy modified by the conception of the unity of husband and wife. *Pray v. Stebbins,* 141 Mass. 219, 4 N. E. 824 (1886). Since the Married Women's Property Acts, tenancies by entireties are not recognized in many states. *Appeal of Robinson,* 88 Me. 17, 33 Atl. 652 (1895); (1895) 30 L. R. A. 314, note. In the instant case, the court applied as the test of a joint tenancy the presence of the four unities of time, title, interest and possession, according to Blackstone's analysis. 2 BL. COMM. *180–184. But, the unity of time has not always been indispensable. *Brent's Case,* 3 Dyer 340 (1575) (estate to A, and to such wife as he shall afterwards marry). *Powell v. Powell,* 68 Ky. 619 (1869) (estate to wife and child, unborn at time of conveyance). TIFFANY, REAL PROPERTY (2d ed. 1924) 627. The unity of title has been often disregarded or evaded by fiction. *Saxon v. Saxon,* 46 Misc. 202, 93 N. Y. Supp. 191 (1905); *Bassett v. Budlong,* 77 Mich. 338, 43 N. W. 984 (1889); *Hiles v.*

Fisher, 144 N. Y. 306, 39 N. E. 337 (1895); *Hayes v. Horton*, 46 Or. 597, 81 Pac. 386 (1905). Since a man could not convey to his wife at common law, a favorite method of complying with the technical requirements of a tenancy by entireties or a joint tenancy was by a conveyance to a third party and a reconveyance to the husband and wife. *Flading v. Rose*, 58 Md. 13 (1882); (1916) 82 CENT. L. J. 161. Many courts have held joint bank accounts joint tenancies by considering the deposit with the bank analogous to a conveyance to a third party. *Deal's Adm'rs v. Merchant's and Mech. Bank*, 120 Va. 297, 91 S. E. 135 (1917); *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926 (1918). Although joint tenancies are generally held in disfavor, they are desirable for particular purposes. *Phila. R. R. v. Lehigh Co.*, 36 Pa. 204 (1860) (excepting conveyance to trustees from statute abolishing joint tenancies). Many statutes abolishing joint tenancies exempt conveyances to joint trustees and mortgages to secure debts to joint creditors. Mass. Gen. Laws (1921) c. 184, § 7; Ind. Ann. Stat. (1926) § 13384. The tendency today is in favor of considering joint bank accounts joint tenancies, where the intent of the parties to provide for survivorship is clear. (1926) 20 ILL. L. REV. 508; (1926) 36 YALE LAW JOURNAL, 138. It would seem unfortunate that the court confined itself to more or less mechanistic reasoning, quite overlooking what would appear to be a desirable social policy.

LIMITATIONS OF ACTIONS—ABSENCE FROM STATE—SERVICE OF PROCESS AT "USUAL PLACE OF ABODE."—In an action on promissory notes made by the defendant's intestate, the defendant pleaded the statute of limitations. The intestate was "domiciled" and had a residence in New York. He also owned, to the plaintiff's knowledge, a farm in Connecticut where his wife resided eight months each year and where the defendant during this time regularly spent one full month in adidtion to week-ends. The trial court gave judgment for the plaintiff relying on the statutory provision that: "In computing the time limited, . . . the time during which the party . . . shall be without this state, shall be excluded." Conn. Gen. Stat. (1918) § 6169. *Held*, on appeal, that the judgment be reversed because the defendant could have been served with process under the statutory provision that "service . . . shall be made . . . at his usual place of abode" [Conn. Gen. Stat. (1918) § 5591] and therefore was not "without the state" within the meaning of the statute of limitations. *Clegg v. Bishop*, 105 Conn. 564, 136 Atl. 102 (Conn. 1927).

If a person can be served with process within the jurisdiction, it would seem fair to hold that the statute of limitations runs in his favor during that time. On this hypothesis, the question in the instant case is whether the defendant had a "usual place of abode" in Connecticut for the purpose of service of process. The principal object of service of process is to give the defendant actual notice. See *Grant v. Dalibor*, 11 Conn. 234, 237 (1836). Accordingly, it is held that where a person lives temporarily at a certain place so that he would in fact probably get notice by service, that is his "usual place of abode." *Dunn's Appeal*, 35 Conn. 82 (1868) (defendant's house had been sold, and service was made at jail where he was imprisoned). *Harrison v. Farrington*, 35 N. J. Eq. 4 (1882) (service at defendant's summer home even though he also had town house with servants). The requirement of notice has been held to be attained by service at the summer home of the defendant's family even though defendant was temporarily absent. *Camden Safe-Deposit & Trust Co. v. Barbour*, 66 N. J. L. 103, 48 Atl. 1008 (1901). But the inference that a man's "usual place of abode" is where his family lives may be rebutted. *Berryhill v. Sepp*, 106 Minn. 458, 119 N. W. 404 (1909) (service at house of defendant's

wife inoperative when they were living apart); *Grant v. Lawrence*, 37 Utah, 450, 108 Pac. 931 (1910) (service at home of one wife while defendant, a Mormon, was abroad with another wife, held inoperative). The later decisions indicate that courts recognize that the likelihood of receiving notice is the controlling factor. Thus a man may have two "usual places of abode" and either will suffice for service of process. *Dorus v. Lyon*, 92 Conn. 55, 101 Atl. 490 (1917). Assuming, however, that the intestate in the instant case, could have been *served*, yet most courts hold, under similar *statutes of limitations*, that absence from the jurisdiction will toll the running. *Buell v. Duchesne Mercantile Co.*, 64 Utah, 391, 231 Pac. 123 (1924). *Roth v. Holman*, 105 Kan. 175, 182 Pac. 416 (1919). But Connecticut has held otherwise. *Sage v. Hawley*, 16 Conn. 107 (1844) (statute not tolled where defendant temporarily left his family on two trips of eight months each). The latter view would seem to be more desirable in that creditors are forced to take reasonably prompt action without being prejudiced.

MASTER AND SERVANT—VERDICT AGAINST MASTER AND NOT AGAINST SERVANT NOT INCONSISTENT.—The plaintiffs sued a master and his servant to recover for injuries caused by the latter's negligence in driving an automobile in the course of the master's business. The jury's verdict was against the master but was silent as to the servant. The master appealed on the ground that an exoneration of the servant was necessarily, under the doctrine of *respondeat superior*, a finding of no right of action against the master. *Held*, that judgment be affirmed since the silence of the verdict is a mistrial as to the servant, and not a finding of no negligence on his part. *Dunbaden v. Castles Ice Cream Co.*, 135 Atl. 886 (N. J. 1927).

In an action against both master and servant based on the sole negligence of the servant, a majority of the courts have upheld a verdict against the master only where a verdict is likewise returned against the servant. *Begin v. Liederbach Bus Co.*, 167 Minn. 84, 208 N. W. 546 (1926); *Lowney v. Butte Electric Ry.*, 61 Mont. 497, 204 Pac. 485 (1921); *Southern Ry. v. Harbin*, 135 Ga. 122, 68 S. E. 1103 (1910). Extended to its logical extreme, if the plaintiff is under a disability to sue the servant, the master is relieved of responsibility. *Maine v. Maine & Sons Co.*, 198 Iowa, 1278, 201 N. W. 20 (1924); but see (1925) 10 IOWA L. BULL. 228; (1925) 38 HARV. L. REV. 824. Other courts have held the master responsible in the following situations: (1) when, as in the instant case, the jury verdict is silent as to the servant. *Whitsell v. Jophin & P. Ry.*, 115 Kan. 53, 222 Pac. 133 (1924); see *Feury v. Reid Ice Cream Co.*, 126 Atl. 462, 463 (N. J. 1924). (2) When there exists a statutory presumption of negligence on the part of the master, on the theory that the jury may find against the master and in favor of the servant to whom the presumption does not apply. *Davis v. Hareford*, 156 Ark. 67, 245 S. W. 833 (1922); see dissenting opinion in *Southern Ry. v. Harbin, supra*, at 126, 68 S. E. at 1106. These are desirable results based on unconvincing reasons and distinctions. Only one jurisdiction appears to have upheld a verdict against the master when the servant is expressly exonerated. *Weil v. Hagan*, 166 Ky. 750, 179 S. W. 835 (1915); but see (1916) 16 COL. L. REV. 164. The latter view finds support by analogy, in the refusal of the courts in criminal cases to upset jury verdicts on the ground of inconsistency. *Steckler v. United States*, 7 Fed. (2d) 59 (C. C. A. 2d, 1925); *Weiderman v. United States*, 10 Fed. (2d) 745 (C. C. A. 8th, 1926). Moreover, the effect of such results is to place the loss on those in the best position to distribute it among the community, the desirability of which would appear as great here as in the case of Workmen's Compensation. See Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444, 456, *et seq.* The majority rule appears to be particularly

undesirable when the appelate court directs the entering of judgment for the defendant-appellant and refuses a new trial. (1922) 22 COL. L. REV. 596. Some courts nevertheless do so. *Dorcmus v. Root*, 23 Wash. 710, 63 Pac. 572 (1901); see *Lowney v. Butter Electric Ry., supra*, at 505, 204 Pac. at 487. The upsetting of these so-called inconsistent verdicts is an attempt to force juries to conform to the courts' own logical processes—a course which seems neither practical nor desirable.

PERSONS—DIVORCE—SUPPLEMENTAL COMPLAINT PERMITTED.—After the action was at issue in a suit for an absolute divorce on grounds of adultery, the plaintiff was granted leave to serve a supplemental complaint, alleging acts of adultery, committed by the defendant subsequent to the commencement of the suit. *Held*, on appeal, that the complaint be allowed under the Civil Practice Act providing that " . . . the court may . . . permit . . . a supplemental complaint . . . alleging material facts which occurred after his former pleading or of which he was ignorant when it was made." N. Y. Civ. Prac. Act, § 245 (1920). *Otto v. Otto*, 220 N. Y. Supp. 513 (App. Div. 1st Dept. 1927).

Upon facts similar to those in the instant case, the New York courts have consistently refused to permit a supplemental complaint to be filed, declaring that this introduced a new cause of action. *Milner v. Milner*, 2 Edw. Ch. 114 (N. Y. 1833); *Faas v. Faas*, 57 App. Div. 611, 68 N. Y. Supp. 509 (1st Dept. 1901); *Beauley v. Beauley*, 199 App. Div. 280, 191 N. Y. Supp. 398 (1st Dept. 1921). CARMODY, NEW YORK PRACTICE (1923) § 924. See (1925) 25 COL. L. REV. 1057, 1060. The defendant, however, might allege in a supplemental answer and counterclaim, any acts of misconduct committed by the plaintiff subsequent to the commencement of a suit for absolute divorce. *Blanc v. Blanc*, 67 Hun, 384, 22 N. Y. Supp. 264 (1st Dept. 1893). And even where the original suit was for separation only. *Ames v. Ames*, 109 Misc. 161, 178 N. Y. Supp. 177 (Sup. Ct. 1919). In suits for separation for cruelty, moreover, the plaintiff has been permitted to show any acts of cruelty committed by the defendant subsequent to the suit. *Smith v. Smith*, 99 App. Div. 283, 90 N. Y. Supp. 927 (1st Dept. 1904). The instant decision is to be commended as a direct step toward simplicity and efficiency in litigation.

PUBLIC SERVICE—PAYMENT OF JOINT RATE FOR INTERNATIONAL TRANSPORTATION.—Joint rates between American and Canadian railroads were established by the railroads in terms of dollars when the exchange value of the Canadian dollar was equal to that of the American dollar. The charges were divided on a percentage basis according to a contract between the railroads. At a time when the Canadian dollar had depreciated the defendant shipped goods from Canada to Minnesota. The defendant paid to the American railroad at the destination its percentage of the established dollar rate in American dollars plus an additional sum (either in Canadian dollars or their then American equivalent) representing the Canadian railroad's percentage. The plaintiff, claiming that the dollar rate should have been computed entirely in terms of American dollars, sued to recover the balance. The lower court gave judgment for the plaintiff. *Held*, on appeal, (one judge *dissenting*) that the judgment be affirmed since a contrary holding would tend to disrupt rate structures. *Washburn-Crosby Co. v. Northern Pac. Ry.*, 16 Fed. (2d) 76 (C. C. A. 8th, 1926).

The rate (computed in American dollars) filed with the Interstate Commerce Commission is the only rate that an American carrier can charge for services rendered in this country. See *Abrasive Co. v. Director General*, 69 I. C. C. 630, 633 (1922). Likewise, a Canadian carrier's charge

for services rendered in Canada is fixed by the rate (computed in Canadian dollars) filed with the Board of Railway Commissioners of Canada. See *United States Surcharge Case*, 27 Can. Ry. Cas. 90, 104 (1921). It would seem, therefore, that in the instant case the defendant paid all that the plaintiff and Canadian carriers were entitled to collect as compensation for their joint services and that payment as required by the court would create an excess which neither railroad could lawfully keep. If payment as made by the defendant tends to disrupt rate structures and give the Canadian carriers an undue increase in business, the plaintiff railroad can obtain relief from the Interstate Commerce Commission. See dissenting opinion in the instant case.

TAXATION—INHERITANCE TAX—GIFTS MADE IN CONTEMPLATION OF DEATH.—A transfer of land by gift was made by the decedent, aged 80 years, within two years of her death. At the time of the transfer, although she was in good health, she expressed the desire to save the donee from the burden of the inheritance tax. By order of the surrogate court the gift was taxed under a statute providing that a gratuitous transfer within two years of death is presumptively in contemplation of death. *Held*, on appeal, that the order be reversed since the showing that there was no condition of ill health or bad faith rebutted the presumption. *In re Baird's Estate*, 219 N. Y. Supp. 158 (App. Div. 4th Dept. 1927).

Most states have imposed taxes on gifts made in contemplation of death in order to prevent avoidance of inheritance taxes. In the construction of these statutes, courts have required proof of apprehension of impending death arising from existing bodily infirmity. *People v. Forman*, 322 Ill. 223, 153 N. E. 376 (1926); Evans, *"Contemplation of Death" in Inheritance Taxation* (1926) 24 MICH. L. REV. 461; (1926) 35 YALE LAW JOURNAL, 859. Many states, to overcome the difficulties of such a requirement, have enacted that gifts made within a certain period before death shall be deemed to be within the tax. These statutes have no application to bar proof that gifts made prior to the period specified were not in fact made in contemplation of death. *Succession of Vatter*, 150 La. 605, 91 So. 60 (1922). A conclusive statutory presumption, for a six year period, has been held unconstitutional. *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 Sup. Ct. 260 (1926). As indicated by the minority opinion, the *Schlesinger* case left open the question of whether an irrebuttable presumption for a more limited period would be valid. (1926) 35 YALE LAW JOURNAL, 1011. A rebuttable presumption is of little value since the burden of going forward with the evidence is easily sustained when the evidence is largely within the exclusive knowledge of those opposing the tax, especially where, as in the instant case, "contemplation of death" is narrowly interpreted. *Cf. Estate of Ebeling*, 169 Wis. 432, 172 N. W. 734 (1919). A more effective method of reaching gifts made to avoid the tax is by defining by statute the phrase "contemplation of death" as "that expectancy of death which actuates the mind of a person on the execution of his will," and declaring the purpose of the law to be "to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate and intestate laws." Calif. Laws 1921, c. 821, § 2 (1–4); *cf.* similar statutes in Colorado, Ohio and Tennessee. This definition has been interpreted as not requiring proof of either the apprehension of impending death or existing physical infirmity. *In re Pauson's Estate*, 186 Calif. 358, 199 Pac. 331 (1921); *Chambers v. Larronde*, 196 Calif. 100, 235 Pac. 1024 (1925).

TORTS—NEGLIGENCE—MISSTATEMENTS HELD ACTIONABLE.—The defendant, a common carrier, carelessly gave to the plaintiff wrong information con-

cerning the storage place of goods consigned to the latter. The goods were thereafter destroyed. As a result of the error being incorporated in the insurance policy which the plaintiff had procured on the goods, the policy was avoided. In an action for negligence, the lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be affirmed. *Int'l Products Co. v. Erie R. R.*, 244 N. Y. 331, 155 N. E. 662 (1927).

The instant case is further authority for the growing American doctrine of responsibility for negligent misstatements. New Hampshire and New York have led the way. *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480 (1899); *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922); (1926) 35 YALE LAW JOURNAL, 767. Judicial support of the doctrine that, aside from responsibility in fraud and deceit, "those engaged in supplying information are traditionally immune from liability in a suit by those not in privity of contract" is thereby diminished. (1921) 31 YALE LAW JOURNAL, 218. It has been suggested that false information negligently given by one in a position to know that the communicant will rely on it and be damaged thereby should be actionable where loss is sustained by reliance thereon. Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 184. That proposition has been adopted almost verbatim by the instant court.

WILLS—AGREEMENTS NOT TO CONTEST—PUBLIC POLICY NOT VIOLATED.—A testatrix decided to give money to her next of kin before her death instead of by will. In consideration therefor, the next of kin agreed not to contest her will, which left the estate to charity. The next of kin contested probate. The appellate court certified for review the question whether the agreements of the next of kin were against public policy. *Held*, that the agreements were enforceable. *In re Cook's Will*, 244 N. Y. 63, 154 N. E. 823 (1926).

Each of the several contracts in the instant case constitutes in effect a conditional release of an expectancy, *i. e.*, a release operative if the testator makes a will not invalidated by a third party. In the analogous situation of unconditional assignment or release many courts have held that the contract is void at law. The first American cases so deciding generally reached the result by reasoning mechanically that one can not transfer what he does not have. *Jackson v. Bradford*, 4 Wend. 619 (N. Y. Sup. Ct. 1830); *Dart v. Dart*, 7 Conn. 250 (1828). Other cases have called such agreements against public policy because of the opportunity afforded (1) to force an unfair bargain, or (2) to perpetrate a fraud on the ancestor, or (3) on the theory that they are wagering contracts. *Boynton v. Hubbard*, 7 Mass. 112 (1810); *Baltimore Humane Soc. v. Pierce*, 100 Md. 520, 60 Atl. 277 (1905); see *McClure v. Raben*, 125 Ind. 139, 146, 147, 25 N. E. 179, 180, 181 (1890). In equity objection (3) is disregarded; objection (1) obviated by insisting on adequate consideration; and objection (2) likewise, in some jurisdictions, by insisting on the ancestor's knowledge of, or consent to, the assignment. *Richey v. Richey*, 189 Iowa, 1300, 179 N. W. 830 (1920) (bill for partition); *Farmers' Loan & Trust Co. v. Wood*, 78 Ind. App. 147, 134 N. E. 899 (1922) (bill against trustee). When a party to the contract is a testator, these objections should not apply. In the parallel case of a testamentary gift conditioned to be void upon contest of the will by the legatee, the condition is generally held in accord with public policy. *Estate of Kitchen*, 192 Calif. 384, 220 Pac. 301 (1923); *Moran v. Moran*, 144 Iowa, 451, 123 N. W. 202 (1909). Some courts allow contest if it be affirmatively shown to be bona fide. *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 Atl. 961 (1917); (1926) 39 HARV. L. REV. 628; (1924) 12 CALIF. L. REV. 532. But there is no mention of such affirmative evidence in the instant case.