3. The contributions to the trust or foundation are deductible for income tax purposes; the trust is not taxable on its income under Section 501, and neither is the creator or contributor thereto; and the property transferred usually is not part of the donor's gross estate.
4. However, if the trust or foundation engages in certain "prohibited transactions", it may lose its tax-exempt status under Section 501.[64] If this happens, the contributor thereto cannot claim an income tax deduction for his contribution during the years the tax-exempt status is denied.[65]
5. Also, if the trust or foundation accumulates amounts out of income during the taxable year, or any prior taxable year, and such amounts are not paid out by the end of the year, exemption will be denied *for that year*, if the amounts are:
   a. unreasonable in amount or duration in order to carry out the charitable, educational or other purpose or function constituting the basis for exemption;
   b. used to a substantial degree for purposes or functions other than those constituting the basis for exemption; or
   c. invested in such a manner as to jeopardize the carrying out of the charitable, educational, or other purpose or function constituting the basis for exemption.[66]
6. The trust or foundation may furnish assistance to a beneficiary other than a formal organization, and other than a resident or domestic organization. Thus, it may

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[64] INT. REV. CODE OF 1954 § 503(c). These transactions are transactions between the trust and its creator, a substantial contributor, a member of the family of either, or a corporation in which such a person owns directly or indirectly at least 50 percent of the voting stock or 50 percent of the total value of all classes of stock. They include the trust:
(a) lending any part of its income or corpus without adequate security and reasonable interest;
(b) paying any compensation, except a reasonable amount for services actually performed;
(c) making any part of its services available on a preferential basis;
(d) making any substantial purchase of securities or other property, for more than an adequate consideration in money or money's worth;
(e) selling any substantial part of its securities or other property, for less than an adequate consideration in money or money's worth; or
(f) engaging in any other transaction which results in a substantial diversion of its income.
If the tax-exempt status is lost, the trust will, however, be able to deduct its charitable contributions not in excess of 20 percent of its taxable income (without deduction for contributions). INT. REV. CODE OF 1954 § 681(b).

[65] INT. REV. CODE OF 1954 §§ 503(e); 681(b)(5).

[66] INT. REV. CODE OF 1954 § 504. But contributions not in excess of 20 percent of its taxable income (without deduction for contributions) are allowable. § 681(c).

aid an individual, for example, a student (however, money could not be put in trust for the education of a named student, and tax exemption be obtained) or a missionary.[67]

[67] Smith, *Income Tax Planning for Charitable Gifts*, 1953 U. ILL. L. FORUM 601, 621. Other recent discussions of the use of charitable foundations include PIPER, HOW THE CHARITABLE FOUNDATION FITS INTO THE INVESTMENT PICTURE, in PROCEEDINGS OF NEW YORK UNIVERSITY TWELFTH ANNUAL INSTITUTE ON FEDERAL TAXATION 1209 (1954); Flechner, *Charitable Foundations and Their Benefits*, 34 NEB. L. REV. 630 (1955). In no other way could a gift to an individual who is an object of charity be made and deduction therefor allowed. MERTENS, LAW OF FEDERAL INCOME TAXATION § 31.13 (1953).

MEASURING DAMAGES TO THE ESTATE IN WRONGFUL DEATH CASES

In order to obtain an intelligible picture of the proper damages in a wrongful death action, it is necessary to examine the evolution of the cause of action as well as the underlying policy considerations that have been instrumental in its growth. In doing so, no attempt is made to analyze certain situations now covered by specific statutes, where the person injured or killed was a married woman or a minor.[1] Rather, the scope of the subject matter herein is limited to what might be called the 'ordinary' wrongful death action.

What recovery for wrongful death could be obtained at common law?

> "At common law, there was no right of action for a wrongful-death. There was a right of action for damages for personal injury, but the death of the plaintiff, pending the suit, abated the same. This was the state of the law in England prior to 1846 . . . ."[2]

Several interesting theories have been advanced in explanation of the common law position as stated. It has been said that the cause of action arising from the injury which resulted in death merged with the felony.[3] A more practical reason for the inability to recover damages would seem to be that upon conviction, the felon forfeited both his goods and his life. The civil action, suspended as it was until after the criminal prosecution, therefore availed the complainant of nothing.[4] The first reason is not persuasive because death might equally well have resulted from a wrongful act which was not a felony. The second is deficient in the same re-

[1] IOWA CODE § 613.11, and R.C.P. 8 (1954).
[2] Gardner v. Beck, 195 Iowa 62, 65, 189 N.W. 962, 964 (1922).
[3] Higgins v. Butcher, Yelverton 89, 80 Eng. Rep. 61 (K.B. 1606).
[4] See Jones, *Civil Liability for Wrongful Death in Iowa*, 10 IOWA L. BULL. 169, 170 (1925).

spect. *Baker v. Bolton,*[5] stating that death produced by a wrongful act could not be complained of in a civil proceeding, seems to have been the basis of most later decisions although neither reasons nor authority were given for the holding in that case.

Whether or not the reasons justified the harshness of the rule, it nevertheless endured in England until the passage of Lord Campbell's Act in 1846.[6] That enactment provided in part:

> ". . . that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

It further provided that:

> ". . . every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

Lord Campbell's Act had little, if any, direct effect upon the common law approach to wrongful death taken by courts in the United States. But prompt legislation soon enabled the courts here to reach a similar result. Iowa was among the first to enact a statute providing for recovery even though death had resulted.[7]

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[5] 1 Campb. 493, 170 Eng. Rep. 1033 (N.P. 1808).

[6] 9 and 10 Vict. c. 93.

[7] IOWA CODE §§ 2501, 2502, 1698, 1699 (1851). These sections read as follows:

"2501. When a wrongful act produces death the perpetrator is civilly liable for the injury. The parties to the action shall be same as though brought for a claim founded on contract against the wrong doer and in favor of the estate of the deceased. And the sum recovered shall be disposed of in the same manner, except that when the deceased left a wife, child, or parent surviving him it shall not be liable for the payment of debts."

"2502. Unless from the necessity of the case, no cause of action *ex delicto* dies with either or both the parties, but the prosecution thereof may be commenced or continued by or against their respective representatives."

"1698. Actions do not abate by the death, marriage, or other disability of either party, or by the transfer of any interest therein, if from the nature of the case the cause of action can survive or continue."

"1699. In such cases the court on motion may allow the action to be continued by or against his representative, or successor in interest."

That statute as it appeared in the Iowa Code of 1851 was revised in 1860, 1862 and again in 1873. It now appears as follows:

> "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."[8]
>
> "The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter."[9]
>
> "Any action contemplated in sections 611.20 and 611.21 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. . . ."[10]
>
> "When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts."[11]

It will be noted that none of these sections provides for a wrongful death action as such. Section 611.20 states that *all* causes of action shall survive and section 635.9 concerns only the distribution of the amount recovered. For this reason, Iowa's legislation on the subject has been called a 'true survival act' as opposed to the so-called 'death acts' which have been enacted in most jurisdictions and which create a new cause of action based on the death itself. The choice of terminology is somewhat misleading because 'true survival act' implies that the cause of action existing even momentarily in the decedent is made to survive as such to his personal representative. This would seem to be the case under the plain wording of the statute but a somewhat different interpretation has been applied by the court. For example, pain and suffering, which would in most cases be a proper element of damages had the individual lived, is entirely excluded in a wrongful death action by the executor or administrator.[12] On the other hand, the action surviving to the estate is enlarged to include the wrongful death itself which obviously could not be considered in an action by the injured party before his death. Therefore, although the term 'true survival act' may be descriptive of the

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[8] IOWA CODE § 611.20 (1954).
[9] IOWA CODE § 611.21 (1954).
[10] IOWA CODE § 611.22 (1954).
[11] IOWA CODE § 635.9 (1954).
[12] Van Wie v. United States, 77 F.Supp. 22 (N.D. Iowa 1948); Donaldson v. Mississippi & M. R.R., 18 Iowa 280 (1865); *see* Boyle v. Bornholtz, 224 Iowa 90, 93, 275 N.W. 479, 482 (1937).

statute, it tends to create an erroneous impression when applied to the results obtained thereunder.[13]

Regardless of the terminology, certain characteristics distinguish the Iowa statutes from the death acts prevalent in most jurisdictions. These acts, almost without exception, provide that the action shall be prosecuted for the benefit of certain specified parties as did Lord Campbell's Act. Section 635.9 of the Iowa Code refers to husband, wife, parent or child, but only for the purpose of stating that if anyone in such a category survives the deceased, the amount recovered shall be free from the debts of the deceased. The same section also provides that any such amount shall be disposed of as personal property belonging to the decedent's estate. It is entirely possible, therefore, that those named might receive none of the amount so recovered. In this respect the testamentary disposition of the decedent must be considered.[14] In any event, the disposition is determined by probate proceedings rather than in the wrongful death action.[15]

The problem of measuring damages may not be disposed of as simply as their distribution once recovered. The Iowa Court has frequently said that the proper measure of damages for the death is the reasonable value of decedent's life to his estate,[16] or such sum of money as will compensate the estate of the deceased for the loss suffered thereto by his death.[17] This view has been followed without material deviation since 1865 and appears to be well established in Iowa law. Age has not made it immune to criticism, however, and recently it has been suggested that a more equitable result would be obtained in many cases if the damages were in proportion to the injury caused the decedent's dependents and paid to them rather than the estate.[18] In many cases their loss of support has more drastic consequences than the loss of a nebulous and uncertain inheritance. The dependents may be forced

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[13] This is pointed out in Jones, *Civil Liability for Wrongful Death in Iowa,* 10 IOWA L. BULL. 169, 11 IOWA L. BULL. 28 (1925). Jones was of the opinion that at the time of its early decisions the Court did not thoroughly appreciate the difference between a 'survival' statute and a 'death' statute, and confused the two in its early decisions. As a result, it was once held that the cause of action accrued, for statute of limtation purposes, at the time the administrator of the estate was appointed. Sherman v. The Western Stage Co., 24 Iowa 515 (1868). This view was reversed as early as 1899, in *Sachs v. Sioux City,* 109 Iowa 224, 80 N.W. 336 (1899). Jones believed that a result of the same confusion is the rule that damages for pain and suffering are recoverable if the action is instituted before decedent's death, but not if instituted by the executor after the death, and the court has failed to make appropriate correction. His views were not discussed by the court in *Boyle v. Bornholtz, supra,* note 8.

[14] *In re* Estate of Cook, 126 Iowa 158, 101 N.W. 747 (1904).

[15] Reidy v. Chicago, B. & Q. Ry., 216 Iowa 415, 249 N.W. 247 (1933).

[16] Boyle v. Bornholtz, 224 Iowa 90, 275 N.W. 479 (1937); Hammer v. Janowitz, 131 Iowa 20, 108 N.W. 109 (1906).

[17] Shutes v. Weeks, 220 Iowa 616, 262 N.W. 518 (1935); *see* Donaldson v. Mississippi & M. R.R., 18 Iowa 280, 290 (1865).

[18] Legis. Note, *The Measure of Damages for the Wrongful Death of the Head of the Family in Iowa,* 39 IOWA L. REV. 494 (1954).

to suffer a loss in two ways. First, they are often deprived of their immediate support. Second, the fact that a large part of the decedent's earnings went for their support reduces the amount he would have been able to accumulate for his estate, and, theoretically at least, reduces the amount recoverable in a wrongful death action to that extent.

Since the beneficiaries of the estate are not necessarily those dependent upon the deceased for support, there is no apparent reason why separate and distinct causes of action should not be permitted to accrue in each case, one accruing to the estate for the benefit of the heirs as it does now and a separate one to the dependents in their own right. The elements of damages in the respective causes would be mutually exclusive and all those who suffered pecuniary loss would be more equitably compensated. Regardless of the merits of such a theory it is doubtful if any change may be expected in the near future.

The administrator's action for the wrongful death of a child, as distinguished from the parent's action for loss of services, emphasizes another weakness inherent in the theory of recovery as it exists in Iowa at the present time. While it is difficult in any case to determine the amount of wealth the decedent would have accumulated at some time in the future, the task approaches impossibility where the estate of a child is concerned. In many cases there is virtually no evidence available as to the child's prospective earnings, and in very few cases can such evidence as exists be considered adequate. It is true that a decedent's education may be shown [19] but this by itself can hardly be reduced to a monetary value. Thus the jury is left to the rankest sort of speculation which would not be tolerated in any other case. One possible solution is legislation to establish a fixed award in such cases. By so doing, however, the legislature would be abrogating to a large extent the policy of compensating the heirs for their loss of inheritance based on the decedent's anticipated accumulation.

The 'loss-to-the-estate' concept has been explained to mean the present value of the estate which the decedent would reasonably be expected to have saved or accumulated if he had lived out the natural term of his life.[20] Computing this amount involves two major steps. First is determining the value of the estate the decedent would have accumulated had it not been for his wrongful death, and, second, determining the present value of such amount. The courts have been liberal in admitting evidence to throw light on the first problem. The decedent's age and probable life ex-

[19] *See* Jettre v. Healy, 245 Iowa 294, 302, 60 N.W. 2d 541, 546 (1953).
[20] Kelley v. Central Railroad of Iowa, 48 Fed. 663 (C.C. E.D. Iowa 1883); Anderson v. Strack, 236 Iowa 1, 17 N.W.2d 719 (1945) (6 year old girl; verdict for $4,500 for wrongful death was not excessive); Hough v. Illinois Central R.R., 169 Iowa 224, 149 N.W. 885 (1915).

pectancy may, of course, be shown.[21] Life expectancy tables are almost always admissible for this latter purpose.[22] They are not conclusive, however, and factors affecting longevity may be shown to aid the jury in making its own estimate.[23] In a suit to recover for the death of a minor the life expectancy is figured from the date of his death but the number of years from that time until he would have reached his majority must be deducted therefrom.[24] Any prospective accumulation during that period may only be recovered in an action by the parent for loss of services.[25] The decedent's state of health has a bearing on his life expectancy and also to some extent on his anticipated earnings.[26] Other factors relevant to show what he could have been expected to earn are his wages at time of death,[27] occupation,[28] former occupations,[29] and, particularly in the case of a child, the occupation of his parent.[30] There is some conflict in regard to whether or not the number and ages of the decedent's children may be shown. The more recent cases seem to agree that such a showing is proper.[31]

Since the gross earnings would not all inure to the benefit of the estate, certain deductions must be made for estimated expenses to determine the amount he would have saved.[32] For this purpose evidence may be introduced to show the manner in which he disposed of his earnings,[33] his habits,[34] and temperance.[35] The amount

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[21] *See* Jettre v. Healy, 245 Iowa 294, 302, 60 N.W.2d 541, 546 (1953).

[22] Donaldson v. Mississippi & M. R.R., 18 Iowa 280 (1865); *see* Knott v. Peterson, 125 Iowa 404, 406, 101 N.W. 173 (1904).

[23] Droullard v. Rudolph, 207 Iowa 367, 223 N.W. 100 (1929); Farrell v. Chicago, R.I. & P. Ry., 123 Iowa 690, 99 N.W. 578 (1904).

[24] *See* Dice v. Johnson, 198 Iowa 1093, 1098, 199 N.W. 346 (1924); Wheelan v. Chicago, M. & St. P. Ry., 85 Iowa 167, 179, 52 N.W. 119, 123 (1892). *But see* Hart v. Hinkley, 215 Iowa 915, 919, 247 N.W. 258 (1933) (where the court implied that recovery should be based on decedent's expectancy at majority).

[25] Carnego v. Crescent Coal Co., 164 Iowa 552, 146 N.W. 38 (1914); Walters v. Chicago, R. I. & P. Ry., 36 Iowa 458 (1873).

[26] *See* Nicoll v. Sweet, 163 Iowa 683, 696, 144 N.W. 615, 620 (1913); Donaldson v. Mississippi & M. R.R., 18 Iowa 280, 290 (1865).

[27] *See* Jettre v. Healy, 245 Iowa 294, 301, 60 N.W.2d 541, 545 (1953) (by implication); Dufree v. Wabash R.R., 155 Iowa 544, 547, 136 N.W. 695, 696 (1912) (by implication).

[28] *See* Jettre v. Healy, 245 Iowa 294, 302, 60 N.W.2d 541, 546 (1953).

[29] Grimmelman v. Union Pac. Ry., 101 Iowa 74, 70 N.W. 90 (1897).

[30] McDowell v. Interstate Oil Co., 212 Iowa 1314, 237 N.W. 456 (1931); Meggison v. James Maine & Sons Co., 160 Iowa 541, 141 N.W. 1074 (1913).

[31] Cawley v. People's G. & E. Co., 193 Iowa 536, 187 N.W. 591 (1922); Nicoll v. Sweet, 163 Iowa 683, 144 N.W. 615 (1913) (Iowa cases on this point reviewed).

[32] Booth v. General Mills, Inc., 243 Iowa 206, 49 N.W.2d 561 (1952); Wheelan v. Chicago, M. & St. P. Ry., 85 Iowa 167, 52 N.W. 119 (1892).

[33] Spaulding v. Chicago, St. P. & K. C. Ry., 98 Iowa 205, 67 N.W. 227 (1896) (investment in life insurance).

[34] *See* DeToskey v. Ruan Transport Corp., 241 Iowa 45, 48, 40 N.W.2d 4, 6 (1949).

[35] *See* Townsend v. Armstrong, 220 Iowa 396, 402, 260 N.W. 17, 20 (1935).

of property he had accumulated at the time of his death is also relevant to show a capacity for earning and saving.[36]

Once the hypothetical value of the estate is thus determined it must be reduced to its present value.[37] This follows because the value of that estate is passing to the heirs at an earlier date than it would have had the decedent lived out his normal life. In theory this is accomplished by determining actuarially the amount of money which, if conservatively invested at compound interest, would equal the amount the deceased would have accumulated during the remainder of his life.[38] The critical element in this computation is, of course, the interest rate used. This has apparently presented little difficulty to the courts. On occasion they seem to have accepted without question the fact that the interest rate on conservative investments is two and one-half per cent or less.[39] This position is rather surprising in view of the fact that some government securities are continually available which yield three per cent compounded semi-annually. Surely these would qualify as conservative investments.

In addition to the amount awarded as discussed above, it is also possible to recover interest on the reasonable funeral expenses.[40] It has been consistently held that the funeral expenses themselves may not be recovered.[41] Such expenses would be incurred by the estate sooner or later anyway. But since they are precipitated by the wrongful death, the recovery may include interest on the sum so expended. However, the resulting figure may not exceed the original reasonable cost of the funeral [42] since this amounts to full compensation for the expense regardless of when it might have been incurred.

Several factors which might greatly affect the proper amount to be awarded have apparently never been urged in the Supreme Court of this state. One such problem arises when a married woman meets a wrongful death. It is accentuated when the woman is considerably younger than her husband. If she had lived, it is probable that she would have outlived her husband. Thus her estate would have been supplemented to some extent by the amount she would have received from his estate as an inheritance. Where the heirs of each are, for practical purposes, identi-

[36] Kelley v. Central Railroad of Iowa, 48 Fed. 663 (C.C. E.D. Iowa 1883); See also Nicholson v. Des Moines, 67 N.W. 2d 533 (Iowa 1954) (evidence admissible that deceased had conveyed property to daughter before his death); Scott v. Hinman, 216 Iowa 1126, 249 N.W. 249 (1933) (evidence showed that decedent had purchased theaters and had practically eliminated the debt thereon).

[37] See note 16 *supra*.

[38] Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

[39] *Ibid.*; See DeToskey v. Ruan Transport Corp., 241 Iowa 45, 51, 40 N.W.2d 4, 7 (1949).

[40] Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); Brady v. Haw, 187 Iowa 501, 174 N.W. 331 (1919).

[41] See note 36 *supra*.

[42] Van Wie v. United States 77 F. Supp. 22 (N.D. Iowa 1948).

cal this matter is of no consequence. But in many cases this will not be so and his heirs will receive the amount that otherwise would probably have descended to her heirs exclusively.

Still another area in which inequity may result is that of insurance. The problems are many and varied but at least two are worthy of mention. No tabulation of cases is necessary to show that many wrongful deaths meet the test of 'accidental' under the double indemnity feature of many insurance policies. If such policies are payable to the decedent's estate the estate has received a benefit which it would not have acquired had the decedent lived and subsequently died a natural death.

On the other hand, if the decedent owned an endowment policy payable on death to a named beneficiary then his estate is denied the amount, or a part thereof, which the decedent might ordinarily have lived to collect and add to his estate. This factor is of less importance where the beneficiary of the insurance is also the principal recipient of the decedent's estate.

It can readily be seen that there is an immense area available for speculation of which only a few examples have been noted. Many of these may be challenged as too remote to deserve serious consideration. Some might tend merely to confuse a jury rather than aid in the computation of a just recovery. By the very nature of the action there can be little certainty. The whole concept is one of probability and surmise. Just how far the courts will go in allowing evidence on the questions is open to conjecture. It would seem, however, that if the court is to maintain its present position as to the theory of recovery, it must not exclude from the jury's consideration any relevant evidence which bears on one of the elements of damages.

In view of the speculative nature of the damages which is inherent in the action it is not surprising that the Supreme Court of Iowa has been reluctant to interfere with the verdicts returned. One reason for the Court's hesitancy to substitute its judgment for that of the jury is of fairly recent origin. That is the fact that the value of our currency has exhibited a tendency to fluctuate. This necessarily affects the adequacy or excessiveness of sums awarded presently to compensate for a loss at some future date.[43] With this factor present it is likely that more and more discretion will be allowed the jury in fixing awards.

LAWRENCE E. GARDNER (June 1957)

[43] *See* Jettre v. Healey, 245 Iowa 294, 302, 60 N.W. 2d 541, 546 (1953) ($20,000); Booth v. General Mills, Inc., 243 Iowa 206, 210, 49 N.W.2d 561, 563 (1952) ($19,000 verdict reduced by Sup. Ct. to $12,500).

THERE IS ADMIRALTY LAW IN IOWA

Most people will agree that a collision between a passenger train and a barge is unusual. Yet that uncommon occurrence happened near Keokuk, Iowa, when the tow of the tug *W. C. Harms* collided with the Mark Twain Zephyr. The railroad proceeded, successfully, in an admiralty action to recover for the damages sustained.[1] This incident serves only as one of many possible illustrations that the Iowa lawyer does have a practical interest in admiralty law.

For three-quarters of a century after our country's independence, our courts adhered to the English common law view that admiralty jurisdiction extended only to those waters influenced by the ebb and flow of the tide.[2] The country was then thinly settled and "the navigability of a stream depended more upon the temper of the Indians living along its banks than upon its natural features."[3] The imposition of a rule satisfactory for "the diminutive size and length and volume of the rivers of England"[4] on the majestic rivers of this continent was analogous to "an attempt to clothe a giant with garments adapted to the form of a dwarf."[5] This "confusion of navigable with tide water, found in the monu-

[1] Chicago, B. & Q. R. R. v. The W. C. Harms, 134 F.Supp. 636 (S.D. Texas 1954). The tug *W. C. Harms* was pushing two barges ahead of her as she approached Lock No. 19 on the Mississippi River at Keokuk, Iowa. To await her turn to enter the lock, she pushed the barges against the west bank of the river, with the forward end of the lead barge overhanging the railroad's tracks. The "Mark Twain Zephyr" struck the barge and was derailed. The action was brought in admiralty in the federal district court in Texas, apparently where the vessel was then located. The court found that liability for damages would exist either under the maritime law or the common law. In disposing of various claims by the barge of negligence on the part of the railroad, the judge commented that considering the nature of the action it could be said that the train was "seaworthy". This case might well have been tried in Iowa.

[2] *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), established the common law rule, and was followed in *The Steamboat Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837). That this doctrine was not completely uniform is pointed out in Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1221 (1954). This note also points out a number of factors that may have affected the decision in *The Thomas Jefferson*. At the time of that decision there was considerable resentment of the extension of federal power, especially federal judicial power, and bills for judicial reform, especially to limit admiralty jurisdiction, were introduced in Congress. One of the authors of these bills was a Senator from Kentury, who was the brother of three owners of the *Jefferson*, who were in considerable financial difficulties.

[3] State v. Baum, 128 N.C. 600, 603, 38 S.E. 900, 901 (1901).

[4] *See* Kinkead v. Turgeon, 74 Neb. 573, 584, 109 N.W. 744, 745 (1906) (involving rights of a riparian owner on one side of the Missouri River in land which was part of an abandoned river bed; the court held that the tidal test of navigability did not apply).

[5] United States v. Burlington & H. C. Ferry Co., 21 Fed. 331 (S.D. Iowa 1884).