NOTES

EFFECT OF FIDUCIARY OR CONFIDENTIAL RELATION UPON VALIDITY OF GIFTS INTER VIVOS—Fiduciaries [1] occupy a most peculiar position in the law. Because of the disparity of situation existing between two persons in a confidential relation, transactions between them, in which the dominant party has obtained a benefit to the detriment of the other, are viewed by courts of equity in a light quite different from similar dealings between strangers.

It is generally said that where a fiduciary relation exists and the one occupying the position of dominance is the object of a bounty from the subservient party, such gifts are scrutinized with suspicion and are presumptively invalid. The law thrusts upon the donee the burden of proving that no undue advantage was taken of the opportunity for exploitation afforded by the confidence and trust reposed.[2] This statement of the law, however, is not entirely accurate inasmuch as there are many relations of a fiducial nature in which no adverse presumption will arise. It will be the purpose of this note, therefore, to distinguish those confidential relations in which no presumption of invalidity arises from those which do raise such presumption and the methods of disproving and rebutting it when it does arise.

For purposes of clarity, fiduciary relations may be divided into two classes—(1) fiduciary relations of dominion, those in which not only confidence is reposed in the dominant party, but influence and control are presumed to exist, and (2) fiduciary relations of trust, those in which there is merely a relationship of trust and confidence and dominion is not implied.[3]

Fiduciary Relations of Dominion.

Where a fiduciary by reason of his relation is in a position to have and exercise, or who does have and exercise authority and influence, the courts unequivocally and almost without exception have

[1] The terms "fiduciary relation" and "confidential relation" are ordinarily held to be synonymous. Bacon v. Soule, 19 Cal. App. 428, 434, 126 Pac. 384, 386 (1912). A fiduciary or confidential relation is not easy of definition or limitation but, in more or less general terms, it is said to be such a relationship in which there is confidence reposed on the one side, and the resulting superiority and influence on the other. The relation and duties involved in it need not be legal. It may be moral, social, domestic, or merely personal. Quinn v. Phipps, 93 Fla. 805, 810, 113 So. 419, 421 (1927); 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 956.

[2] Thaw v. Thaw, 27 F. (2d) 729 (C. C. A. 2d 1928); Gregory v. Gregory, 323 Ill. 380, 154 N. E. 149 (1926); CAL. CIV. CODE (Deering, 1923) §§ 2219, 2235; THORNTON, GIFTS AND ADVANCEMENTS (1893) § 455; 1 WHITE & TUDOR, LEADING CASES IN EQUITY (8th ed. 1910) 281.

[3] See note (1886) 25 Fed. 23. Distinction not recognized in Missouri. Reed v. Carroll, 82 Mo. App. 102, 109 (1899).

declared that any gift or donation, received by such fiduciary from the one in subservience is at least *prima facie* void thus requiring the donee to exculpate himself from any possible inference of having exerted undue influence.[4]

The relation of attorney and client is of a highly fiduciary character in which the former possesses great power and control. In consonance with a realization of this fact courts formerly ruled that during the subsistence of the relationship any gift made by one to his legal adviser was absolutely void.[5] Later English decisions,[6] on the other hand, declared that where the client had received independent advice in respect to the gift, it will be upheld as valid. Upon examination of these cases it may be discovered that they may be reconciled by interpreting the phrase "during the subsistence of the relationship" as meaning that the general business connection between the donor and donee need not be finally terminated, but that in all dealings connected with the gift itself the relation must be suspended, which suspension may be effected by the introduction of independent advice.[7] In this country a gift may be made by a client to his attorney, but the *onus* is on the donee to clearly prove that the transaction was voluntary, fair, and without undue influence,[8] which is extremely difficult of accomplishment.[9]

Domination and control are also the characteristic features of the relation of guardian and ward. During its continuance the problem of the validity of a gratuity from the ward to the guardian rarely presents itself since from the very nature of the relation the ward is incapable of conveying property. The problem has arisen, however, where the guardian is the recipient of a gift from the ward made soon after the termination of the guardianship and while it is

[4] "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another." Sir Samuel Romilly in his celebrated reply in Huguein v. Baseley, 14 Ves. 273 (Eng. 1807), cited with approval in Dent v. Bennett, 4 Myl. & C. 269, 277 (Eng. 1839). See GA. ANN. CODE (Michie 1926) § 4152.

[5] Berrien v. McLane, Hoffman 421 (N. Y. 1840); Tomson v. Judge, 3 Drew. 306 (Eng. 1855); Morgan v. Minett, 6 Ch. D. 638 (1877); BISPHAM, EQUITY (10th ed. 1922) 406. The attorney could retain the subject of the gift as security for his reasonable fees.

[6] Rhodes v. Bate, L. R. 1 Ch. App. 252 (1866); Wright v. Carter, [1903] 1 Ch. 27. This applies as well to gifts to near relatives of the attorney. Goddard v. Carlisle, 9 Price 169 (Eng. 1821) (wife); Liles v. Terry, [1895] 2 Q. B. D. 679 (wife also niece of donor); Barron v. Willis, [1902] A. C. 271 (son). Rule did not apply to trifling gifts.

[7] See 2 POMEROY, *op. cit. supra* note 1, at § 960, n. 2.

[8] Bolles v. O'Brien, 63 Fla. 342, 59 So. 133 (1912); Whipple v. Barton, 63 N. H. 613, 3 Atl. 922 (1885); Brock v. Barnes, 40 Barb. 521 (N. Y. 1863); Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179 (1917). It has been held that to cause a gift to an attorney to be viewed with suspicion something more than the mere relation of attorney and client must appear. Rice v. Benningham Co. Sav. Bk., 93 Vt. 493, 108 Atl. 708 (1919).

[9] Greenfield's Estate, 14 Pa. 489, 506 (1850); 1 LAWRENCE, EQUITY JURISPRUDENCE (1929) § 399.

supposed the former influence continues. Earlier courts adopted a strict and illiberal view by considering such gifts void especially if made before the final settlement of the guardian's accounts.[10] It is surprising, however, to observe that these cases were later interpreted as supporting the present doctrine which is similar to that applicable to the relation of attorney and client.[11] After the ward has come of age and is actually *sui juris,* and has been put into possession of his property, then his transaction with his former guardian will be viewed as though between strangers.[12]

Gifts from *cestui que trust* to trustee,[13] patient to physician,[14] and penitent to spiritual adviser [15] are viewed with the same jealousy and scrutiny as those between attorney and client, and guardian and ward, the rule commonly adopted being that the burden is on the donee to prove that the transaction was fair, and its nature and effect were fully understood. This rule of shifting burden of proof is applicable not only to these special relations in which dominion and control commonly exist, but also to all such relations in which *as a fact* trust and confidence are reposed in one who also enjoys a position of ascendancy and authority by reason of such relation.[16]

Fiduciary Relations of Trust.

There is clearly no reason why a relationship merely of confidence should raise a presumption of the invalidity of a gift. If it is evident that the donor intended to make a gift and no power of dominion is vested in the donee, there is then no necessity to look further to determine if that donative intention is the result of the

[10] Waller v. Armistead's Admr., 2 Leigh. 11 (Va. 1830) (rule applied as well to releases and acquittances); Hylton v. Hylton, 2 Ves. Sr. 547 (Eng. 1754); Faulkner v. Salmon, 9 L. J. Ch. 155 (1831).

[11] Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918 (1884); Hawkin's Appeal, 32 Pa. 263 (1858); see Melos v. Hagen, 133 Atl. 538 (N. J. 1926); Taylor v. Johnston, 19 Ch. D. 603 (1882). Such a gift has been held to be voidable at the option of the ward. Wade v. Pulsifer, 54 Vt. 45 (1881).

[12] See Hylton v. Hylton, *supra* note 10, at 549.

[13] Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93 (1885); Smith v. Schoffer, 86 N. J. Eq. 107, 97 Atl. 52 (1916); CAL. CIV. CODE (Deering, 1923) § 2235.

[14] Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275 (1886); Thorndell, Admrx. v. Munn, 298 Pa. 1, 147 Atl. 848 (1929); Mitchell v. Homfray, 8 Q. B. D. 587 (1881) (voidable); Radcliffe v. Price, 18 T. L. R. 466 (1902). But see Audenried's Appeal, 89 Pa. 114 (1879).

[15] Gilmore v. Lee, 237 Ill. 402, 86 N. E. 568 (1908) (gift causa mortis); Corson's Estate, 137 Pa. 160, 20 Atl. 588 (1890); Huguein v. Baseley, *supra* note 4 (a leading case); Allcard v. Skinner, 36 Ch. D. 183 (1887): ". . ., and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far." *Ibid.* 183; Morley v. Loughnan, [1893] 1 Ch. 737. *Cf.* Greenfield's Estate, 24 Pa. 232, 240 (1855): "In this country the danger rather is that clergymen will receive too little than too much." Rule applies where donee receives through the intervention of a spiritual adviser. Caspari v. First German Church, 12 Mo. App. 293 (1882).

[16] 2 POMEROY, *op. cit. supra* note 1, at § 956.

free and unrestrained will of the donor and require the donee to prove this, since the latter is not in a position by reason of his fiduciary position alone to influence the will of the donor.[17]

The relation of agent to principal is merely a confidential relation of trust. In the ordinary principal and agent relationship, the principal and not the agent controls. Although transactions between them in which the agent has been benefited and the principal has suffered, are scrutinized because of the opportunities for abuse of trust and confidence, yet a voluntary donation by a principal to his agent is *prima facie* valid.[18] The *onus probandi* is on the one impugning the transaction to show actual fraud or undue influence legally sufficient to invalidate the gift. In a few jurisdictions it has been declared that a presumption of invalidity does exist but it does not apply as strongly, and less is required to rebut it than those presumptions arising out of the fiduciary relations of dominion.[19] Where in addition to the confidential relation, there are present circumstances indicating actual influence by the agent over the principal, then clearly the rules governing the relationships of dominion should apply.[20]

The mere fact that the donor and donee are child and parent does not *per se* cause the existence of an adverse presumption,[21] especially in view of the fact that such gifts are usually motivated by the natural ties of love and affection ordinarily existing between parent and child. Where, on the other hand, the parental relation is augmented by other circumstances which evidence parental authority

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[17] "I believe, if the principle is examined, it will be found most frequently applied in such cases, for this simple reason, that the fiduciary relation gives a power of influence: but I could suggest fifty cases of fiduciary relation where the principle would not apply at all." Smith v. Kay, 7 H. L. Cas. 750, 771 (1859).

[18] Ralston v. Turpin, 25 Fed. 7 (C. C. S. D. Ga. 1885), *aff'd*, 129 U. S. 663, 9 Sup. Ct. 420 (1889); Uhlick v. Muhlke, 61 Ill. 499 (1871); Zimmerman v. Frushour, 108 Md. 115, 69 Atl. 796 (1908); *In re* Coomber, [1911] 1 Ch. 723; Trusts and Guarantee Co. v. Hart, 32 Can. S. C. 553 (1902); THORNTON, *op. cit. supra* note 2, at § 456; see Parker v. Ross, 234 Fed. 289, 313 (C. C. A. 7th 1916). *Contra:* Reed v. Carroll, *supra* note 3. These rules apply also to gifts between partners. THORNTON, *op. cit. supra* note 2, at § 456.

[19] Decker v. Waterman, 67 Barb. 460 (N. Y. 1876); KERR, FRAUD AND MISTAKE (5th ed. 1920) 185.

[20] Todd v. Grove, 33 Md. 188 (1870); Hobart's Admr. v. Vail, 80 Vt. 152, 66 Atl. 820 (1905).

[21] Jenkins v. Pye, 12 Pet. 241 (U. S. 1838); Taylor v. Taylor, 8 How. 183 (U. S. 1850); Giers v. Hudson, 102 Ark. 232, 143 S. W. 916 (1911); Murray v. Hilton, 8 App. D. C. 281 (1896); Pusey v. Gardner, 21 W. Va. 469 (1883); EVERSLEY, DOMESTIC RELATIONS (1026) 542; 1 LAWRENCE, *op. cit. supra* note 8, at § 402. But see Millican v. Millican, 24 Tex. 426 (1859); 2 POMEROY, *op. cit. supra* note 1, at § 962, n. 3. (Pomeroy argues that the relation of child to parent is one of dependence on the one side and authority on the other; this is not so, since the child may be of such age and the circumstances such that there is no dominion of the parent over the child but child over parent, which is not unusual, (see *infra* note 27) in which case it would be unfair to hold the gift presumptively void.)

and domination, and filial deference thereto, it will then be incumbent upon a donee parent to prove the fairness and absence of undue influence in respect to the gift. Such circumstances exist when a substantial gift has been made to a parent by a child who has recently attained majority;[22] who still resides under the parental roof so as to be under the constant and immediate influence of the parent;[23] who is mentally incompetent;[24] or where the parent retains possession and control of the child's property.[25]

A reversal of the positions so that the child is the recipient of a gift from the parent does not change the rule;[26] but if a gift, unreasonable and improvident in respect to the financial ability of the donor, is made by a parent enfeebled in mind and body,[27] or where in addition to the family ties there exists also a relationship of a fiduciary nature,[28] then a presumption adverse to the validity of the gift will result since these facts indicate a power of domination vested in the child. Alabama courts, by a possible misinterpretation of a decision,[29] have committed themselves to the peculiar rule that once the parental dominion over the child has ceased, then a presumption of undue influence arises.[30]

No legal presumption or alteration of burden of proof occurs

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[22] Cooley v. Stringfellow, 164 Ala. 460, 51 So. 321 (1909); Turner v. Burton, 101 Okla. 251, 225 Pac. 368 (1924); Wright v. Vanderplank, 8 D. G., M. & G. 133 (Eng. 1855); Delong v. Mumford, 25 Grant Ch. 586 (Can. 1878) (gift to one *in loco parentis*). If child still an infant his gifts are at least voidable. Slaughter v. Cunningham, 24 Ala. 260 (1854); Johnson v. Alden, 15 La. Ann. 505 (1860); TIFFANY, DOMESTIC RELATIONS (3rd ed. 1921) § 141 (b). Gift by infant void. Gillmett v. Tourcott, 213 Mich. 617, 182 N. W. 128 (1921). *Contra:* Taylor v. Johnston, *supra* note 11.

[23] Ashton v. Thompson, *supra* note 11; Miller v. Simonds, 72 Mo. 669 (1880).

[24] Hays v. Feather, 244 Ill. 172, 91 N. E. 97 (1910); Miskey's Appeal, 107 Pa. 611 (1883) (child habitual drunkard).

[25] See Ashton v. Thompson, *supra* note 11.

[26] Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332 (1899); McKinney v. Hensl, 74 Mo. 326 (1881); Northern Trust Co. v. Huber, 274 Pa. 329, 118 Atl. 217 (1922).

[27] Gilson v. Hamang, 63 Neb. 349, 88 N. W. 500 (1901); Flowers v. Flowers, 94 Okla. 134, 221 Pac. 483 (1923); Kinsella v. Pask, 23 Ont. L. R. 393 (1913); note (1912) 60 U. OF PA. L. REV. 274. Some courts merely require old age and dependence on child to raise presumption. Carleton v. Benham, 60 Cal. App. 725, 214 Pac. 503 (1923); Smith v. Smith, 84 Kan. 242, 114 Pac. 245 (1911); Powers v. Finnerty, 94 N. J. Eq. 193, 118 Atl. 415 (1922).

[28] Floyd v. Floyd, 11 F. (2d) 841 (C. C. A. 7th 1926); Roller v. Roller, 201 Iowa 1077, 203 N. W. 41 (1926); Disbrow v. Disbrow, 31 App. Div. 624, 52 N. Y. Supp. 471 (1898). *Contra:* Sawyer v. White, 122 Fed. 223 (C. C. A. 8th 1903); Mooney v. Mooney, 80 Conn. 446, 68 Atl. 985 (1908).

[29] Keeble v. Underwood, 193 Ala. 582, 588, 69 So. 473, 475 (1915): "where dominion of father has been displaced by subservience to child" then presumption arises.

[30] Grubb v. Hawkins, 208 Ala. 349, 94 So. 484 (1922); Gibbons v. Gibbons, 205 Ala. 636, 88 So. 833 (1921). But see Dowe v. Farley, 206 Ala. 421, 90 So. 291 (1921).

where there is a gratuitous transfer of property from husband to wife. The marital relation, although one of trust and confidence, is not alone sufficient to raise an invalidating presumption.[31] The suspicious nature of the circumstances contemporary with the making of the gift, however, will cause a court of equity to declare the gift *prima facie* invalid, as in case the husband is old in years, mentally weak, and dependent on the wife so that he is highly susceptible to influence.[32]

The law in respect to gifts from wife to husband is not entirely settled. Many courts have argued that the most dominant of all relations is that of husband over wife and, therefore, since it is a fiduciary relation of dominion the presumption of undue influence should arise.[33] The better and more logical present-day view would be in favor of the principle that the mere relation of husband to wife should not affect in any manner the validity of a gift by the latter to the former.[34] The reason for such rule is obviously stated by one court:

> "Wherever husband and wife reside together under the ordinary condition of marriage, confidential relations necessarily exist between them; but in this day of better education of woman, when she and her property have been very largely emancipated from the control of the husband, it cannot be said as a matter of law, that he is the dominant and she is the dependent party. Whether or not that be true is a question of fact." [35]

Thus as indicated by the above quotation, if as a matter of fact the husband does exercise domination and control over his spouse, then and only then, should the gift be presumptively void.[36]

It is manifest, therefore, that the mere fiduciary character of the relationship is not sufficient *per se* to alter the burden of proof, but where, in addition to the existence of a fiduciary relation of trust, there appears *as a matter of fact* such circumstances as convert it into

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[31] Crofford v. Crofford, 29 Cal. App. 662, 157 Pac. 560 (1916); Pritchard v. Hutton, 187 Mich. 346, 153 N. W. 705 (1915); Ford v. Ford, 193 Pa. 530, 44 Atl. 561 (1899). Rule applicable to gifts by one to his fiancee. Kelso v. Kelso, 96 N. J. Eq. 354, 124 Atl. 763 (1924).

[32] Paulus v. Reed, 121 Iowa 224, 96 N. W. 757 (1903); Curtis v. Crowley, 59 N. J. Eq. 358, 45 Atl. 905 (1900); Monoghan v. Collins, 71 Atl. 617 (N. J. 1908).

[33] Mathy v. Mathy, 88 Ark. 56, 113 S. W. 1012 (1908); Havorka v. Havlika, 68 Neb. 14, 93 N. W. 990 (1903); Darlington's Appeal, 86 Pa. 512 (1878).

[34] Mahan v. Schroeder, 236 Ill. 392, 86 N. E. 97 (1908); Donlon v. Donlon, 154 App. Div. 212, 138 N. Y. Supp. 1039 (1912); Hardy v. Van Harlingen, 7 Oh. St. 208 (1857); Baron v. Willis, [1899] 2 Ch. 578, *aff'd*, [1902] A. C. 271; KERR, *op. cit, supra* note 19, at 201.

[35] Mahan v. Schroeder, *supra* note 34, at 404, 86 N. E. at 100. "It may be that, as social conditions continue to change, an analysis of the normal relation of husband and wife will lead us to hold that neither one of the two occupies a dominant position." Kelso v. Kelso, *supra* note 31, at 358, 124 Atl. at 765.

[36] Hill v. Hill, 115 So. 258 (Ala. 1928); Stiles v. Breed, 151 Iowa 86, 130 N. W. 376 (1911); see Mahan v. Schroeder, *supra* note 34.

a fiduciary relation of dominion, then *a priori* the rules governing the latter relationships should be applicable.

Methods of Disproving and Rebutting Adverse Presumptions.

Where in consequence of the existence of a confidential relation the presumption of the invalidity of a gift has arisen and has not been sufficiently rebutted, courts of equity will set such gifts aside.[37] This is not by reason of the actual commission of a wrongful act but because of public policy and safety in view of the opportunities and temptations which such relationships afford for the improper exercise of the dominion thus acquired.[38] What circumstance surrounding the gift must be shown by a donee once having assumed the burden of proving the validity of the gift? A most comprehensive statement of the elements necessary to rebut the presumption was made in the recent case of *Thorndell, Admrx. v. Munn*[39] in which the court said:

> ". . . the burden was cast upon him to 'prove (affirmatively) that the gift was made intelligently and with a full knowledge . . . of the character of the transaction; that no deception was used, and that all was fair, open, voluntary and well understood; that the transaction was fair, conscionable and beyond the reach of suspicion;' that he had not availed himself either of the necessities of the decedent or her good nature, liberality or credulity; and that the proof was full and clear that the transaction was the free and intelligent act of decedent performed with a thorough understanding of the transaction and of its consequences."[40]

In some jurisdictions, under certain circumstances, where the donor and donee occupy a fiduciary relation of dominion, competent independent advice[41] is essential in order to prevent the invalidation of the gift. It is problematic whether independent advice is merely a method of sufficiently satisfying the burden of proof, or has the

[37] Court sets gift aside as if actual undue influence has been proved which is sufficient to invalidate a gift. THORNTON, *op. cit. supra* note 2, at § 440.

[38] *Ibid.* § 456. "The chance to do a wrong is the *'fons et origo malorum'*." Wade v. Pulsifer, *supra* note 11, at 61.

[39] *Supra* note 14.

[40] *Ibid.* 8, 9, 147 Atl. at 850.

[41] "Proper independent advice in this connection means that the donor has the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so dissociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction." Post v. Hagan, 71 N. J. Eq. 234, 243, 65 Atl. 1026, 1027 (1906). If solicitor acts for both parties such is not competent independent advice. Powell v. Powell, [1900] 1 Ch. 243. It has been held that independent advice must be of a professional nature. Liles v. Terry, *supra* note 6, at 685.

strong effect of terminating the confidential relation *in hac re* so that the presumption of invalidity does not arise.[42] In those jurisdictions where independent advice is absolutely necessary in order to uphold a gift to a fiduciary, it is evident that either interpretation will reach the same result—the gift will be declared valid. Those courts, however, which hold that independent advice is not a prerequisite of the validity of the gift clearly would consider independent advice rather as an evidential factor in determining whether or not the transaction was fully understood and subject to no undue influence. From the language of most decisions it would seem that independent advice is merely a means of rebutting the adverse presumption.

In England, where the doctrine of independent advice originated, the earlier cases expressed the view that a gift to a fiduciary was entirely void unless the donor had the benefit of proper independent advice which if proved would of itself make the gift valid.[43] A later case[44] refused to abide by the former arbitrary rule, and held that independent advice alone was not sufficient to prevent a gift from being set aside if it were shown that the influence arising from the confidential relation continued to exist. The recent English case of *Inche Noriah v. Shaik Allie Bin Omar*[45] seems to have repudiated any idea prevailing among the English courts that in the absence of independent advice the presumption of invalidity could not be rebutted and held merely that "it is necessary for the donee to prove that the gift was the result of the free exercise of independent will",[46] thus arraying itself with the doctrine adopted in this country.

Most of the states in this country do not require independent advice, although admitting that it is of evidential value in the determination of the fairness of the transaction.[47] A few jurisdictions have made independent advice a condition precedent to the validity of the gift but have applied it only where the transfer has been improvident.[48]

The doctrine of the requirement of independent advice has often been deplored as reaching unjust results. As an evidential factor and not as an arbitrary rule of validity, it is desirable. Absurd con-

[42] See discussion of the relation of attorney and client *supra* page 755.

[43] Rhodes v. Bate; Liles v. Terry (rule deplored), both *supra* note 6. Essential that donor act on advice because of possibility of influence of fiduciary vitiating the effect of the advice. Powell v. Powell, *supra* note 41. But see Inche Noriah v. Shaik Allie Bin Omar, [1929] A. C. 127 to effect that advice need not of necessity be taken. It is essential that independent advice be given with full knowledge of all relevant circumstances. *Ibid.*

[44] Wright v. Carter, *supra* note 6.

[45] *Supra* note 43.

[46] *Ibid.*

[47] Hawkins v. Gray, 128 Ark. 143, 193 S. W. 509 (1917); 1 LAWRENCE, *op. cit. supra* note 9, at § 398.

[48] Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289 (1907); *In re* Fulper, 99 N. J. Eq. 293, 132 Atl. 834 (1926) "Improvident i. e. where the result thereof is to leave donor without adequate means of support." *Ibid.* Probably a rule of public policy.

sequences would result if a gift should be invalidated because of the lack of independent advice when it can be clearly proved that the donor fully appreciated the nature of his act and the independent advice would be a repetition of what he already knew. In determining whether or not a gift to a fiduciary should be set aside it should not matter what facts or circumstances are introduced in support of the validity of the gift as long as the court is really satisfied that the gift was a deliberate and well understood act, and a product of the untrammeled will of the donor.

J. S. R.

RATIONALE OF "ACCIDENTAL MEANS"*—The frequency of litigation and the confusion in the reasoning of the courts with regard to the standard personal accident insurance policy have been brought into particular prominence by three recent decisions: *Hesse v. Traveler's Insurance Co.*,[1] *Taylor v. New York Life Insurance Co.*,[2] *International Travelers' Insurance Ass'n. v. Francis.*[3] The first, a Pennsylvania case decided by a bare majority of the court, reaches a result directly *contra* to the second, a Minnesota decision rendered on identical facts; while in the last of these, a case different in facts, but similar in the problem involved, the Texas court employed a line of reasoning very much different from that followed in either of the other two decisions.

The modern standard policy of accident insurance found its beginnings in 1849, when an English company wrote a policy protecting against railway accidents only; in 1865 this was extended to include accidents of all kinds. The first accident insurance company in the United States was established in 1863.[4] Early policies guarded the insured "against personal injury arising from accident and causing death",[5] or "in case of death resulting . . . in consequence of accident".[6] Fearing that the courts would hold that they were insuring against all fortuitous and unexpected bodily injuries, external or internal, and innumerable diseases or abnormal conditions,[7] the insurance companies restricted their liability to death resulting from "bodily injuries effected through violent and accidental means".[8] In later policies, the companies imposed still further limitations on

*For a very recent discussion of the subject of "Accidental Injuries and Injuries by Accidental Means" see VANCE, INSURANCE (2d ed. 1930) 869-880 (now being printed).

[1] Pa. Supreme Court, decided Jan. 20, 1930 (Justices Frazer, Kephart, and Sadler dissenting).

[2] 176 Minn. 171, 222 N. W. 912 (1929).

[3] 23 S. W. (2d) 282 (Tex. 1930).

[4] 1 JOYCE, LAW OF INSURANCE (2d ed. 1917) § VIII.

[5] Schneider v. Provident Life Ins. Co., 24 Wis. 28 (1869).

[6] North American Life and Acc. Ins. Co. v. Burroughs, 69 Pa. 43 (1871).

[7] CORNELIUS, ACCIDENTAL MEANS (1917) 2.

[8] Ripley v. Insurance Co., 83 U. S. 336 (1872).

the risk. The modern insuring clause protects against death "resulting from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means".[9]

Around each of these words and phrases there has arisen a mass of litigation attempting to determine its exact legal signification and not attaining, in the case of any of the three provisions, consistent results.[10] However, this note will concern itself solely with the major problems of "accidental means", arising from cases involving the voluntary conduct of the insured.[11]

In construing the term "accidental means", it must be realized at the outset that an insurance policy is in fact a contract between the insurer and the insured. As such, it is clear that the expressed mutual intention of the parties must be regarded,[12] subject to the well-recognized rule of construction that an insurance policy is to be interpreted most strictly against the insurer.[13] Furthermore, it is clear that an accident insurance policy is to be distinguished from one of life insurance. In the latter, death is the contingency insured against, and if it be the result of an accident, this fact is immaterial from the viewpoint of liability—while in the standard accident insurance policy, it is the means which causes the death or injury, and not the death or injury itself, which is significant.[14] In a sense, almost

[9] Hesse v. Traveler's Ins. Co., *supra* note 1. This terminology, with slight variations in wording but not in legal effect, is present in virtually all modern accident policies and also in the double indemnity clauses of life insurance policies.

[10] "Resulting from bodily injuries": Bohaker v. Travelers Ins. Co., 215 Mass. 32, 102 N. E. 342 (1913) (insured, overcome by dizziness caused by disease, fell out of window). *Contra:* Rathman v. New Amsterdam Cas. Co., 186 Mich. 115, 152 N. W. 983 (1915) (insured, affected by disease, fell or jumped off vessel).

"Effected directly and independently of all other causes" (often expressed in policies as "sole cause"): Penn. v. Standard Life and Acc. Ins. Co., 158 N. C. 29, 73 S. E. 99 (1911) (insured, having cataract on eye, fell from car, hastening loss of eyesight). *Contra:* Fidelity & Cas. Co. v. Meyer, 106 Ark. 91, 152 S. W. 995 (1912) (insured, falling from wagon, was killed due to aggravated tumorous growth which would have caused death eventually).

"External and violent means": Lyon v. Travelers' Protective Assn., 25 F. (2d) 596 (C. C. A. 4th, 1928) (bursting of blood vessel due to overexertion, from driving automobile, held a matter arising within insured's own body). *Contra:* Bankers' Health & Acc. Co. of America v. Shadden, 15 S. W. (2d) 704 (Tex. 1929) (heart dilation due to overexertion from cranking automobile, held an external and violent means of death).

[11] This note will not concern itself with the comparatively well-settled problems arising from situations involving (1) the purely involuntary conduct of the insured, (2) the conduct of third persons, and (3) "acts of God". For discussion of these elements, see 5 COUCH, INSURANCE (1929) c. XVI.

[12] Royster Guano Co. v. Globe & Rutgers Fire Ins. Co., 252 N. Y. 75, 168 N. E. 834 (1929).

[13] Comm'l Union Assur. Co., Ltd. v. Jass, 36 F. (2d) 9 (C. C. A. 5th, 1929); Fidelity Health & Acc. Co. v. Holbrook, 169 N. E. 57 (Ind. App. 1929); see Hesse v. Travelers' Ins. Co., *supra* note 1.

[14] See Jones v. Prudential Ins. Co., 208 Mo. App. 679, 687, 235 S. W. 429, 432 (1922).

every death may be termed an "accidental death" since generally "it is uncertain beforehand whether the effect will ensue in any particular case".[15] Therefore, it is obvious that if there is to be any differentiation between the liability incurred by the insurer in life insurance as compared with that in accident insurance, then such differentiation lies in the distinction between "accidental death" and death caused by "accidental means".

The distinction, substantially as stated by the majority of courts is as follows: where the act resulting in death or injury is such that nothing unforeseen and unintended occurs in the doing of such act and the sole unforeseen element is the effect or consequence of the act, that is, the death or injury—such death or injury is "accidental";[16] where something unforeseen and unintended occurs in the very performance of the act itself, then the resulting death or injury not only is "accidental", but also is caused by "accidental means".[17]

In consideration first of those cases in which the distinction is strictly applied, it is found that even these courts often reach directly opposite results. This is due to diametrically opposite interpretations of what is meant by *intended* within the meaning of the requirement that there must be something *unintended* in the very doing of the act itself. The manner in which courts have treated the situation presented in *Hesse v. Traveler's Insurance Co.* is particularly illustrative of the two viewpoints. In this case the insured, about to undergo a major operation for the removal of a diseased kidney, authorized a skillful surgeon to use a specified anaesthetic; the anaesthetic was properly administered, and the insured suddenly died due to an idiosyncrasy or hypersusceptibility to the particular anaesthetic, a condition entirely indiscernible beforehand and which occurs with extraordinary infrequency—perhaps in one out of a hundred thousand cases. The majority of the court, in deciding that the death had not resulted "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means", dismisses the entire issue of accidental means with this statement: "There were no accidental means, all those employed were intentional." From this statement the Pennsylvania court, there-

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[15] Sinclair v. Maritime Passengers' Assurance Co., 3 E. & E. 478, 486 (Eng. 1861).

[16] Carswell v. Railway Mail Assn., 8 F. (2d) 612 (C. C. A. 6th, 1928) (death from kidney operation due to danger inherent in such operations); Husbands v. Indiana Travelers' Acc. Assn., 194 Ind. 586, 133 N. E. 130 (1921) (rupture of blood vessel caused by shaking furnace in usual manner); *cf.* Banker's Health & Acc. Co. v. Shadden, *supra* note 10.

[17] U. S. Mutual Acc. Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755 (1889) (stricture of *duodenum* due to involuntary turn of body in jumping, causing insured to land on heels instead of toes); U. S. Fidelity & Guarantee Co. v. Blum, 270 Fed. 946 (C. C. A. 9th, 1921) (misstep from window ledge); Curry v. Fed. Life Ins. Co., 221 Mo. App. 626, 287 S. W. 1053 (1926) (injury, due to instinctive raising of arm to stop object falling toward insured); Yates v. International Travelers' Assn., 16 S. W. (2d) 301 (Tex. 1929) (asphyxiation due to defective condition of machine used in administering anæsthetic).

fore, seems to have reasoned that the doctor, with the consent of the insured, intended to apply the specific anaesthetic in the very manner employed, to that particular person, and that, since the doctor did everything he intended to do in the manner intended, without any slip or mishap in the doing of the act, the means by which the death resulted was not accidental.[18] In direct contrast to this is the reasoning of *Mutual Life Insurance Co. v. Dodge:* "It is true that the doctor intended to apply the drug and the insured intended that he should apply it; but neither intended to apply it to a body possessed of the idiosyncrasy".[19] Here the court reasons that the doctor intended to apply the anaesthetic to a normal person, and did not intend to apply it to a person with a hypersusceptibility; therefore, something unintended having occurred in the doing of the act, the means employed were accidental.[20] The Pennsylvania court, then, has adopted one viewpoint of "intention", and this federal court another. There is no reconciling these two views; nor can it be said, as a matter of logic or of legal principle, that either is the correct one. It is possible to apply the strict distinction between "accidental death" and death caused by "accidental means" with equal accuracy in following either of these views, although the result reached will of course be entirely different.

Further, not even the same jurisdictions take a consistent stand with regard to this question. Thus, in another Pennsylvania case[21] the court reaches a result which indicates that it reasoned as did the

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[18] *Accord* (hypersusceptibility cases): Wayne v. Travelers' Ins. Co., 220 Ill. App. 493 (1921) (insured, being treated for syphilis, died upon proper administration of morphine. This case may be considered overruled by the Illinois decisions, *infra* note 20); Barnstead v. Commercial Travelers' Mutual Acc. Assn., 204 App. Div. 473, 198 N. Y. Supp. 416 (1923) (death caused by proper administration of nitrous oxide in preparation for tooth extraction).

[19] 11 F. (2d) 486, 488 (C. C. A. 4th, 1926), *certiorari* denied 271 U. S. 677, 46 Sup. Ct. 629 (1926).

[20] *Accord* (hypersusceptibility cases): Schleicher v. General Acc., Fire & Life Ins. Corp., 240 Ill. App. 247 (1926) (death caused by proper administration of nitrous oxide preparatory to extraction of tooth); Vollrath v. Central Life Ins. Co., 243 Ill. App. 181 (1926) (death caused by proper administration of ether in preparation for tonsilitis operation); Taylor v. New York Life Ins. Co., *supra* note 2; Beile v. Travelers' Protective Assn., 155 Mo. App. 629, 135 S. W. 497 (1911) (death caused by skillful administration of chloroform in surgical operation, overruled by Caldwell v. Travelers' Ins. Co., 305 Mo. 619, 267 S. W. 907 (1924); see Collins v. Casualty Co., 224 Mass. 327, 112 N. E. 634 (1916).

[21] Bloom v. Brotherhood Acc. Co., 85 Pa. Super. 398 (1925) (recovery allowed where insured took poison mistakenly given to him in place of medicine by pharmacist). This case cited and followed Pickett v. Pacific Mutual Life Ins. Co., 144 Pa. 79, 22 Atl. 871 (1891), holding that "the death of the insured was caused by external, violent, and accidental means, and without any conscious or voluntary act on his part. No one, knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein", insured having descended into well to repair it. In each of these decisions, as in the principal case, insured voluntarily and without mishap, acted—death resulting because of an unknown existing circumstance.

federal court of the fourth circuit in the *Dodge* case, while in a later decision in the same circuit,[22] the federal court adopted reasoning analogous to that of *Hesse v. Traveler's Insurance Co.*

Since so much confusion results from the two interpretations of intention, and since, as noted above, neither view can be considered the more logical, it seems that a remedy which would tend toward the desirable uniformity must emphasize elements other than that of intention.

It is believed that this may be accomplished by the following lines of reasoning suggested originally in connection with problems different from the one under discussion, but which, it is thought, have a clear application to it. Where an unforeseen and unusual fact or element, knowledge of which would have caused the insured to perform the act in a different manner from that employed, or perhaps to refrain from performing it at all, enters into the circumstances, and such fact is so connected with the means employed as to be part of the means, then such means, though employed voluntarily, becomes accidental.[23] Under this reasoning, the hypersusceptibility of the patient to whom a particular anaesthetic is applied would be an unforeseen and certainly unusual factor, so closely related to the use of the specific anaesthetic upon that patient that it may well be regarded sufficiently bound up with the administration of the anaesthetic as to render such administration the accidental means or cause of the patient's death.

A second possible solution lies in the argument that if the means used are applied exactly in the manner planned and foreseen by the insured, they may still be regarded as accidental if there is present another unusual and unforeseen element, ignorance of some material fact in the situation, which could not reasonably have been foreseen[24] and which, had the insured known of its presence, would have induced him to perform the act in a manner different from that employed, or perhaps to refrain from performing it at all.[25] Under this reasoning, the problem in the hypersusceptibility cases would be answered by saying that the unusual and unknown element is the hypersusceptibility of the patient. It is of no particular importance

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[22] Lyon v. Travelers' Protective Assn., *supra* note 10 it was held: "Death was caused, not by the fact that deceased accidentally or unintentionally got off of the road, but by the fact that he overexerted himself in trying to get into the road." Consistency of reasoning would here have required the court to hold that the insured intended to act, but did not intend to act in such manner as to lead to overexertion.

[23] See International Travelers' Assn. v. Francis, *supra* note 3, at 285.

[24] Whether or not the negligence of the insured is a defense available to the insurer, is a problem not within the scope of this note. It seems certain, however, that under this solution, it is a requisite that the material fact which is actually unknown be such a fact as would be unknown to a reasonable man in the insured's circumstances.

[25] BULLITT, ACCIDENTAL MEANS 23 (Address delivered before Association of Life Insurance Counsel, December 27, 1927).

insofar as result is concerned, which of these two lines of reasoning is adopted, since the conclusion reached will be the same whichever is employed. Under the first, the unknown element is regarded as *part of the act itself;* under the second, the unknown element is not regarded as part of the act, but is *itself considered the accidental cause of death.* The latter view, then, would really be an exception to the well established rule that to constitute accidental means there must be something unforeseen in the *doing of the act.* This being the case, it is submitted that, for the sake of simplicity in a problem already sufficiently complex, it is preferable to adopt the former line of reasoning. That the hypersusceptibility of a patient is actually part of the act of administering the anaesthetic may be illustrated in the following manner: the anaesthetizing of a patient obviously involves two elements, one, the anaesthetic, the other, the patient—and the act of anaesthetizing consists of bringing these two elements into contact with each other. If there were some unknown defect in the machine with which the anaesthetic was administered, such as a leakage causing the patient to suffocate, it could not be doubted that this death was caused by accidental means.[26] Why then, should the reasoning be any different where the unknown circumstance is present in the other element of the act, that is, the patient. It is submitted that no logical distinction can be drawn and that the latter rationalization is the preferable one, since it logically regards the hypersusceptibility of the patient as the unforeseen element in the *doing of the act,* and thus does not necessitate the deviation from the rule which the adoption of the alternative view would require.

Comparing the suggested theory with the rule of intention adopted by the Supreme Court of Pennsylvania in the *Hesse* case, it must be conceded that the latter view at least permits courts to take a consistent stand on all situations which come before it with little difficulty. It necessitates only a brief charge to the jury and a little speculation upon the evidence to determine the exact physical act or acts which the insured performed or authorized to be performed upon him. This is all that need be ascertained to declare such his "intended" acts under this view. It becomes unnecessary to consider whether any unknown element exists, or whether such element is so much a part of the voluntary act as to constitute the act the accidental means. However, this facility of treatment is attained at the expense of what would actually seem to be within the fair and reasonable contemplation of the parties. There would be excluded from the field of recovery under an accident insurance policy a great mass of cases in which the overwhelming weight of authority holds the insurer liable.[27] Indeed, it would be difficult to see how, with any consistency, courts could allow recovery in any cases in which the injury

[26] Yates v. International Travelers' Assn., *supra* note 17.

[27] U. S. Casualty Co. v. Griffis, 186 Ind. 126, 114 N. E. 83 (1916); Johnson v. Fidelity & Casualty Co., 148 Mich. 406, 151 N. W. 593 (1915); Newsoms v. Commercial Casualty Ins. Co., 147 Va. 471, 137 S. E. 456 (1927).

is due to the voluntary conduct of the insured. There would, of course, be no recovery in any situation in which the insured ostensibly acted voluntarily and without slip or mishap in the actual physical performance of the act, despite the fact that there was present some unforeseeable element which actually controlled the nature of the result. Yet it would seem that it is primarily to guard against the situation where some unforeseen element in conjunction with the insured's conduct is the means of death or injury, that the insured takes out an accident policy. A recognition of this fact and of the injustice that would be perpetrated in many cases by a strict, unequivocal adherence to this rule, may be found in the vacillations of courts, like the Supreme Court of Pennsylvania, between the one view in situations like those present in the hypersusceptibility cases and the other in the various other types to which reference has already been made.[28] A departure from this view, therefore, seems timely and desirable.

To this point the discussion has centered upon the problems facing those courts which are seriously endeavoring to apply the distinction between "accidental death" and death by "accidental means". The solutions offered supply, it is hoped, some basis for a rationalistic treatment of the issues raised.

It is not to be supposed, however, that there is universal adherence, even to the very general and seemingly incontrovertible proposition that there is a distinction to be drawn between "accidental death" and death by "accidental means". Those cases in which courts have not made any such differentiation may be divided into three groups: those courts which do not seem to realize that there is any clear-cut distinction; those which believe that is one and so state, but then, in attempting to apply the distinction to the particular facts before them, become completely confused between the means and the result; and those which, realizing that there is such a distinction and seeing its full legal significance, frankly disavow and refuse to apply it.

The first group [29]—those in which the court does not seem to realize that there is any real distinction at all, or in which courts, cognizant of some distinction, define the one in terms of the other—for the most part use the terms interchangeably in their opinions.[30] Such decisions are particularly harmful to an ultimate rationalization in

[28] *Supra* page 765.

[29] Western Commercial Travelers v. Smith, 85 Fed. 401 (C. C. A. 8th, 1898); Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 132, 73 Pac. 1028 (1903); Dondeneaw v. State Ind'l Acc. Comm., 116 Ore. 76, 249 Pac. 820 (1926) (workman's compensation case); for later cases, see *infra* note 30.

[30] 6 COOLEY, BRIEFS ON INSURANCE (2d ed. 1928) 5234: "Accidental means are those which produce effects which are not their natural and probable consequences," cited in a great many cases, *e. g.*: Continental Casualty Co. v. Willis, 28 F. (2d) 707, 709 (C. C. A. 4th, 1928); Vollrath v. Central Life Ins. Co., *supra* note 20, at 187; Rowe v. United Commercial Travelers, 186 Iowa 454, 464, 172 N. W. 454, 457 (1919); see International Travelers' Ass'n v. Francis, *supra* note 3, at 284.

judicial treatment of the standard accident insurance policy in that they cite indiscriminately cases decided on the basis of "accidental means" and those decided as "accidental result". It seems unquestionable that there is a distinction; therefore, however correct or just the results in a particular case of this group, each one adds to the general confusion and uncertainty.

The second group of cases—those which usually faultlessly state as a matter of law the correct distinction between "accidental death" and death by "accidental means", but then, in applying the tests established, proceed to interchange and confuse the two—constitute a more considerable and more important body of authority.[31] These cases condemn themselves in that, immediately after acknowledging the desirability of making the distinction and after stating correctly the difference in the significance of the two terms in a policy, they then proceed to use them indiscriminately.

Several cases in a few jurisdictions have substantially repudiated the distinction between death by "accidental means" and "accidental death".[32] These constitute the third group classified above.[33] They believe that "such refinement may be indulged in as a matter of intellectual pleasure" feeling that "in the practical adjustment of the rights of the parties to an insurance contract it ought not to be given much weight".[34] This view, which fully realizes that the distinction does exist but refuses to apply it, bases such refusal upon the following reasoning: "Our point of view . . . must be that of the average man. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts".[35] There is considerable justification for saying that the average man does not know or realize that there is any distinction between these two terms. As one court has asserted: "If an insured at the time he applies for accident insurance, was made to understand that his right to recover would hinge upon such fine distinctions as the difference between 'an accidental death' and death by 'accidental means' he would probably conclude that the purchase of such a policy would be, a hazardous investment and one which he ought not to make".[36] Since the in-

[31] Higgins v. Midland Casualty Co., 281 Ill. 431, 118 N. E. 11 (1917); Clarkson v. Union Mut Casualty Co., 201 Iowa 1249, 207 N. W. 132 (1926); see Brown v. Continental Cas. Co., 161 La. 229, 108 So. 464 (1926).

[32] Interstate Business Men's Assn. v. Lewis, 257 Fed. 241 (C. C. A. 8th, 1919); Lewis v. Ocean Acc. and Guaranty Corp., Ltd., 224 N. Y. 18, 120 N. E. 56 (1918); Continental Cas. Co. v. Clark, 70 Okl. 187, 173 Pac. 453 (1918); Carter v. Standard Acc. Ins. Co., 65 Utah 465, 238 Pac. 259 (1925).

[33] *Supra* page 768.

[34] Interstate Business Men's Assn. v. Lewis, *supra* note 32, at 243.

[35] Lewis v. Ocean Acc. & Guaranty Corp., Ltd., *supra* note 32, at 21, 120 N. E. at 57.

[36] Carter v. Standard Acc. Ins. Co., *supra* note 32, at 504, 238 Pac. at 275.

sured is a party to the contract and since it is an accepted doctrine in the construction of insurance policies that they are to be construed most strongly against the insurer,[37] these courts conclude that no such distinction should be drawn in determining the right of the insured to recover.

This view clearly has the advantage of obviating the complicated reasoning incident to the proper application of the distinction. Also there can be no doubt that it does, to a considerable extent, give effect to the average man's conception of his "accident insurance policy".[38] However, it is obviously open to many objections. In the first place, it goes to the extreme, opposite to that previously noted [39] in that, if the court follows the view to its logical conclusion, it will allow recovery in so many situations that, of necessity, the utility of accident insurance would be greatly decreased. The widened field of risk would necessitate such an increase in insurance rates as to make it prohibitive for the average man to procure this type of protection.

Secondly, the insurance company is also a party to the contract and it is difficult to see just why its understanding of the meaning of the policy should not also be given some weight. The rule of construction, if accurately applied, affects only ambiguities in the contract and it seems to be giving the rule too great a weight to employ it in such a manner as to give no effect whatever to the intent of one of the parties to the contract.[40]

Finally, this solution raises new problems which lead to the conclusion that it is not so convenient a formula as it at first seems. The question arises first as to whether this rule shall apply in instances where the insured knew, at the time of making the contract, that there is a distinction between "accidental death" and death by "accidental means". If the answer is that clearly he should not recover, this raises a whole new host of problems of evidence: the determination in each case of whether the insured did actually know there is a distinction; if he did, whether he understood it; and so on. In a subject so complicated already, it needs little argument to establish the desirability of not borrowing a new mass of problems from other fields of the law.

In conclusion, it seems indisputable that, the insurance policy being a contract between the insurer and the insured, the term "accidental means" must be given full effect. This necessarily involves a recognition of the distinction between "accidental death" and death by "accidental means" and precludes recovery under the policy for the former. Accepting this as the premise, then, any attempted solution of this problem next requires a consideration of the conflict be-

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[37] *Supra* note 13.

[38] It is interesting to note, however, that the view has been expressed that this distinction is clearly understood by the average policy holder, Pope v. Prudential Ins. Co., 29 F. (2d) 185, at 186 (1928).

[39] *Supra* page 767.

[40] Rosenthal v. American Bonding Co., 207 N. Y. 162, 100 N. E. 716 (1912).

tween the two viewpoints of "intention" which courts have taken in attempting to apply the distinction between "accidental death" and death by "accidental means." There seems to be no reconciling these two views and it is submitted that the true solution lies in a reallocation of the emphasis, placing it rather upon whether there is any unknown and unforeseen element which is sufficiently connected with the voluntary act of the insured to constitute a part of it and therefore render the act the accidental means of the injury or death. It is undoubtedly true that, inasmuch as the insurance company's legal and technical experts have drawn up the contract, justice to the insured demands that, in accordance with well-recognized contract principles, the policy be construed most favorably to him. However, this alone cannot warrant the position taken by those courts which look to the result rather than the means either because of a neglect to differentiate clearly between the two, or a refusal to do so. If it is desired, out of sympathy for the insured or in an attempt to give to the words in the policy the meaning attached to them by the average policyholder, to reach this result, it may be done just as effectively and with fewer confusing consequences by means of statutes clearly setting forth type forms of insurance policies and stating the legal signification attaching to them. It must be remembered, however, that from the viewpoint of social utility, the effect of a too liberal construction of the insurance policy would be offset by the consequent prohibitive cost of such protection. This being so, proper judicial appreciation requires that the contractual nature of the policy should be the controlling factor.

JURISDICTION BASED ON AGENT'S OPERATION OF VEHICLE WITHIN THE STATE—The recent case of *Gesell v. Wells*[1] presents an interesting variation of the general subject of jurisdiction over a non-resident vehicle owner. Suit was instituted in a New York court for damages arising out of an automobile accident within the state. At the time of the accident the minor son of the owner of the car was driving it with the latter's family. The defendant owner, a resident of Wisconsin, had never entered the state of New York. Service was made upon the Secretary of State as his agent in accordance with a local statute.[2] After much delibera-

[1] 236 N. Y. Supp. 381 (1929).

[2] The New York statute provides as follows: "The operation by a non-resident of a motor vehicle on a public highway in this state shall be deemed equivalent to an appointment by such non-resident of the secretary of State to be his true and lawful attorney, upon whom may be served the summons in any action against him growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on such a public highway; and such operation shall be deemed a signification of his agreement that any summons against him shall be of the same legal force and validity as if served on him personally within the state." Laws of 1928, c. 459. The statute has been subsequently amended. See Laws of 1929, c. 54, § 52. The following states have adopted statutes of like tenor: Conn., 1925 Pub. Acts,

tion [3] the court held that jurisdiction over the father existed.[4] In view of the fact that he was never within the state a scrutiny of the decision seems appropriate.[5]

Among the constitutional objections raised it has been claimed in the first place that the due process clause [6] is violated. This argument may be disposed of without a great deal of difficulty. The Supreme Court has held [7] that the state in the exercise of its police power may deny a non-resident the privilege of the use of its highways until he has executed a power of attorney authorizing a state officer to receive summons for him. The elimination of the formal power of appointment moreover is immaterial as far as due process is concerned; [8] the status of the state officer as agent arises by reason of the mere *operation* by the non-resident of a car within the jurisdiction. But the state may not exclude the non-resident as such; [9] it is the fact that he is driving the car that is the important thing, and

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c. 122; Md., Laws of 1929, c. 254; Mass., 1923 Mass. Stat., c. 431, amended 1928 *ibid*, c. 344; Mich., Pub. Acts 1929, No. 80; Minn., Laws of 1927, c. 409; N. H., 1925 Pub. Acts, c. 106; N. J., 1924 N. J. Laws, c. 232, held unconstitutional in Wuchter v. Pizutti, 276 U. S. 13, 48 Sup. Ct. 259 (1928) and amended by P. L. 1927, c. 232. See Dwyer v. Volmar Trucking Corp., 146 Atl. 685 (N. J. 1929) applying this amendment. See also (1929) 78 U. OF PA. L. REV. 275. Okla., Session Laws of 1929, c. 125; PA., 1929 P. L. 1721, sec. 563; S. D., Session Laws 1929, c. 182; Wis., 1925 Wis. Laws, c. 94.

[3] An opposite conclusion, setting aside the service, was at first reached, and the opinion so holding was published in 236 N. Y. Supp. 87, and 134 Misc. Rep. 331 (1929). This opinion was subsequently withdrawn however and replaced by that cited *supra* note 1.

[4] In the instant case the court based its holding upon the case of O'Tier v. Sell, 226 App. Div. 434 (N. Y. 1929). The sole question there involved was whether the statute, *supra* note 3 should be construed to apply to the operation of the car by an agent, *the owner having brought the car into the jurisdiction himself*. The court held in the affirmative. This decision has since been reversed on appeal, 252 N. Y. 403 (1930), but this reversal does not affect the instant case as the Court of Appeals held that the driver of the car was not the agent of the owner at the time and therefore the statute did not apply. It is intimated that the statute still applies to the operation of the car by one who is an agent as well as to the non-resident himself. *Ibid* at 403. Several of the statutes cited *supra* note 3 specifically include the operation of a car by an agent. The Pennsylvania Statute includes within its operation "Non-resident operators or owners . . . operating or having the same operated within the commonwealth". The words "operation by himself or agent" are embodied in the Mass., Minn., and S. D. statutes, while the Md., and Conn. statutes contain the words "While operating or causing to be operated".

[5] See also (1930) 43 HARV. L. REV. 492.

[6] U. S. CONSTITUTION, 14th Amendment.

[7] Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916).

[8] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927). Due process requires a method of notification reasonably calculated to give the defendant personal knowledge of the pendency of the action, Wuchter v. Pizzutti, *supra* note 3. As to what constitutes sufficient notice see Friedman v. Poirer, 134 Misc. Rep. 253, 236 N. Y. Supp. 96 (1929), Jones v. Paxton, 27 F. (2d) 364 (D. C. Minn. 1928), and Schilling v. Odleback, 177 Minn. 90, 224 N. W. 694, 696 (1929).

[9] Flexner v. Farson, 248 U. S. 289, 290 (1919).

it would therefore follow that under its police power it might deny *anyone* the right to drive the car within the jurisdiction [10] until execution of such power of attorney by the owner *and this although the owner never comes within the state.* Hence, where the owner consents to his car being driven into the state, the state might make the entrance of the car within the jurisdiction result in the agency of the state officer, no matter who the driver.

It may also be argued that such statutes violate the "equal privileges and immunities" provision [11] of the constitution. The answer is clear. They merely serve to put the non-resident upon an equal basis with the resident [12] in subjecting him to suits arising out of the operation of his car within the jurisdiction, and though service upon them is not effectuated in the same manner, this is not necessary.[13] Under the decision in the instant case the non-resident as well as the resident is now subject to the jurisdiction of the courts of the forum in a cause of action arising out of the operation of his car within the jurisdiction though he himself be absent from the state.

There is one more objection that must be met if the holding of the principal case is to be sustained. As a general rule statutes can have no extra-territorial effect,[14] but must be confined to acts done within the jurisdiction.[15] Here the non-resident has not only done no act, but has never been within the jurisdiction. However a state may attach legal consequences to an act or acts caused within its limits by one in another state.[16] Thus if a principal send his agent into another state with authority to make a contract for him, he will be bound according to the laws of the latter state irrespective of those of the former.[17] By sending his agent into the jurisdiction

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[10] It has been said that the state might entirely forbid the use of automobiles upon its highways. See Yellow Taxicab Co. v. Gaynor, 159 App. Div. 893, 894 (N. Y. 1913) quoting People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530 (1913).

[11] Article 4, sec. 2, and the 14th Amendment. The purpose of these two provisions is the same. The Slaughter House Cases, 16 Wall. 36, 75 (1872).

[12] Kane v. New Jersey, *supra* note 7, at 167.

[13] Absolute equality is not called for by this provision of the constitution. Its purpose is to avoid discrimination. COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927), 46. Also see Ward v. Maryland, 12 Wall. 418, 431 (1870).

[14] RORER, AMERICAN INTERSTATE LAW (2d ed. 1893), 226. Whitford v. Panama R. R. Co., 23 N. Y. 465 (1861). CONFLICTS OF LAWS RESTATEMENT (Am. L. Inst. 1926), § 74.

[15] CONFLICTS OF LAWS RESTATEMENT, *supra* note 14, § 69. With the exception of acts of its citizens in other jurisdictions, *ibid.* § 68.

[16] Chatenay v. Brazilian L. T. Co., (1891) 1 Q. B. 79, Baldwin v. Gray, 4 Mart. N. S. 192 (La. 1826), *semble.* CONFLICT OF LAWS RESTATEMENT, *supra* note 14, §§ 70-74. "When a person in one state acts through an agent sent by him into another state for that purpose he is bound by the agent's act according to the law of the state where it is done, *ibid.* § 72.

[17] Smith v. Frame, 3 Ohio C. C. 587 (1889), Thompson v. Taylor, 66 N. J. L. 253, 49 Atl. 544 (1901); Baum v. Birchall, 150 Pa. 164, 24 Atl. 620 (1892). Though the contract may not be enforced in another state if contrary to public policy, First National Bank v. Shaw, 109 Tenn. 237, 70 S. W. 807 (1902).

he has submitted himself to its laws governing the consequences of the agent's acts.[18] Whether or not he consents to their application is immaterial,[19] consent to the act of the agent in that particular state is all that is necessary for its laws to govern.[20] Though no cases have been found applying the same principles to a tort of an agent in another jurisdiction,[21] it is submitted that the same result should undoubtedly follow as far as the jurisdictional question is concerned. The *lex loci delicti* governs tort liability [22] just as the *lex loci contractus* governs contractual liability,[23] and as a statute of the instant type is one of the *leges loci delicti* consent by the non-resident to the use of his car within the jurisdiction is all that is necessary for the statute to affect him.

It might seem that the case of *Flexner v. Farson* [24] is inconsistent with this power of the state to attach legal consequences to acts caused within its limits. However the decision does not deny such

[18] "If I, residing in England, send down my agent to Scotland and he makes contracts for me there, it is the same as if I myself went there and made them". Per Lord Lyndhurst in Pattison v. Mills, 1 Dow. & Clark 342, 363, quoted with approval in Milliken v. Pratt, 125 Mass. 374 (1878).

[19] "The mere fact that she signed these notes (in Wisconsin) . . . with the possible mental reservation of nevertheless preserving her freedom from liability by reason of the Wisconsin law as to coverture is insufficient to overrule the well established rule that by promising to pay in Illinois she binds herself by the law of that state". Jefferis v. Kanawha Fuel Co., 182 Wis. 203, 196 N. W. 238 (1922). But *cf.* Union National Bank v. Chapman, 169 N. Y. 538, 545, 62 N. E. 672 (1902). See also WHARTON, CONFLICTS OF LAWS (3rd ed. 1905), 1091, 1092.

[20] Thus if a principal authorize an agent to make a contract in one state but the agent does so in another, the law of the latter state cannot impose liability upon the principal. Basilia v. Spagnuolo, 80 N. J. L. 88, 77 Atl. 531 (1910). See also Union National Bank v. Chapman, *supra* note 19. CONFLICT OF LAWS RESTATEMENT *supra* note 14, § 74. *Cf.* Hauck Clothing Co. v. Sharp, 83 Mo. App. 385 (1900).

[21] In Poti v. New England Road Machinery Co., 83 N. H. 232, 140 Atl. 587 (1928) and Dwyer v. Volmar Trucking Corp., *supra* note 3, the owner's car was driven into the jurisdiction by an agent, but in neither case does the court discuss this factor. There are of course cases in which agency is not involved where the negligence occurs in one state and the injury results in another. In such instances the cause of action arises in that state in which the injury occurred. Alabama R. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Cameron v. Vandegriff, 53 Ark. 381, 13 S. W. 1092 (1892); El Paso & N. W. Ry. Co., v. McComas, 72 S. W. 629 (Tex. Civ. App. 1903).

[22] Holland v. Park, Peck, 151 (Tenn. 1823); Carter v. Good, 50 Ark. 155, 6 S. W. 719 (1887); The Lamington, 87 Fed. 752 (1898); McCleod v. Conn. & Pass. Ry. Co., 58 Vt. 727 (1886). The English Rule however is that the tort must have been actionable in England as well as unjustifiable by the *lex loci*, Phillips v. Eyre, L. R. 4 Q. B. 225 (1870).

[23] "If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts just the same as in contracts in respect to the legal effects and incidents of the acts." Chase, J., in Beacham v. Proprietors of Portsmouth Beach, 68 N. H. 382, 40 Atl. 1066 (1896).

[24] *Supra* note 9. In this case the Supreme Court held unconstitutional a statute providing for service upon an agent in causes of action against his non-resident principal which arose from the transaction of business within the state.

power, it merely limits it in respect to the act of carrying on business since that is one of the privileges of the citizens of the several states which cannot be controlled by a state. The distinction would seem to be that the operation of a car is a dangerous act [25] while that of carrying on business is not, and the state may go further in regulating the former than the latter.[26]

No new question would be raised as regards the Interstate Commerce clause.[27] If the statute does not constitute an unwarrantable interference with interstate commerce when the owner is engaged in carrying on such business, it could no more be so when the agent is engaged in interstate transactions.

So far the discussion has been limited to the acts of an agent within the jurisdiction. Had it not been for the fact that New York [28] has repudiated the so-called "family purpose doctrine" [29] the facts of the principal case would undoubtedly have called for its application. New York bases the liability of a parent for the negligent driving of his car by a member of the family on pure agency grounds.[30] Here there is no difficulty, nor is there difficulty where the law of agency is distorted to reach a result deemed desirable. It is where agency is disregarded and liability grounded solely upon "natural justice" [31] that the problem arises. Can the law of the forum impose liability upon the non-resident parent under such circumstances? If so, can a personal judgment be rendered against him by means of the service provided by the statute? This is virgin soil.[32] However, the agency through which an act is caused within another state need not always be the relationship of principal and agent in order for that state to attach legal consequences to the act.[33] It is therefore sub-

[25] See Hess v. Pawloski, *supra* note 8, at 356.

[26] See CONFLICT OF LAWS RESTATEMENT, *supra* note 14, § 90; Scott, *Jurisdiction over Non-Resident Motorists,* 39 HARV. L. REV. 563, at 582 *et seq.*

[27] Though there has been no actual decision holding in terms that such a statute is not an unconstitutional burden on interstate commerce, yet the requirement of an actual execution of a power of attorney to receive service of summons may be imposed as a condition to a non-resident's use of the state highways without conflicting with the commerce clause. Kane v. New Jersey, *supra* note 7. It would therefore seem that the same result should be reached in a case involving a statute of the instant type.

[28] Van Blarcom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917) especially at 444, 445.

[29] It is not the purpose of this note to discuss the nature of this doctrine. For such discussions see note, (1920) 20 COL. L. REV. 213; note, (1922) 36 HARV. L. REV. 102.

[30] Van Blarcom v. Dodgson, *supra* note 28, at 444. See also Smith v. Jordan, 211 Mass. 269, 97 N. E. 76 (1912); Clawson v. Shroeder, 63 Mont. 488, 495, 208 Pac. 924, 926 (1922).

[31] King v. Smythe, 140 Tenn. 217, 225, 204 S. W. 296, 298 (1918).

[32] See CONFLICT OF LAWS RESTATEMENT (Amer. L. Inst. 1928), § 418, at p. 63-64.

[33] Thus the shareholder of a corporation who resides in one state may be held liable under a statute of another state imposing personal liability for corporate debts on all shareholders of corporations doing business within the

mitted that the same considerations should govern, namely, that if the father consents to the use of the car within the jurisdiction by a member of the family he thereby submits to the laws of that jurisdiction as respects the operation of the car, both to the common law governing substantive liability,[34] and to the statute as to service upon a state officer as his agent. Mere consent to the use of the car without knowledge that it is to be driven into the state is insufficient. *A fortiori* if the car were taken without the consent of the owner he could in nowise be affected by the law of another state into which it might be driven.

The decision in the instant case did not go this far. It is based upon agency, and had actual consent on the part of the father been shown the result would undoubtedly have been correct. Consent however was presumed under a New York rule of law, and it is submitted that in the absence of a showing of actual consent to the use of the car within the jurisdiction the laws of New York could not affect the non-resident.

R. W. H., Jr.

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state. Thomas v. Mathiesson, 232 U. S. 221, 34 Sup. Ct. 312 (1914). But the shareholder must have consented to or authorized the transaction of the business in that state. Risdon I. & L. Works v. Furness, [1906] 1 K. B. 49. See also Pinney v. Nelson, 183 U. S. 144, 22 Sup. Ct. 52 (1901).

[34] *Cf.* CONFLICTS OF LAWS RESTATEMENT, *supra* note 32.