RECENT CASE NOTES

ATTACHMENT—GARNISHMENT OF CONTINGENT INTERESTS.—The defendant, a foreign corporation sold a $7,000,000 business to the garnishee, a domestic corporation, and as part consideration received the right to twenty per cent. of the profits over a period of seven years. Plaintiff, the broker who procured the sale, sought to attach this right in a suit to recover his commission. From an order of the supreme court denying his motion to vacate the attachment, the defendant appealed. *Held*, one judge *dissenting*, that the motion be granted on the ground that the right to share in the profits was a mere contingency. *Frederick v. Chicago Bearing Metal Co.*, 221 App. Div. 588, 224 N. Y. Supp. 629 (1st Dept. 1927).

A "contingent right," as denoting an obligation subject to extinguishment by subsequent events, is generally held not subject to attachment or garnishment. *Cavanaugh v. Merrimac Hat Co.*, 213 Mass. 384, 100 N. E. 662 (1913) (debt uncertain because in litigation); *Packard Motors Co. v. Talley*, 212 Ala. 487, 103 So. 455 (1925) (cannot garnish wages of employee before earned); *Herman & Grace v. City of New York*, 130 App. Div. 531, 114 N. Y. Supp. 1107 (1st Dept. 1909) (sum due building contractor on completion of building not garnishable until building completed); *Armstrong v. Armstrong*, 196 Iowa 947, 192 N. W. 887 (1923) (purchase price, due on tender of good deed, not garnishable until such tender). Such a contingent interest is attachable by statute in Kansas and Michigan. *Farmers & Merchants Bank v. Dondelonger*, 103 Kan. 444, 175 Pac. 109 (1918); see *Simmons Hardware Co. v. Rose*, 140 Mich. 123, 125, 103 N. W. 529, 530 (1905). But where the existence of an obligation is fixed, and the contingency relates merely to the amount or time when due, many courts have allowed garnishment. *Miller v. Scoville*, 35 Ill. App. 385 (1889) (engineers certificate, condition precedent to payment for work done, affects merely the time of payment); *Brainard v. Rogers*, 74 Cal. App. 247, 239 Pac. 1095 (1925) (insured's interest in policy attachable after fire but before proofs of loss showing amount due); *Ransom v. Bidwell*, 89 Conn. 137, 93 Atl. 134 (1915) (where contract provided for arbitration to fix amount due contractor if he stopped work, his claim garnishable before such arbitration); *Rankin v. Smith*, 174 Iowa 537, 156 N. W. 756 (1916) (where garnishee agreed to pay debtor one third of proceeds in excess of certain amount realized from sale of land, the obligation accrued at time of making of contract and was attachable); *Fay & Egan Co. v. Onachita Saw Mills*, 50 La. Ann. 205 (1898) (where garnishee contracted to saw and market logs supplied by debtor for one year and to collect and turn over the proceeds less a commission, the obligation was fixed and attachable although the amount was contingent on business done). *Contra: Stevenson v. McFarland*, 162 Mo. 159, 62 S. W. 695 (1901). It would seem that this view might well be applied to the instant case. See (1927) 27 COL. L. REV. 880. Furthermore, it has been held that a contingency must be clearly imminent in order to preclude attachment or garnishment. If it be merely a possibility, attachment or garnishment may issue subject to the possibility of subsequent discharge. *Goodman v. Meriden Britannia Co.*, 50 Conn. 139 (1882) (garnishee to pay $500 monthly if not disturbed in use of patents); *Ottumwa Nat. Bank v. Norfolk*, 185 Iowa 1334, 172 N. W. 3 (1919) (insurance company deposited amount of policy in bank to be delivered to beneficiary after ten years unless it proved insured alive); *Dunlop v. Patterson Insurance Co.*, 74 N. Y. 145 (1878) (money paid into court by insurance company attachable by creditor of

beneficiary while appeal pending); *Cavanaugh v. Chicago Ry.*, 75 N. H. 243, 72 Atl. 694 (1909) (indebtedness dependant on taking voluminous testimony and examination of complicated accounts). The possibility of the instant garnishee's not earning profits seems rather remote. See *dissent* by Finck, J, in the instant case. If attachment were permitted the risk of such possibility might well fall upon the garnisher as a condition subsequent. The defendant's interest would seem to be attachable as a "cause of action arising out of a contract." N. Y. Civ. Prac. Act § 916. Since the same section makes an interest in an instrument for the payment of money not yet due subject to attachment, an immediate right to sue does not seem to be always necessary.

BILLS AND NOTES—EFFECT OF REFERENCE TO COLLATERAL AGREEMENT.—The plaintiff sued as holder in due course of a negotiable note. On the back of the instrument were written the words, "subject to terms of agreement." The collateral agreement contained an optional acceleration clause. The defendant maker set up failure of consideration as a defense. The trial court and Appellate Division gave judgment for the defendant because the acceleration clause was incorporated by reference rendering the instrument non-negotiable. *Held*, on appeal, that the judgment be affirmed on the ground "that the provision in the note to the effect that it is subject to the terms of another agreement not attached thereto makes the promise of payment one that is not absolute on its face and thus destroys negotiability." *Old Colony Trust Co. v. Stumpel*, 247 N. Y. 22 (Memorandum, 1928).

As to what kinds of references on the face of an instrument will be treated as merely "a statement of the transaction which gave rise to the instrument" not affecting negotiability, see (1926) 26 COL. L. REV. 622. If the collateral agreement, as in the instant case, imposes upon the note a provision inconsistent with the formal requisites of a negotiable instrument, it is clear that the note is non-negotiable. *International Finance Corp. v. Calvert Drug Co.*, 144 Md. 303, 124 Atl. 891 (1924); *King Cattle Co. v. Joseph*, 158 Minn. 481, 199 N. W. 437 (1924); *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159 (1914); *Reynolds v. Richards*, 14 Pa. 205 (1850). Where the collateral agreement if appearing on the face of the instrument would not have defeated negotiability, it has been suggested that only the question of *notice* of possible defenses would remain. See *Snelling State Bank v. Clasen*, 132 Minn. 404, 407, 157 N. W. 643, 644 (1916); (1926) 26 COL. L. REV. 622. If the words "subject to" merely incorporate the collateral agreement by reference, then, in accord with the foregoing suggestion the only problem would be whether the taker would have acquired notice of any defenses from a perusal of the collateral agreement. But the cases hold that these words render the promise to pay conditional upon *performance* of the collateral agreement, allowing against a purchaser of such a note any defense which the maker would have had under the agreement, without regard to whether the purchaser should or could have had notice. *Post v. Kinzua Hemlock R. R.*, 171 Pa. 615, 33 Atl. 362 (1895) (failure to perform executory contract); *Verner v. White*, 214 Ala. 550, 108 So. 369 (1926) (failure to perform executory contract); *First National Bank of Richmond v. Badham*, 86 S. C. 170, 68 S. E. 536 (1910) (fraudulent representations of seller to maker); *Pope v. Righter Lumber Co.*, 162 N. C. 206, 78 S. E. 65 (1913); *Klots Throwing Co. v. Manufacturers' Co.*, 179 Fed. 813 (C. C. A. 2d, 1910); *American Exchange Bank v. Blanchard*, 89 Mass. 333 (1863); *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579 (1886); *Cushing v. Field*, 70 Me. 50 (1879). Where the maker had no defense arising out of the collateral contract, however, and at the time there was

no provision in the agreement which would have made the note non-negotiable in form, two courts have held the note negotiable. *Littlefield v. Hodge*, 6 Mich. 326 (1859) (defense of garnishment by payee's creditor not available to maker against purchaser of note); *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178 (1902) (defendant held responsible as indorser of negotiable note). It seems inadvisable to attempt to reconcile these cases by making negotiable form depend on whether the collateral agreement has been performed or not. It has been held that in such a case the note is non-negotiable without regard to performance. *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 77 S. E. 274 (1913) (such note held fatal variance in action on negotiable instrument). The language of the memorandum opinion in the instant case would seem to support the view suggested. On such a theory the inquiry of the lower court as to the restrictive provisions in the collateral agreement was immaterial.

CONFLICT OF LAWS—DEATH BY WRONGFUL ACT—PARTIES—AMENDMENT.—The decedent's administrator brought suit in New York in accordance with the law of that state for damages for the death caused by the alleged wrongful act of the defendant in the province of Quebec, Canada. The defendant moved for non-suit and dismissal of the complaint. Upon trial, it was *held* that the motion be granted since under the law of Quebec the right to sue is given solely to the ascendant and descendent relations and the proper parties might not be substituted as they would be barred by the statute of limitations. *Sapone v. New York Central & H. R. R.*, 225 N. Y. Supp. 211 (Sup. Ct. 1927).

Recovery for wrongful death is predicated upon the *lex loci delicti*. *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 120 N. E. 198 (1918). Where that law gives the right to sue to specific beneficiaries it is generally held that they only may sue. *Rankin v. Cent. R. R. of N. J.*, 77 N. J. L. 175, 71 Atl. 55 (1908); *cf. Teti v. Consolidated Coal Co.*, 217 Fed. 443 (N. D. N. Y. 1914). *Contra: Bussey v. Charleston & W. C. Ry.*, 73 S. C. 215, 53 S. E. 165 (1906) (allowing personal representative, in accordance with *lex fori*, to sue for the beneficiaries); *cf. Stewart v. B. & O. R. R.*, 168 U. S. 445, 18 Sup. Ct. 105 (1897) (similar result where the *lex loci delicti* directed suit by the state for the beneficiaries). This requirement is deemed waived where seasonable objection is not taken. *Giardini v. McAdoo*, 93 N. J. L. 138, 107 Atl. 437 (1919). Where the strict general rule as to parties is followed, and there has been no waiver, the statute of limitations makes the question of amendment as to parties important, for if a new "cause of action" is stated the statute is not tolled. See Clark & Yerion, *Amendment and Aider of Pleading* (1928) 12 MINN. L. REV. 97, 115. Many of the older cases were strict in regard to what constituted a new "cause of action." *King v. Avery*, 37 Ala. 169 (1861); *Flatley v. Memphis & C. R. R.*, 9 Heisk. 230 (Tenn. 1872). The more recent cases, however, have taken a more liberal view. *Friederichsen v. Renard*, 247 U. S. 207, 38 Sup. Ct. 450 (1918); *Birmingham Belt R. R. v. Ellenberg*, 215 Ala. 395, 111 So. 219 (1927) (compare with *King v. Avery, supra*); *Reynolds v. Mo., K. & T. Ry.*, 228 Mass. 584, 117 N. E. 913 (1917); *Kansas City W. Ry. v. McAdow*, 240 U. S. 51, 36 Sup. Ct. 252 (1916). But *cf. N. & G. Taylor Co. v. Anderson*, 48 Sup. Ct. 144 (1928). More specifically, it is generally held that changes in capacity of the party plaintiff do not constitute a new "cause of action" and the statute is tolled. *Pugmire v. Diamond C. & C.*, 26 Utah 115, 72 Pac. 385 (1903); *Wilson v. Denver & R. G. R. R.*, 68 Colo. 105, 187 Pac. 1027 (1920); *Mo., K. & T. Ry. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135 (1913); *Quaker City Cab Co. v. Fixter*, 4 F. (2d) 327 (C. C. A. 3d, 1925);

see ANN. CAS. 1916 C 401, annotation. *Contra: LaBar v. N. Y., S. & W. R. R.*, 218 Pa. 261, 67 Atl. 413 (1907); *cf. Mumma v. Phila. & R. Ry.*, 275 Pa. 277, 119 Atl. 287 (1922). There is an actual change in party plaintiff in these cases despite the physical identity. Smith, *Legal Personality* (1928) 37 YALE LAW JOURNAL 283. And the same result has been reached where the element of physical identity is lacking. *Bryan v. Inspiration Consol. Copper Co.*, 23 Ariz. 541, 205 Pac. 904 (1922), *rev'g* 20 Ariz. 485, 181 Pac. 577 (1919); *Keystone C. & C. Co. v. Fekete*, 232 Fed. 72 (C. C. A. 6th, 1916); *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, 185 S. W. 677 (1916) (compare with *Flatley v. Memphis & C. Ry., supra*). Thus, in the instant case, it would seem the motion for nonsuit should have been dismissed either by the adoption of a liberal rule as to parties or by following the majority and more modern view permitting amendment and treating it as the same cause of action.

CONSTITUTIONAL LAW—POLICE POWER—REASONABLE RELATION OF STATUTE TO THE PUBLIC WELFARE.—The plaintiff company sought an injunction against the enforcement, as unconstitutional, of a statute forbidding anyone other than a licensed pharmacist, or a partnership or corporation all of whose members or shareholders are licensed pharmacists, to own a drug store. *Held*, that such a statute, saving the rights of persons now in business to continue, was in substantial relation to the public interests and a valid exercise of the state's police power. *Louis K. Liggett Co. v. Baldridge*, 22 F. (2d) 993 (D. Pa. 1927).

Statutes which forbid or regulate the practice of otherwise lawful occupations must be called into being in the interests of the public and must be reasonably related to the public health, safety, morals, comfort, or welfare. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992 (1888); *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273 (1887); see Comment (1924) 33 YALE LAW JOURNAL 847. But regulations ostensibly for the public health have often been held unreasonable and arbitrary exercises of the police power and so unconstitutional. So a statute forbidding comfortables made of "shoddy." *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. 320 (1926). Fixing the maximum weight of loaves of bread. *Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 Sup. Ct. 412 (1924). Requiring licenses for itinerant vendors of patent medicines. *People v. Wilson*, 249 Ill. 195, 94 N. E. 141 (1911). Forbidding anyone not having a dentist's license to "own, run, or manage" a dental office. *State v. Brown*, 37 Wash. 97, 79 Pac. 635 (1905). Requiring all members of plumbing firms to be registered. *Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83, 74 N. E. 561 (1905). Conferring on registered pharmacists the exclusive right to sell patent medicines. *Noel v. State*, 187 Ill. 587, 58 N. E. 616 (1900). And forbidding anyone to sell food in a store where dry goods are sold. *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707 (1899). Although the regulation of the practice of pharmacy has been said to be "peculiarly within the province" of the police power [*State v. Kumpfert*, 115 La. 950, 40 So. 365 (1905)], and laws requiring the licensing of pharmacists and that registered pharmacists be in charge of the retail end of drugstores are undoubtedly constitutional [*State v. Heinemann*, 80 Wis. 253, 49 N. W. 818 (1891)], it appears that the instant act has too tenuous a relation to the public welfare to be sustained. The requirement of a licensed pharmacist in charge of the store (Pa. Stat. 1920, § 9315) would seem adequate protection to the public. One suspects the language of Peckham, J., in *People v. Gillson*, 109 N. Y. 389, at 399, to be appropriate: "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community

against the fair, full and free competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature. . . ."

COURTS—FEDERAL JURISDICTION—ACTION FOR DAMAGES FOR UNLAWFUL SEARCH NOT MATTER IN CONTROVERSY ARISING UNDER CONSTITUTION OR LAWS OF THE UNITED STATES.—The plaintiff brought an action for damages for an unlawful search made by defendants under color of office as federal prohibition agents in violation of Constitutional Amendment IV and the National Prohibition Act. *Held*, that the matter in controversy did not arise under the Constitution or laws of the United States so as to give the district court jurisdiction. *Taylor v. De Hart*, 22 F. (2d) 206 (W. D. Mo. 1927).

The district courts have original jurisdiction where the matter in controversy arises under the Constitution or laws of the United States. U. S. Comp. Stat. (1916) § 991, 28 U. S. C. A. (1927) § 41. The matter in controversy is said to arise under the Constitution or laws of the United States when the correct solution of the case depends on a construction of either. See *Smith v. Kansas Title & Trust Co.*, 255 U. S. 180, 199, 41 Sup. Ct. 243, 245 (1920). The federal courts have not deemed it feasible to extend their limited jurisdiction to cases where the matter of defense may depend on the interpretation of the Constitution or laws of the United States. *Kirklin v. Ellerbe*, 278 Fed. 168 (C. C. A. 5th, 1922). Or where the plaintiff sets up a well defined and acknowledged constitutional and statutory right as in the instant case. The instant decision thus further limits the actions available for unlawful searches and seizures. Undoubtedly an officer who makes an unlawful search has committed a trespass. *Adams v. Allen*, 99 Me. 249, 59 Atl. 62 (1904). See also, 42 Stat. 223, U. S. Comp. Stat. (Supp. 1923) § 10184a. Yet there have been few suits, even in state courts, against trespassing officers. *McClannan v. Chaplain*, 136 Va. 1, 116 S. E. 495 (1923); *Westover v. Calder*, 64 Mont. 264, 209 Pac. 306 (1922); *Banfell v. Byrd*, 122 Miss. 288, 84 So. 227 (1920); see Comment (1927) 36 YALE LAW JOURNAL 988, 995. The injunction has been used in rare cases to restrain a wrongful search and seizure. *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530 (1895); *Owens v. Way*, 141 Ga. 796, 82 S. E. 132 (1914); *McNally v. Jackson*, 7 F. (2d) 373 (E. D. La. 1925) (denied on jurisdictional grounds). Some courts have allowed damages for mental suffering caused by an unlawful search and seizure. *United States Fidelity & Guaranty Co. v. State*, 121 Miss. 369, 83 So. 610 (1920); (1920) 6 VA. L. REV. 599; *Shall v. Minn., St. P. & S. S. M. Ry.*, 156 Wis. 195, 145 N. W. 649 (1914). In all these cases the courts have given rather meagre damages in order to protect the officers. See *Nally v. Richmond*, 105 Or. 462, 466, 209 Pac. 871, 872 (1922). Where the seizure was illegal the plaintiff may successfully sue to recover the value of the property taken. *Spry v. Freeman*, 85 Okla. 119, 204 Pac. 1104 (1922); *Petition of Barber*, 281 Fed. 550 (E. D. Mich. 1922) (federal court has jurisdiction because national prohibition act, title 2, § 25, provides that such property "shall be subject to such disposition as the court may make thereof"). The instant case seems to be the only one where a civil suit for damages against a trespassing officer has been brought in the federal courts. The federal rule against illegally obtained evidence provides only uncertain protection. *Cf.* Comment (1927) 36 YALE LAW JOURNAL 988. And federal district attorneys are disinclined to prosecute such trespassers criminally. *Ibid.* Furthermore, as pointed out above, state courts seldom afford civil relief. It would appear that under the instant decision the injured party gets but slight comfort from his "constitutional guaranties."

DAMAGES—LIQUIDATED DAMAGES RECOVERED NOTWITHSTANDING NO LOSS CAUSED BY BREACH.—A contract for the sale of land by the plaintiff to the defendant provided for the vendor's recovery of a sum deposited as liquidated damages in case of the purchaser's default. Upon default by the defendant, the plaintiff subsequently sold the land at a higher price to another purchaser. In an action to recover the sum deposited, judgment was rendered for the plaintiff. *Held,* on appeal, that the judgment be affirmed notwithstanding that the plaintiff realized a substantial profit by the resale. *Nelson v. Richardson,* 299 S. W. 304 (Tex. 1927).

The power to contract has generally been held to include the power to provide for consequences of breach when at the time of contracting the amount of damages are uncertain and not readily capable of computation. *Robbins v. Plant,* 297 S. W. 1027 (Ark. 1927); *Sun Printing Ass'n v. Moore,* 183 U. S. 642, 22 Sup. Ct. 240 (1902). In a few states the recovery of liquidated damages has been regulated by statute. Cal. Civ. Code (Deering, 1923) §§ 1670, 1671; Ga. Code (1926) §§ 4390, 4391; *Weinrich Estate v. Johnston Co.,* 28 Cal. App. 144, 151 Pac. 667 (1915) (plaintiff must prove the agreement is within the statute). The fact that damages become easy to ascertain at the time of breach will not invalidate such provisions. *Hanlon Drydock Co. v. McNear,* 70 Cal. App. 204, 232 Pac. 1002 (1924); *Wise v. United States,* 249 U. S. 361, 39 Sup. Ct. 303 (1919). And the failure to allege or prove actual damages in most cases does not preclude recovery. *Robbins v. Plant, supra; Pace v. Zellmer,* 194 Iowa 516, 186 N. W. 420 (1922); *Schwartz v. Lee,* 287 S. W. 519 (Tex. Civ. App. 1926). *Contra: Ward v. Haren,* 167 S. W. 1064 (St. Louis Ct. of App. 1914). A few cases which hold otherwise regard the absence of actual loss as evidence that the original agreement was a penalty. *Disosway v. Edwards,* 134 N. C. 254, 46 S. E. 501 (1904). When damages are stipulated, the parties may not recover a greater sum, *Posner v. Rosenberg,* 149 App. Div. 272, 133 N. Y. Supp. 704 (2d Dept. 1912); *Stone Co. v. United States,* 234 U. S. 270, 34 Sup. Ct. 865 (1914). The agreement to pay liquidated damages may well have been a major part of the consideration and as such should be enforced under any theory which preserves the value of the bargain to a contracting party. *Blackwood v. Liebke,* 87 Ark. 545, 113 S. W. 210 (1908).

EVIDENCE—PRIVILEGED COMMUNICATIONS—TESTIMONY BY THIRD PERSONS.—In the trial of a wife for the murder of her husband, the prosecution offered in evidence, and the court admitted, letters obtained from third parties which had been written by the wife to her husband and to her attorney. The letters to the husband were found in the husband's safe-deposit box by his administrator. *Held,* on appeal (two judges *dissenting*) that this was error since the evidence itself, by virtue of a statute excluding confidential communications between spouses, and attorneys and clients, was inadmissible regardless of the channel through which it reached the court. *McKie v. State,* 140 S. E. 625 (Ga. 1927).

Where a third person overhears communications, otherwise privileged, between husband and wife, attorney and client, and physician and patient, such person may testify thereto. *Knight v. State,* 114 Ga. 48, 39 S. E. 928 (1901) (husband-wife); *State v. Falsetta,* 43 Wash. 159, 86 Pac. 168 (1906) (attorney-client); *Springer v. Byrom,* 137 Ind. 15, 36 N. E. 361 (1893) (physician-patient); 5 Wigmore, *Evidence* (2d ed. 1923) § 2326; *cf. Mutual Life Ins. Co. v. Owen,* 111 Ark. 554, 164 S. W. 720 (1914) (advisory physician procured by attending physician could not so testify); *Raymond v. Burlington Ry.,* 65 Iowa 152, 21 N. W. 495 (1884) (nor a partner overhearing communication). The reason is that the privilege

excludes relevant evidence and should be interpreted to prevent only the parties from disclosing the communications on the witness stand. *Cf. Hay v. Morris*, 13 Gray 519 (Mass. 1859); 5 Wigmore, *op. cit. supra* §§ 2326, 2332. Similarly as to written communications between spouses when produced by a third party. *Commonwealth v. Bishop*, 285 Pa. 49, 131 Atl. 657 (1926) (unsealed letter, handed to officer by one spouse for mailing to the other, admitted); *McNeil v. State*, 117 Ark. 8, 173 S. W. 826 (1915); 33 L. R. A. (N. S.) 477 (1911) annotation; *cf.* 5 Wigmore, *op. cit. supra* § 2325 (urging that the confidential attorney-client documents surreptitiously procured by a third party be admissible also). And it is usually immaterial how the communication was obtained. *State v. Buffinton*, 20 Kan. 599 (1878); *State v. Wallace*, 162 N. C. 622, 78 S. E. 1 (1913); *State v. Mathers*, 66 Vt. 101, 23 Atl. 590 (1892); *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951 (1894). Some courts, treating the communications as "inherently privileged," refuse to admit them regardless of the manner in which they were procured. *Mercer v. State*, 40 Fla. 216, 24 So. 154 (1898); *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. 219 (1893); *Selden v. State*, 74 Wis. 271, 42 N. W. 218 (1889). Others refuse to admit them if they were procured by the connivance of one of the spouses. *Mahner v. Linck*, 70 Mo. App. 380 (1897); *Dalton v. People*, 68 Colo. 44, 189 Pac. 37 (1920); *Harris v. State*, 72 Tex. Cr. App. 117, 161 S. W. 125 (1913); *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916). It has been held that the message is still privileged if procured from the spouse by force. *Ward v. State*, 70 Ark. 204, 66 S. W. 926 (1902). Or by artifice of officers. *People v. Dunnigan*, 163 Mich. 349, 128 N. W. 180 (1910). In England, while the original document continues to be privileged, secondary evidence of its contents may be offered. *Calcraft v. Guest* [1898] 1 Q. B. 759. It is believed that the desirability of admitting as much relevant evidence as possible outweighs the largely speculative disadvantage that one party to a justly privileged relation may evade its restrictions in order to embarrass the other.

EXECUTORS AND ADMINISTRATORS—CONSOLIDATED NATIONAL BANK DOES NOT ACQUIRE TRUSTEE-SHIP OF CONSOLIDATING TRUST CO.—The *A* Trust Company, organized under the laws of Massachusetts, was appointed by the probate court as trustee under two wills and as conservator of certain property. Subsequently the Trust Company was converted into a national bank pursuant to U. S. Rev. Stat. (1913) § 5154, and thereafter consolidated with another bank to form the Commonwealth-Atlantic National Bank. On this latter bank's petition for the allowance of accounts, the probate court reserved the case for the consideration of the Supreme Judicial Court. *Held*, that the petitioner could account only *de son tort* since it was not the "fiduciary" appointed, but one organized and operating under a different jurisdiction. Moreover the *A* Trust Company had no such "property interest" in its appointment as would pass to the petitioner. *Petition of Commonwealth-Atlantic Nat. Bank*, 158 N. E. 780 (Mass. 1927).

Where two trust companies, both incorporated in state *X*, consolidate under the laws of state *X*, apparently prior to the testator's death, the resulting corporation is entitled to appointment as executor under a will naming one of the consolidating companies. *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912); *Title & Trust Co. v. Zinser*, 264 Ill. 31, 105 N. E. 718 (1914). These decisions are not based on the ground that the identity of the original companies was preserved in the consolidated company, but that the "property interest" in the appointment as executor was such as to pass to the new company by virtue of the transaction. *Cf. Power Co. v. First Nat. Bank*, 250 Mass. 353, 145 N. E. 433 (1924) (in

terest of trustee in trust agreement passes to consolidated company as against trustor who seeks to have property released from trust). And the testator is presumed to have foreseen the possibility of such lawful activity by the appointee. *In re Bergdorf's Will, supra.* The Massachusetts court does not seem opposed to regarding the corporate identity of a consolidating company as preserved for some purposes. *Proprietors v. B. & M. R. R.*, 245 Mass. 52, 139 N. E. 839 (1923) (consolidated company held entitled to possession under lease to consolidating company "while it should remain sole owner of said railroad"); *cf. McElwaine v. Primavera*, 180 App. Div. 288, 167 N. Y. Supp. 815 (1st Dept. 1917) (identity of corporation, obligee on surety contract, not so changed by consolidation as to discharge surety). But it dissents from the result in the *Bergdorf* case if the consolidating bank has also been converted into a national bank. *Petition of Nat. Bank*, 249 Mass. 440, 144 N. E. 443 (1924); (1924) 73 U. PA. L. REV. 96. The entity of a state bank has, however, been regarded for some purposes as preserved in the national bank into which it has been converted. *Nat. Bank v. Claggett*, 141 U. S. 520 (1891) (national bank responsible for state bank's obligations); *City Nat. Bank v. Phelps*, 97 N. Y. 44 (1884) (identity of state bank, obligee on surety contract, not so changed by conversion into national bank as to discharge surety); *cf. Petition of Nat. Bank, supra* at 446, 144 N. E. at 446. Thus there seems to be no legalistic necessity for the present holding. Moreover, a material change in corporate management or state laws would defeat the intent of the one appointing the fiduciary as much as would a conversion from a state to a national bank. To allow the bank's co-appointees, if any, to continue as executors without its cooperation would often be even more subversive of that intent. The decision in the instant case seems to result in a hardship to the petitioner which it is difficult to justify.

FRAUDULENT CONVEYANCES—BULK SALES ACT—TYPES OF BUSINESS SUBJECT THERETO.—The plaintiff brought trover against a sheriff for attaching lumber sold to the former by *X*. The defendant, acting for a creditor of *X*, had attached the lumber as the property of *X* claiming the sale to be void under Cal. Stat. 1923, c. 91 (providing that the sale "of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practise and method of business of the vendor" will be void as against existing creditors of the vendor, unless prior notice be given). The plaintiff recovered judgment. *Held*, on appeal, that the judgment be affirmed on the ground that "stock in trade" does not include articles manufactured by the vendor but only goods or chattels which a merchant holds for sale. *Shasta Lumber Co. v. McCoy*, 259 Pac. 965 (Cal. 1927).

Similar statutes are generally applied only to "bulk sales" of such "stock in trade" as a merchant usually keeps for sale. *American Trust & Savings Bank v. Durham*, 298 Fed. 304 (C. C. A. 7th, 1924) (business and stock of used car dealer); *Michigan Cent. Ry. v. Morgan*, 227 Mich. 491, 198 N. W. 967 (1924) (coal and accounts receivable by retail coal company). To hold differently, it has been said, would make the provision "otherwise than in the ordinary course of trade" meaningless. See *Meier Electric & Mach. Co. v. Dixon*, 81 Ind. App. 400, 403, 143 N. E. 363, 364 (1924). Accordingly, as in the instant case, a "bulk sale" in many types of business has been held not subject to the statute. *Nichols North Buse Co. v. Green County Canneries*, 205 N. W. 804 (Wis. 1925) (season's pack of pea cannery); *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S. E. 465 (1919) (lunch wagon); *Rothenheber v. Pulitzer*, 262 S. W. 48 (Mo. 1924) (auto repair shop); *McPartin v. Clarkson*, 240 Mich. 390, 215

N. W. 338 (1927) (pool room); *Swanson v. Devine*, 49 Utah 1, 160 Pac. 872 (1916) (shoe repairing business); *Bank v. Hannaman*, 115 Kan. 370, 223 Pac. 478 (1924) (restaurant); *Meier Electric & Mach. Co. v. Dixon, supra* (hotel and sanitarium with fixtures); *In re Traveling Goods Co.*, 297 Fed. 823 (C. C. A. 2d, 1924) (manufacturing gear); *Atlas Rock Co. v. Miami Beach*, 89 Fla. 340, 103 So. 615 (1925) (tow boat, barge, crusher and rock used in construction business); *Ramey-Milburn Co. v. Sevick*, 159 Ark. 358, 252 S. W. 20 (1923) (saw mill plants); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257 (1909) (all lumber on hand by saw mill operator). And in conjunction with such types of business merely incidental sales will not convert them into merchandising enterprises subject to the statute. *D. C. Goff Co. v. First State Bank*, 298 S. W. 884 (Ark. 1927) (tobacco sold in restaurant); *Swanson v. DeVine, supra* (shoe laces and polish sold in shoe repair shop); *Ramey-Milburn Co. v. Sevick, supra* (output of lumber mill). Yet a "manufacturer" has been held a "merchant" also for this purpose. *In re Traveling Goods Co., supra* (made traveling goods; kept stock for sale); *Prins v. American Trust Co.*, 275 S. W. 914 (Ark. 1925) (plantation conducting company store); *Root Refineries v. Gay Oil Co.*, 284 S. W. 26 (Ark. 1926) (refinery; disposed of products as a "merchant.") And even though a statute contained the additional provision "or equipment pertaining to vendor's business," it has been confined to equipment pertaining to vendor's business of wholesale or retail merchandising. *Bolanovich v. Peter Hamptman Tobacco Co.*, 261 S. W. 723 (Mo. 1924) (not applied to restaurant equipment); *Balter v. Crum*, 199 Mo. App. 380, 203 S. W. 506 (1918) (nor to horses and wagons of liveryman). It has been further held that a substantial amount must be involved in order to constitute a "bulk sale." *Krueger v. Hammond*, 123 Kan. 319, 255 Pac. 30 (1927) (eight tires and four tubes, entire stock, not enough); *Fudge v. Brown*, 126 Wash. 475, 218 Pac. 251 (1923) (likewise goods estimated from 7 to 25%); *Armfield Co. v. Saleeby*, 178 N. C. 298, 100 S. E. 611 (1919) (10% of stock sold in two sales). But a sale of half has been held a "bulk sale" within the statute. *Mahoney-Jones Co. v. Sams Bros.*, 128 Tenn. 207, 159 S. W. 1094 (1913). And likewise when a chain grocery corporation sells out a branch store or its central stock. *Keller v. Fowler Bros.*, 148 Tenn. 571, 256 S. W. 879 (1923).

MORTGAGES—ACCELERATION CLAUSES—EQUITABLE RELIEF FROM FORECLOSURE.—The plaintiff filed a bill to foreclose a mortgage made by the defendant to the plaintiff's assignor. The mortgage provided that the mortgagee should have the option to foreclose for the principal sum upon the mortgagor's failure to pay any interest installment within 30 days of its due date. Shortly after its execution, the mortgagee agreed to accept interest payments semi-annually instead of quarterly as provided in the mortgage. He accepted two such semi-annual payments, but refused a tender of the third semi-annual payment, declaring that he elected to exercise his option to accelerate maturity of the mortgage for default in payment of interest quarter-annually. *Held*, that the foreclosure proceedings be stayed upon defendant's payment of all interest due. *Lettieri v. Mistretta*, 139 Atl. 514 (N. J. Eq. 1927).

Such clauses giving the mortgagee the power to foreclose for the principal sum upon failure of the mortgagor to comply with the conditions of the mortgage are universally enforced. *Derechinsky v. Epstein*, 98 N. J. Eq. 79, 130 Atl. 720 (1925); *Weinstein v. Sinel*, 133 App. Div. 441, 117 N. Y. Supp. 346 (2d Dept. 1909). And the power to exercise them inures to the assignee of the mortgagee, even though it is not in terms granted to the assignee. *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58,

94 Pac. 900 (1908). A default in payment does not of itself mature the principal sum. *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002 (1909); *Clark v. Paddock*, 24 Idaho 142, 132 Pac. 795 (1913). But it creates a power in the mortgagee to cause the whole debt to fall due by giving notice of his election to accelerate or by instituting foreclosure proceedings. *Union Central Life Ins. Co. v. Schultz*, 261 Pac. 235 (Idaho, 1927). But the suit must be properly commenced. *Beck v. Williams*, 116 Misc. 80, 190 N. Y. Supp. 256 (Sup. Ct. 1921) (complaint improperly verified). The power may be extinguished by the mortgagor's payment of interest before it is exercised. *Rathbone v. Forsyth*, 171 App. Div. 26, 156 N. Y. Supp. 888 (3d Dept. 1916). After suit has been started, however, an acceptance of the amount of interest due does not affect the mortgagee's power to continue foreclosure for the principal sum where the mortgage contains an acceleration clause of the type in the instant case. *Grootemaat v. Bertrand*, 213 N. W. 294 (Wis. 1927); *Collins v. Nagel*, 200 Iowa 562, 203 N. W. 702 (1925); *Pizer v. Herzig*, 120 App. Div. 102, 105 N. Y. Supp. 38 (1st Dept. 1907). Nor does a failure to foreclose on the first default in payment operate as a waiver of the option to foreclose because of later defaults. *Dunn v. Barry*, 35 Cal. App. 325, 169 Pac. 910 (1917); *Bower v. Stein*, 177 Fed. 673 (C. C. A. 9th, 1910). Recovery on such foreclosure is limited to the amount of the principal plus earned interest, no interest being allowed for the unexpired term. *Holman v. Hollis*, 114 So. 254 (Fla. 1927). Courts of equity will not grant a foreclosure decree when the mortgagee is himself at fault or has misled the mortgagor. *Firestone v. Miroth Const. Co.*, 215 App. Div. 564, 214 N. Y. Supp. 239 (1st Dept. 1926); *DeGroot v. McCotter*, 19 N. J. Eq. 531 (1868). The marked trend of recent cases is to afford protection to the mortgagor from mere technical defaults which are not wilful. *Cf. Besas v. Slobodoff*, 129 Misc. 205, 221 N. Y. Supp. 588 (Sup. Ct. 1927) (mistake in date); *Novo Holding Corp. v. Schechter*, 218 App. Div. 479, 218 N. Y. Supp. 623 (1st Dept. 1926) (payment lost in mails); *Farmer's Sav. Bank v. Roe*, 195 Iowa 137, 191 N. W. 810 (1923) (mortgagee delayed presentation of interest coupons); *Tibbetts v. Bush & Lane Piano Co.*, 111 Wash. 165, 189 Pac. 996 (1920) (mortgagee refused to make known amount due); see Note (1922) 22 COL. L. REV. 266. The instant decision bears out the view that an acceleration clause imposes a penalty which will not be enforced where the mortgagor acts in good faith.

PLEADING—AMENDMENT—DEATH ACTION.—In an action by an administrator for the death of his intestate, the plaintiff neglected to allege the death damage statute of the *locus delicti*. At trial, the court refused to allow proof of, or an amendment setting forth, the proper act. The plaintiff was non-suited and exception taken. *Held*, on appeal, that the exceptions be sustained on the ground that the amendment was proper since it did not change the "cause of action" and, being permissible, related back to the commencement of the action so as to avoid the foreign statute of limitations. *Frost v. Cone Taxi and Livery Co.*, 139 Atl. 227 (Me. 1927).

This result, especially since it was reached in a common-law jurisdiction, indicates the modern attitude toward amendments. The factual transaction generally rather than the legal theory of the complaint, determines the limits of change. *Cf.* Clark & Yerion, *Amendment and Aider of Pleadings* (1928) 12 MINN. L. REV. 97; (1923) 32 YALE LAW JOURNAL 506. Liberality is also shown in the court's view of the running of the statutory bar. This, too, is in accord with most of the holdings in code jurisdictions. *L. & N. R. R. v. Greene*, 113 Ohio St. 546, 149 N. E. 876 (1925); *Nashville Ry. v. Anderson*, 134 Tenn. 666, 185 S. W. 677 (1915); *Louisville & N. R. R. v.*

Pointer's Adm'x, 113 Ky. 952, 69 S. W. 1108 (1902) (relation back to commencement of action); *cf. Ala. Coal Co. v. Heald*, 154 Ala. 580, 45 So. 686 (1908) (in common law state); *Phila. R. R. v. Gatta*, 4 Boyce 38, 85 Atl. 721 (Del. 1913) (bar stopped when action was brought, not when declaration was filed). The instant case, however, is not entirely divorced from the formalistic attitude of the common law, as is indicated in a dictum (p. 229) to the effect that an amendment from a common law action to one under a statute would not be allowed, being tantamount to introducing a new "cause of action." But the court distinguished the original declaration, calling it a defective *statutory*, rather than a *common law* complaint. Although this view has been adopted before, it is merely an evasion of the issue. As to the presumption of foreign law, the commentators agree that where the origin of the forums is the same, the common law is presumed to be in effect. Kales, *Presumption of Foreign Law* (1906) 19 HARV. L. REV. 401, 402-3; Von Moschzisker, *Presumptions as to Foreign Law* (1927) 61 AMER. L. REV. 844. But see *Cunningham v. Patterson*, 89 Kan. 684, 685-6, 132 Pac. 198 (1913); *Lassiter v. Norfolk R. R.*, 136 N. C. 89, 91, 48 S. E. 642, 643 (1904) (with dissent on this dictum). Under this view it would seem that the declaration should be regarded as founded on the common law in the absence of an express allegation of the foreign death statute. So regarded, adherence to the common law theory would deny amendment as introducing a new "cause of action," it being a change from "law to law." *Carpenter v. Ry.*, 93 Vt. 357, 107 Atl. 569 (1919); *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105 (1907); *Wingert v. Carpenter*, 101 Mich. 395, 59 N. W. 662 (1894) (statute to statute). It would follow that the statute of limitations would run until the actual time of making the amendment. *Wingert v. Carpenter, supra.* Although the instant result is beyond reproach the court may have gone further than it would care to admit.

PROCESS—SERVICE—SUBSTITUTED SERVICE NOT ALLOWED IN FEDERAL ACTION TO ENJOIN LIQUOR NUISANCE.—In an action brought by the Federal District Attorney to enjoin a liquor nuisance, the marshal serving summons was unable to find either the defendant personally or his usual place of abode. Pursuant to a special order, a summons was left at the defendant's place of business and also mailed to him at that address, following the New York State statute. The defendant appeared specially by attorney to move to dismiss the action for failure to serve process. *Held*, that the procedure in federal equity courts is governed by the Federal Equity Rules alone, that the mode of service used was not authorized, and that the action must be dismissed. *United States v. Waverly Club*, 22 F. (2d) 422 (S. D. N. Y. 1927).

Most states, including New York, provide, where a defendant has concealed himself to avoid service of process, that, upon affidavit to that effect, service may be made by publication, or by other substituted service. N. Y. Civ. Prac. Act §§ 231-2; Cal. C. C. P. (Deering, 1923) § 412; Ill. Rev. Stat. (Cahill, 1927) c. 22, § 12. Substituted service may be made in England under these circumstances, in such a manner as to bring the matter to the defendant's attention, *e. g.*, to his attorney, etc., or by publication. *Porter v. Freudenberg* [1915] 1 K. B. 857; (1923) 87 JUST. P. 320, 340. However, federal equity practice is controlled by the Federal Equity Rules, exclusively. U. S. Comp. Stat. (1916) § 1536. And the procedure of the states has no application. *Fee-Crayton Co. v. Richardson Co.*, 18 F. (2d) 617 (W. D. La., 1927); Simkin, *Federal Practice* (Rev. ed. 1923) 582. The United States, in an action to abate a liquor nuisance, must act in accordance with these rules. *Kandle v. United States*, 4 F. (2d) 183 (C. C. A. 3d, 1925). Under Rule 13 only personal service, or service at the usual

place of abode of the defendant, are authorized, and these provisions are strictly construed. *Trask v. Karrick*, 10 F. (2d) 995 (D. C. App., 1926); (1927) 36 YALE LAW JOURNAL 1025. An exception is made in the federal courts in the case of an ancillary bill, in which case process may be served upon the attorney of a party already before the court. *Franz v. Franz*, 15 F. (2d) 797 (C. C. A. 8th, 1926); Hopkins, *Federal Equity Rules* (3d ed., 1922) 77. The holding in the instant court seems to have been necessary in view of the rules governing its action. If this is found to provide too easy a loophole for violators of the Volstead Act, it would seem to be an opportunity for the United States Supreme Court to exercise its rule-making power, and bring federal equity practice in line with the practice in the states.

PUBLIC UTILITIES—UNIFORM SYSTEM OF ACCOUNTING.—The Board of Public Utilities Commissioners under a statute giving it power to require every public utility corporation to keep its accounts so as to afford "an intelligent understanding of the conduct of its business" and to adopt a uniform system of accounting [N. J. Laws 1911, c. 195, § 17d.], ordered the plaintiff company to rewrite its fixed capital charge on its books, substituting the valuation determined by the board for rate-making purposes for the company's appraisal, although there was no attempt to use the valuation for any improper purpose. *Held*, on writ of certiorari to the Supreme Court of New Jersey, that the order be set aside, since the power to prescribe a uniform system of accounts did not include the power to determine what measure of value should be used for the fixed capital. *Passaic Consol. Water Co. v. Board of P. U. Comm'rs*, 139 Atl. 324 (N. J. 1927).

Power to prescribe a uniform method of accounting may be given to a commission. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436 (1912). The Interstate Commerce Commission and most state public utility commissions have this power. Scovill, *The Uniform Accounting Systems Advocated by Utilities Commissioners* (1925) 1 J. OF L. AND P. U. EC. 276. The I. C. C.'s authority allows determination of what shall be included in the fixed capital account. *Kansas City So. Ry. v. I. C. C.*, 231 U. S. 423, 34 Sup. Ct. 125 (1913) (order that abandoned property be deducted from the fixed capital account). The commissions have acted on the assumption that they have also authority to order the use of a common measure of value. *St. Paul & Puget Sound Acc'ts*, 29 I. C. C. 508 (1914) (entries of expenditures and equipment ordered to represent actual investment); *Re Murfreesboro L. & P. Co.*, P. U. R. 1926C 419 (Tenn. R. & P. U. Comm.) (difference between temporary cost entry and later rate-making valuation, if less, must be subtracted from fixed capital account and amortized); *Re Butler Telephone Co.*, P. U. R. 1927C 800 (Ind. P. S. Comm.) (actual cost, not appraisal, must be used for fixed capital account); *Re Wisconsin Fuel & Light Co.*, P. U. R. 1927D 748 (Wis. R. R. Comm.). The uniform accounting system advocated by the commissioners recommends the use of actual cost at the time of acquisition for all charges to fixed capital accounts. Scovill, *op. cit. supra* 287. The decision in the instant case upsets the accepted practice of the commissions. An appraisal value may, as pointed out by the court, be useful for some purposes. The problem, however, seems to be whether allowing a choice of several methods of valuation would not nullify the advantages of a uniform system of accounting, especially for the regulation of rates and the issuance of securities.

RULE AGAINST PERPETUITIES—SEPARABILITY OF LIMITATIONS.—The testator devised his residuary estate to trustees to pay, out of an annual in-

come of over $10,000, fifty dollars a month to his foster daughter for life, and the balance to his wife for life and then to his incompetent son for life, with a gift over of the remainder "when the above payments shall cease by reason of the deaths of the beneficiaries mentioned." The surrogate held the will void because the trust suspended the power of alienation for more than two lives in being. *Held*, on appeal (one judge *concurring* in part and one *dissenting*), that the judgment be reversed, since by construing the will to read "as the above payments shall severally cease," the principal gift, for the lives of the wife and son, could be severed and saved. *Matter of Gallien*, 247 N. Y. 195 (1928).

Where an estate is limited on several contingencies, one of which is too remote, the courts have separated the contingencies where the testator has done so, and saved the valid limitation. *Matter of Trevor*, 239 N. Y. 6, 147 N. E. 203 (1924); Note (1925) 38 HARV. L. REV. 379. Similarly construing in favor of validity, they have severed the corpus of a trust fund for more than two life beneficiaries where the testator has indicated the shares which each is to take. *Matter of Horner*, 237 N. Y. 489, 143 N. E. 655 (1924). And have held gifts over to vest pro tanto on the death of each life tenant. *Matter of United States Trust Co.*, 86 Misc. 603, 148 N. Y. Supp. 762 (Surr. 1914), *aff'd* 216 N. Y. 639, 110 N. E. 1051 (1915) (gift over "after death respectively of all"); *Matter of McGeehan*, 115 Misc. 737, 187 N. Y. Supp. 823 (Surr. 1921) (gift over "after their deaths"). But a different result was reached in *Donaldson v. American Tract Society*, 1 Thomp. & C., Addenda 15 (N. Y. Sup. Ct. 1873) (gift over "after payment in full of all annuities"); *Hooker v. Hooker*, 166 N. Y. 156, 59 N. E. 769 (1901) (gift over "upon death of daughters . . . and after provisions for wife [annuity and life estate] carried out"). So where a trust fund is established for the lives of *A* and *B*, but with an annuity to *C* charged thereon, it is held that the trust terminates on the death of *A* and *B* and that thereafter the annuity to *C* is merely a charge on the estate. *Cole v. Lee*, 143 Mich. 267, 106 N. W. 855 (1906); *People's Trust Co. v. Flynn*, 188 N. Y. 385, 80 N. E. 1098 (1907). Such construction in the instant case is rendered difficult by the clause quoted, but seems the best way to sustain the principal gift. The majority construction, severing the trust into two parts of unequal duration, and thereby invalidating one, goes a long way toward rewriting the will.

TAXATION—BONDS AND MORTGAGES AS TANGIBLE PROPERTY.—Bonds and mortgages secured by New York real estate were owned by the decedent who had been domiciled in Connecticut. The instruments, however, had always been kept in New York and the decedent had never been taxed on them by Connecticut. The defendant, Connecticut Tax Commissioner, assessed a tax on the instruments. The lower court held that Connecticut could assess this tax. *Held*, on appeal, that the judgment be affirmed. *Lockwood v. Blodgett*, 138 Atl. 520 (Conn. 1927).

The doctrine *mobilia sequuntur personam* has been discarded for the purpose of taxing tangibles, which are now subject to a property tax only at the situs. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36 (1905); 2 Cooley, *Taxation* (4th ed. 1924) § 451. It still applies, however, to intangibles, including stocks, bonds and mortgages, which are taxable at the domicile of the owner. *Buck v. Beach*, 206 U. S. 392, 27 Sup. Ct. 712 (1907); *Michelin Tire Co. v. Hurlburt*, 254 Pac. 196 (Or. 1927); 2 Cooley, *op. cit. supra* § 455. This is true even if a mortgage, as in the instant case, is secured by land situated in another state. *Kirtland v. Hotchkiss*, 42 Conn. 426 (1875), *aff'd* 100 U. S. 491 (1879); 2 Cooley, *op. cit. supra*

§ 458. The courts so holding assume that the debt is the "property" of the creditor and conclude, therefore, that the situs of the debt is at his domicile. *State Tax on Foreign-Held Bonds*, 15 Wall. 300 (U. S. 1872); Maxey, *Situs of Personal Property For Taxation* (1919) 3 MINN. L. REV. 217. But this view has been criticized. Carpenter, *Jurisdiction Over Debts For the Purpose of Administration* (1918) 31 HARV. L. REV. 905, 918. Especially when the debt is evidenced by an instrument such as a bond or mortgage. *Guarantee Life Ins. Co. v. Austin*, 165 S. W. 53 (Tex. Civ. App. 1914); Beale, *The Progress of the Law* (1925) 38 HARV. L. REV. 281, 287. Also, the rule seems to be different in the case of government bonds and other public securities, which are considered "tangibles" for the purpose of taxation. *Appeal of Silberman*, 105 Conn. 192, 134 Atl. 778 (1926); see *New Orleans v. Stempel*, 175 U. S. 309, 320, 20 Sup. Ct. 110, 115 (1899); Comment (1927) 36 YALE LAW JOURNAL 694. This particular problem has not, as yet, been decided by the Supreme Court, but it has been suggested that there is little reason why they should have "property" attributes different from private bonds and other debt-evidencing instruments. (1927) 40 HARV. L. REV. 651. For the purpose of collecting property taxes, it is of little avail to hold such debt-evidencing instruments "tangible," and therefore taxable only where located, because they are usually hidden inaccessibly. See Lorenzen, *Extraterritorial Succession Taxes* (1927) 1 CONN. BAR J. 154, 168; Otis, *What Is Tangible Property?* (1927) 1 CONN. BAR J. 146. The rule of the instant case affords at least a method of assessing full taxes in arrears on the death of the owner. This would not be true if they were considered "tangibles," since a removal from one state to another would make taxes collectable only in the state where found for the period of location there. The instant problem has not been presented before the Supreme Court in recent years, and its determination by this tribunal may mean as great an upset in the law of property taxation as was caused in succession tax law by the *Frick* case. *Frick v. Pennsylvania*, 268 U. S. 473, 45 Sup. Ct. 603 (1925); see Comment (1926) 35 YALE LAW JOURNAL 357.

TENDER—APPROPRIATENESS OF MEDIUM OTHER THAN LEGAL TENDER.—Pursuant to a contract for the sale of a pickle factory, the plaintiff tendered a certificate of deposit of a nearby bank of undoubted solvency as payment for one of the installments due. The defendant had delayed meeting the plaintiff on the day of payment until after business hours and then in an endeavor to avoid the contract, refused the tender. The plaintiff sued for breach of the contract. *Held*, on certiorari, that the evidence of tender was sufficient to go to the jury on the question of plaintiff's compliance with the contract. *Simmons v. Swan*, 48 Sup. Ct. 52 (U. S. 1927).

Neither an ordinary check, a certified check, nor a certificate of deposit is legal tender, *i.e.*, no disabilities are imposed on the creditor because of his refusal to accept such a mode of payment. *Cf. Vick v. Howard*, 136 Va. 101, 116 S. E. 465 (1923), 31 A. L. R. 246 (1924) annotation. Nor are they the equivalent of "money." See *Hobbs v. Ray*, 96 S. W. 589, 590 (Ky. 1906) (tender of certified check). And it is said that tender of such medium will not be validated by business custom. *Stein v. Shapiro*, 145 Minn. 60, 176 N. W. 54 (1920) (draft); 8 A. L. R. 1268 (1920) annotation. Early decisions allowed unqualified refusal of objectionable tender on any motive. *Decamp v. Feay*, 5 S. & R. 323 (Pa. 1819). But if no objections are made to these forms of payment at the time of tender, they are effectual. *Murray v. Savings Bank*, 197 Iowa 318, 197 N. W. 69 (1924) (check); *Minsky v. Zieve*, 255 Mass. 542, 152 N. E. 41 (1926) (certified check); 51 A. L. R. 391 (1927) annotation; see *Cassville Co. v. Aetna Ins.*

Co., 105 Mo. App. 146, 154, 79 S. W. 720, 722 (1904) (actually tendered certificate of deposit). The burden of proof is on the tenderor to show facts which obviate legal tender. *Roanoke R. R. & Lumber Co. v. Privette*, 178 N. C. 37, 100 S. E. 79 (1919). A showing that the refusal of tender proceeds from grounds other than those of the medium of payment is sufficient. *Murphy v. Miller Corp.*, 229 Mich. 162, 200 N. W. 974 (1924). Or that the objection to the form of payment is not specific as to that point. *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118 (1892) (certificate of deposit). But *cf. Hall v. Appel*, 67 Conn. 585, 35 Atl. 524 (1896) (accepted note of third person). A payee, moreover, who avoids the tender of a check may not thereafter object to its form. *Servel v. Jamieson*, 255 Fed. 892 (C. C. A. 9th, 1919). Apart from "waiver," when a bank which holds an escrow deed offers to cash a tendered check on another bank and pay to vendor, the tender is sufficient to entitle the vendee to specific performance. See *Kessler v. Pruitt*, 14 Idaho 175, 93 Pac. 965 (1908). In an action for specific performance, upon vendor's default, the vendee's ability to produce certified checks in payment has been held compliance with his part of the contract. *Kopeyka v. Woodstrom*, 305 Ill. 69, 137 N. E. 137 (1922). But *cf. Pearlstein v. Novitch*, 239 Mass. 228, 131 N. E. 853 (1921) (tender of personal note and mortgage); *Simmons v. Swan*, 11 F. (2d) 267 (C. C. A. 1st, 1926) (reversed by instant case). When tender of payment on a note has been made and refused, a certificate of deposit paid into court has been held sufficient to keep the tender good against a claim for interest on the note. *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489 (1898). *Contra: Smith v. Merchants Bank*, 8 Ohio Circ. Dec. 176 (1897). Even assuming a well taken and valid objection to the medium of payment, if there has been no notice that legal tender would be demanded, it is well substantiated by modern liberal authority that if a usual tender has been made a reasonable time must be allowed the tenderor to procure the desired medium. *Bass v. White*, 65 N. Y. 565 (1875); *Skinner v. Stone*, 144 Ark. 353, 222 S. W. 360 (1920); *Farris v. Ferguson*, 146 Tenn. 498, 242 S. W. 873 (1922), 23 A. L. R. 630 (1923) annotation; *Vick v. Howard, supra.* But *cf. Chambers v. Slethei*, 136 Wash. 84, 238 Pac. 924 (1925), noted in (1925) 74 U. PA. L. REV. 198, wherein specific performance was denied a vendee who had notified his vendor of a deposit in the latter's name, and the vendor without objecting had refused to carry out the contract. As to when a reasonable time has elapsed, see *Burden v. Elling State Bank*, 76 Mont. 24, 245 Pac. 958 (1926). The instant case, in recognizing the appropriateness of the tender involved for the purpose before the court, adopts a wise policy of conforming to the business and economic needs of the present day.

WORKMEN'S COMPENSATION—ACCIDENT OCCURRING IN COURSE OF EMPLOYMENT—STATUS OF EMPLOYEE SLEEPING AT EMPLOYER'S LODGING.—A chef was employed by the defendant hotel company for a definite term at a weekly wage which included board and lodging in the hotel. He was allowed a day off, and could leave the hotel premises entirely at the end of work the day before, but was allowed to remain in his room if he so desired. He was suffocated during a fire in the hotel while he was sleeping in his room on the morning of his day off. The Appellate Division reversed an award of compensation for his death made by the State Industrial Board under the Workmen's Compensation Law. *Held*, on appeal (two judges *dissenting*), that the order of the Industrial Board be reinstated, as the accident was one arising in the course of the employment. *Matter of Giliotti v. Hoffman Catering Co.*, 246 N. Y. 279, 158 N. E. 621 (1927).

In practically every jurisdiction, compensation for disability under the Workmen's Compensation Acts is limited to injuries arising "out of" and "in the course of employment." Schneider, *Workmen's Compensation Law* (1922) § 262. This classification has been held to include generally not only direct acts of employment, but also such activity as eating, resting, and satisfying physical necessities. *Haller v. City of Lansing*, 195 Mich. 753, 162 N. W. 335 (1917); *Zurich Gen. Accident Ins. Co. v. Brunson*, 15 F. (2d) 906 (C. C. A. 9th, 1926); (1921) 19 MICH. L. REV. 458. And where an employee is on the way to work in a truck furnished by the employer, it is held in many jurisdictions, including New York, that injuries thereby received are in the course of employment. (1924) 33 YALE LAW JOURNAL 563. The instant case presents the somewhat analogous problem whether injuries received by an employee while off duty fall within this classification where the employee is, at the time of the accident, in lodgings provided by the employer. Such injuries are clearly compensatory in those cases where the employee is subject to call at any time. *In re Bollman*, 73 Ind. App. 46, 126 N. E. 639 (1920); *Doyle's Case*, 256 Mass. 290, 152 N. E. 340 (1926); *Boyce v. Burleigh*, 112 Neb. 509, 199 N. W. 785 (1924); *Berlin v. Crawford*, 86 Pa. Super. Ct. 283 (1926). The same view is generally taken where the employee is not subject to call at any time but is required to live in lodgings furnished by his employer. *Cokolon v. Ship "Kentra,"* 5 B. W. C. C. 658 (1912); *Larson v. Industrial Acc. Comm.*, 193 Cal. 406, 224 Pac. 744 (1924); *Southern Surety Co. v. Stubbs*, 199 S. W. 343 (Tex. Civ. App. 1917); *Holt Lumber Co. v. Industrial Comm.*, 168 Wis. 381, 170 N. W. 366 (1919). But see *Griffith v. Cole Bros.*, 183 Iowa 415, 165 N. W. 577 (1918). This is especially true where the employer is strongly benefitted by having the employee reside in his lodging house. *Malky v. Kiskiminetas Valley Coal Co.*, 278 Pa. 552, 123 Atl. 505 (1924). Where, however, the employee is not required to live in the lodgings offered to him, but elects to do so, injuries received while occupying those lodgings are generally held not to arise in the course of employment. *Briskin v. Hyman*, 203 App. Div. 275, 197 N. Y. Supp. 111 (3d Dept. 1922); *Associated Oil Co. v. Industrial Acc. Comm.*, 191 Cal. 557, 217 Pac. 744 (1923). But see *Aho v. Chichagoff Mining Co.*, 6 Alaska 528 (1922). Some courts have taken this view even where living conditions practically forced the acceptance of the accommodations offered. *Philbin v. Hayes*, 87 L. J. K. B. 779, 119 L. T. R. 133 (1918); *Guiliano v. Daniel O'Connell's Sons*, 105 Conn. 695, 136 Atl. 677 (1927). It is difficult to reconcile the present decision with these cases where the injuries have been held not arising in the course of the employment except by straining the contract of employment so as to make it require the employee to use the accommodations offered. The decision is more readily reconciled with previous decisions on the ground, suggested by the court, that the employee was virtually a domestic servant. And the tendency has been to favor strongly the awarding of compensation to such servants who receive injuries while living on the employer's premises. *Alderidge v. Merry*, 47 Ir. L. T. 5, 6 B. W. C. C. 450 (1912); *State Compensation Ins. Fund v. Industrial Acc. Comm.*, 194 Cal. 28, 227 Pac. 168 (1924); *Rucker v. Read*, 39 N. J. L. J. 48 (1916); 31 A. L. R. 1256 (1924) annotation. In any event, the instant decision shows a far more liberal tendency to favor the employee in this type of cases than has been previously exhibited in this jurisdiction. *Cf. Daly v. Bates & Roberts*, 224 N. Y. 126, 120 N. E. 118 (1918); *Lauterbach v. Jarett*, 189 App. Div. 303, 178 N. Y. Supp. 480 (3d Dept. 1919); *Kane v. Barbe*, 210 App. Div. 558, 206 N. Y. Supp. 444 (3d Dept. 1924).