that case from the one at bar. In the *Shaw* case there was an executed contract, while in the present case it was wholly executory. Furthermore the suit in that case was instituted by a mortgagor, attempting to assert a right of redemption after its release pursuant to the terms of the contract, whereas here the mortgagor was endeavoring to extinguish the mortgage indebtedness by his parol contract so as to deprive the mortgagee of his status as a creditor of the estate entitled to letters of administration. The effect in the latter case is to force into the mortgagee an interest in lands.

The Ohio Supreme Court has expressly recognized the distinction between an executed and executory contract in question involving the statute of frauds. Although the former has been held enforceable, the latter has been expressly declared unenforceable as being within the statute. *Bumiller* v. *Walker*, 95 Ohio St. 344, 116 N.E. 797, L.R.A. 1918B (1917). Therefore, authority does not sustain an estoppel based solely on an executory parol contract where neither party has substantially relied, and since application of the concept of locus of title has been subordinated to the view that the equity of redemption is an interest in land which cannot be transferred without a writing, it would seem that the appellate court erred in permitting the morgage debt to be extinguished. The practical effect of the decision is to allow a transfer of an interest in land in contravention of the statute.

ROBIN W. LETT.

NEGLIGENCE

LIABILITY OF INSURANCE COMPANY WHEN DRIVER OF CAR IS FOUND GUILTY OF WILFUL MISCONDUCT

Louis Brinsky, a passenger in a truck owned and operated by Meyer and Silekovitz, was injured in a collision with a truck owned by the Fro-Joy Baker-Tabor Ice Cream Company. The Common Pleas Court of Lake County found Meyer and Silekovitz guilty of wilful and wanton conduct, thereby taking the case out of the operation of the Guest Act (Ohio Gen. Code 6308-6) and allowed recovery. Brinsky then filed a supplemental petition against the defendant, the American Casualty Company, alleging that Meyer and Silekovitz carried a liability policy which obligated the defendant to pay the judgment. The policy contained a clause relieving assured from "liability imposed by law upon the assured, for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered or alleged to have been suffered by any person. . . ." *Held*, Defendant insurance company is not liable

since judgment against the assured was not one for injuries accidentally suffered. *American Casualty Company* v. *Brinsky*, et al., 51 Ohio App. 298, 2 Ohio Op. 146, 200 N.E. 654 (1934).

The distinction between negligence and wilful and wanton misconduct has been clearly established in Ohio. A wilful act is one in which the party acting intends to bring about a certain result. A negligent act is one in which the party acting fails to come up to a required standard of care. A wanton act, on the other hand, is one in which the actor proceeds in a certain course of action knowing of the danger that his conduct is likely to entail to others. *Reserve Trucking Company* v. *Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934); *Universal Concrete Pipe Co.* v. *Bassett*, 130 Ohio St. 567, 5 Ohio Op. 214 (1936); 2 Ohio St. L.J. 315.

The Ohio Guest Statute has relieved the driver of a car (and, incidentally, his insurance company) of all liability for injuries to a guest except those sustained as a result of the wilful or wanton misconduct of the driver (Ohio Gen. Code 6308-6).

A fortiori, the principal case, by refusing to allow injuries received as a result of wilful or wanton misconduct to come under the provision of a liability policy, has completely relieved the insurance company of liability for injuries received by a guest of a policy holder.

It should be noted, however, that the principal case is noncommittal on the question of whether or not injuries caused by the *wanton* misconduct of a driver would be accidentally suffered. The jury declared the driver guilty of wilful *and* wanton conduct so the appellate court discussed the problems as if the driver had been guilty of wilful conduct alone. Thus, it is possible that the decision of the principal case might be avoided if a jury should declare a car owner guilty of only wanton conduct. The later case of *The Universal Pipe Co.* v. *Bassett*, *supra*, will indubitably facilitate this result since the sharp distinction that it draws between wilful misconduct and wanton misconduct shows clearly that a finding joining the two concepts would be inconsistent. So here it might be considered that the finding of wilful *and* wanton misconduct was inconsistent in that the jury, in effect, found that, first, the defendant did the act deliberately, and, second, that he acted recklessly without caring what the result might be.

Aside from this, however, the instant case is still open to considerable criticism. The verdict of the jury declared the driver guilty of wilful conduct. The appellate court considered this to mean that the driver acted with an intent to bring about a certain result—that he deliberately collided with the truck in front of him. The question arises—is that the real meaning of the word "wilful" as it is used in the legal sense?

Perhaps, in theory "wilful" necessarily implies intent but in case law examples of strict adherence to the theoretical meaning have been rare. More often in a case such as this, "wilful" is held to be the deliberate driving of the car in a certain way. In the case of *Loveless* v. *Kirk*, 34 Ohio L.Rep. 175 (App.) (1930), mere failure of a driver of a car to use ordinary care after observing plaintiff, a pedestrian, in the street ahead was styled a "wilful conscious wrong" and the contributory negligence of the plaintiff was no defense to the suit. In *Cleveland, C. C. and St. L. Ry. Co.* v. *Starks*, 58 Ind. App. 341, 106 N.E. 646 (1914), the complaint was held to charge a wilful injury when defendant's train failed to stop or give warning signals after the defendant became aware of decedent's buggy on the track ahead. In the instant case it seems absurd to say that the driver of the car had the actual intent to collide with the truck owned by the ice cream company, especially, as such collision would quite probably cause injury to himself.

For the purposes of discussion let us concede that the driver had such an intent. Does it necessarily follow that the intent was directed against the passenger, as the court assumes? Does it follow that there was a specific intent to injure the guest? This seems even less plausible. In a large number of cases in which the conduct of a person has been characterized wilful, the act which was the cause of the damage was deliberate but the resulting consequences were not intended or expected. In *Lobdell Car Wheel Co.* v. *Subielski*, 2 W. W. Harr. (Del.) 462, 125 Atl. 462 (1924), it was held to be such a wilful act as to prevent recovery under the compensation act of Delaware when the employee removed his goggles after being ordered to wear them at all times. In that case the claimant did not intend or expect that his eyes should be damaged by flying steel. So here it is difficult to believe that the driver had an actual intent to injure his guest.

Again for the purposes of discussion let us assume the improbable, that the car owner deliberately collided with the truck ahead with the intent to injure the passenger riding with him. Even under this assumption the decision of the court is questionable as it is based upon a case that is clearly not in point. The instant case was based wholly upon *Commonwealth Casualty Co.* v. *Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928). There the driver of a taxi-cab committed a battery on a passenger. The court held that the insurance company was not liable to the taxi-cab company for the costs of defending the suit because the injuries were the result of a personal assault, and not an accident. Surely there cannot be derived from this case the proposition of law that an intentional injury cannot be an accident as the word is used in an insurance policy.

There seems to be no other Ohio cases except *Commonwealth Cas-*

ualty Co. v. *Headers, supra,* in which this question has been considered. It is settled law in other jurisdictions, however, that, in the absence of any policy provision on the subject, an injury inflicted upon the insured by a third person, designedly and intentionally so far as the actor is concerned, is an accident as to him and authorizes a recovery under an accident policy, *Travelers' Ins. Co.* v. *Wyness,* 107 Ga. 584 (3), 589, 34 S.E. 113 (1899); *American Accident Co.* v. *Carson,* 99 Ky. 441, 36 S.W. 169, 34 L.R.A. 301, 59 Am. St. Rep. 473 (1896); *Newsome* v. *Travelers' Ins. Co. of Hartford, Conn.,* 143 Ga. 785, 85 S.E. 1035 (1915); *General Accident, Fire and Life Assur. Corporation* v. *Hymes,* 77 Okla. 20, 185 Pac. 1085 (1919); 14 R.C.L. 1260; 22 Ohio Jur. 661.

This concept must be distinguished from a situation in which the injury has been the result of the intentional act of the person claiming under the accident policy. In that situation it is settled law that the injury is not the result of an accident. *New Amsterdam Casualty Co.* v. *Johnson,* 91 Ohio St. 155, L.R.A. 1916B 1018, 110 N.E. 475 (1914).

It should also be noted that if the injury intentionally inflicted by a third party has been the result of some act of provocation on the part of the insured he is precluded from recovery under an accident policy. *Hutton* v. *States Accident Ins. Co.,* 267 Ill. 267, 108 N.E. 296, L.R.A. 1915E (1915); *Prudential Casualty Co.* v. *Curry,* 10 Ala. App. 642, 65 So. 852 (1914).

In view of the body of law contrary to the principal case and the rather dubious basis on which it was predicated, it is difficult to believe that the instant case represents the settled law of Ohio on this important point. It would seem more likely that if the question should be carried to the court of last resort, it would be decided in conformity with the settled law of other states, viz., that an accident insurance policy covers a situation in which the insured is injured as a result of the intentional act of a third party. From this it would follow that an insurance company would be held liable under a liability policy for injuries to a guest occasioned by the wilful or wanton misconduct of the driver.

GEORGE BAILEY.

LIABILITY OF AN EMPLOYER FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR

Defendant corporation owned a clothing store in front of which, and overhanging the sidewalk, was an electric sign. The defendant contracted with the Power Co. to keep the sign in repair. The obliga-