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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—
WHETHER OR NOT A BOY SCOUT, INJURED ON SCOUTMASTER'S TRAILER
WHILE ASSISTING IN COLLECTION OF WASTE PAPER, IS WITHIN COMPRE-
HENSION OF A "GUEST" STATUTE—In the case of *Vest v. Kramer*,¹ the
Supreme Court of Ohio was confronted with a question concerning the
right to recovery by a twelve-year old boy scout for injuries sustained by
him while riding in the scoutmaster's trailer and assisting in a scrap

¹ 158 Ohio St. 78, 107 N. E. (2d) 105 (1952). Taft, J., wrote a dissenting opinion
concurring in by Middleton and Matthias, JJ.

paper drive for the benefit of his scout troop.² Two separate actions were instituted, one by the minor boy scout, acting by his next friend, for the personal injuries, the other by his father for loss of services. The actions were consolidated for trial and, at the conclusion of the opening statement on behalf of plaintiffs, the defendant moved for judgment, which motion was granted. On plaintiffs' appeal to the Ohio Court of Appeals, that court reversed and remanded the cause for further proceedings. The Ohio Supreme Court, on the allowance of defendant's motion to certify the record, although divided four to three, in turn affirmed the judgment of the Court of Appeals, holding that the plaintiff was not a "guest" within the meaning of the Ohio "guest" statute³ at the time the accident occurred.⁴

The Ohio Supreme Court described three possible relationships which might have existed between plaintiff and defendant. It concluded that (1) the plaintiff might have been rendering service to the defendant who had taken over the job of transporting the papers for the troop; (2) that the plaintiff and the defendant might have been jointly and mutually interested in the project of picking up and transporting the papers; or (3) that plaintiff and defendant might have been fellow workers for the troop in prosecuting the paper collection project. Although it proceeded to discuss each of these three possible relationships individually, it did not actually decide that any particular one existed, but arrived at an identical

² The facts disclosed that the paper collection was being conducted to raise money for the troop and was under the supervision and direction of defendant, an assistant scoutmaster. The transportation consisted of a two-wheeled utility trailer attached to an automobile owned by defendant and under his control. The collection had progressed to the point where the trailer was filled to capacity, so the plaintiff, and other boys, at defendant's direction, climbed on the trailer for the purpose of pressing the papers into place. The defendant started his car and moved the trailer a short distance, then reduced his speed as some of the papers had fallen off. The plaintiff jumped down, replaced the dislodged papers, and was climbing back on the moving trailer when defendant increased his speed without warning. The plaintiff was thereby caused to lose his balance and fall, thereby suffering injury.

³ Page Ohio Gen. Code Ann. 1945, § 6308(6). Similar language is contained in Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 58a. The only material difference between them is that the Illinois statute restricts the definition of guest to one riding in a motor vehicle while the Ohio statute includes a person riding "in or upon" the vehicle. The difference is noteworthy. Whether a person riding in a trailer attached to the host's automobile can be said to be riding in the host's vehicle has not been decided in Illinois. In *Miller v. Miller*, 395 Ill. 273, 69 N. E. (2d) 878 (1946), the Illinois Supreme Court made the general statement that one may be a guest whether riding in a tractor-trailer, a truck, or a pleasure vehicle, but the statement was dictum. In *Samuelson v. Sherrill*, 225 Iowa 421, 280 N. W. 596 (1938), a child riding on a sled attached to an automobile was not considered as being within the provisions of the guest statute of that state as he was not riding "in" the automobile. See also *Langford v. Rogers*, 278 Mich. 310, 270 N. W. 692 (1936), another sled case, where the rider was said to be "transported" by the vehicle, hence a guest.

⁴ Also involved was the question as to whether a "trailer" could be said to be a motor vehicle. The court said it could, defining a motor vehicle as being any vehicle drawn by power other than muscular power or power collected from overhead trolley wires.

conclusion as to each, to-wit: that plaintiff was not a guest of defendant at the time the accident occurred.

The question as to who may be said to be a guest, riding without payment, has been the subject of considerable litigation in the courts of those states which have enacted so-called "guest" statutes. It has been held that "payment" under the guest statute is not necessarily limited to monetary compensation and is not to be considered in its strict legal sense as the discharge in money of a sum due, but includes the acceptance of a ride for the purpose of conferring some substantial benefit on the host or car owner.⁵

The Ohio Supreme Court, in the case of *Duncan v. Hutchinson*,⁶ outlined seven instances which have been held to constitute payment sufficient to remove the rider from the effect of the guest statute. One instance would cover those situations where carriage is provided to a prospective purchaser of property which the auto host has for sale, the trip being made for the purpose of inducing a sale. An example of this instance may be found in the Illinois case of *Connett v. Winget*⁷ where a prospective purchaser of real estate, riding in the broker's car to view the property, was held not to be a guest. In that connection, it might be noted that several states have guest statutes which specifically exclude prospective purchasers of automobiles while being taken on demonstration rides.⁸

The second and third illustrations appear in those cases where the automobile host has a financial or business interest in the time or service of the passenger and the purpose of the transportation is to take the passenger to or from his place of employment,⁹ or where the passenger is making the trip to assist the automobile host in arriving at his destination or to perform some other service for the latter's benefit. In the case of *Dorn v. Village of North Olmstead*,¹⁰ for example, an individual was invited for a ride for the sole purpose of pointing out to the driver the location of a certain house and was held not to be a guest.

While another instance recognizes that the conferring of a substantial or tangible benefit upon the automobile host in lieu of and for the transportation may be enough to provide exemption, it has been held, by the vast majority of courts, that, if the trip is of a social nature, a sharing

⁵ *Albrecht v. Safeway Stores, Inc.*, 159 Ore. 331, 80 P. (2d) 62 (1938). A definition of "without giving compensation therefor" may be found in *Crawford v. Foster*, 110 Cal. App. 81, 293 P. 841 (1930).

⁶ 139 Ohio St. 185, 39 N. E. (2d) 140 (1942).

⁷ 374 Ill. 531, 1 N. E. (2d) 807 (1940).

⁸ See, for example, Colo. Stat. Ann. 1935, Ch. 16, § 371.

⁹ *Kruey v. Smith*, 108 Conn. 628, 144 A. 304 (1929); *Knutson v. Lurie*, 217 Iowa 192, 251 N. W. 147 (1933).

¹⁰ 133 Ohio St. 375, 14 N. E. (2d) 11 (1938).

of the expenses will not disturb an individual's guest status.¹¹ On the other hand, if the auto host and passenger embark on a joint adventure or enterprise in which each is equally or similarly interested, and which adventure or enterprise is of such moment and character as to indicate that payment is the motivating influence in providing the transportation, the statute is inapplicable. In that connection, the case of *Carbonneau v. Peterson*¹² is significant for it listed the essential ingredients of a joint adventure as consisting of a contract, a common purpose, a community of interest, and an equal right to a voice accompanied by an equal right of control.

Still another instance may be found in those cases where the passenger might be said to be an involuntary occupant of the automobile. That situation could well arise where an infant child is taken for an automobile ride, thereby leading to the question as to whether or not the infant had the capacity to enter into the guest relationship. The Indiana court, in *Fuller v. Thrum*,¹³ took the position that a child under the age of seven years is conclusively presumed to be *non sui juris*, hence incapable in law of accepting the invitation to become a guest, and this would appear to be the better view on the subject.¹⁴ In the instant case, the plaintiff was a twelve-year old minor but the court in no way seemed to consider the implications of his minority as a possible escape from the guest statute. If age is to be the criterion, it might be noted that in *Hart v. Hogan*¹⁵ a twelve-year old daughter of a woman employed as a companion to another woman who was doing the driving was held to be an involuntary occupant of the host's car and thus not a guest. There may be reason to believe, however, that where the element of choice is present a child beyond the so-called "tender" years might be regarded as capable of entering into the guest relationship.

Although the last exception previously noted was in those instances where the compensation was paid by a third person,¹⁶ the Ohio Supreme Court would now seem to add another method of "payment" to the ever-

¹¹ The case of *Sloan v. Nevil*, 33 Tenn. App. 100, 229 S. W. (2d) 350 (1949), so construed the Illinois guest statute. See also *Albert McGann Securities Co. v. Coen*, 114 Ind. App. 60, 48 N. E. (2d) 58 (1943); *Voelke v. Latin*, 53 Ohio App. 245, 16 N. E. (2d) 519 (1938).

¹² 1 Wash. (2d) 347, 95 P. (2d) 1043 (1939).

¹³ 109 Ind. App. 407, 31 N. E. (2d) 670 (1941).

¹⁴ *Kundra v. Adamski*, 188 Ore. 396, 216 P. (2d) 262, 16 A. L. R. (2d) 1297 (1950). But see *Morgan v. Anderson*, 149 Kan. 814, 89 P. (2d) 866 (1939), where a seven-year old child was held to be a guest.

¹⁵ 173 Wash. 598, 24 P. (2d) 99 (1933). See also Richards, "Another Decade under the Guest Statute," 24 Wash. L. Rev. 101 (1949), particularly p. 110.

¹⁶ *Elliott v. Behner*, 146 Kan. 827, 73 P. (2d) 1116 (1937); *McGuire v. Armstrong*, 268 Mich. 152, 255 N. W. 745 (1934).

increasing list developed under the guest statutes. It would indicate that if the transportation tends to promote the "mutual interests" of both parties and operates for their "common benefit," then the person accepting the ride is not to be classed as a guest. While this so-called method of payment may not be entirely new,¹⁷ the statement thereof has not, heretofore, been as broad as the result in the instant case would tend to indicate. Although the Illinois court, in *Miller v. Miller*,¹⁸ stated that where "the relationship between the automobile host and a party riding with him has a business aspect and the transportation is supplied for their mutual benefit, any payment or service rendered to the automobile host by such person for the ride will constitute 'payment therefor' and will remove the automobile host from the protection of the statute,"¹⁹ it was careful to restrict the mutual benefit theory to a transaction of a business rather than of a social nature.

The Ohio court concerned with the instant case placed substantial reliance upon the Iowa case of *Thuente v. Hart Motors*.²⁰ The plaintiff there had volunteered to assist in a scrap paper drive sponsored by the local chamber of commerce and the defendant used his truck to assist in the collection. Holding the Iowa guest statute to be inapplicable to the relationship between the parties, the court pointed to a distinction between a purely social enterprise and a patriotic and community project such as a scrap drive. The court there stated that "the purpose of each was to aid the defense of his country. . . . The trip was advantageous to each in the accomplishment of their mutual enterprise."²¹ It is doubtful, however, if this case can be cited as precedent for the instant decision. Emphasis on the patriotic and community nature of the scrap drive in the one case is lacking in the other for the paper drive was there conducted solely for the benefit of a boy scout troop of which defendant was not actually a member but which he served in a supervisory capacity. As the real benefits to be derived from the paper drive were directed not at the defendant but at the plaintiff and his fellow scouts, the only benefit that defendant could be said to have received was a feeling of good will predicated upon his knowledge that he had helped the scout troop raise money.

It might have been pointed out that, where the benefit is conferred only upon the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, companionship, and the like

¹⁷ *Hasbrook v. Wingate*, 152 Ohio St. 50, 87 N. E. (2d) 87, 10 A. L. R. (2d) 1342 (1949).

¹⁸ 395 Ill. 273, 69 N. E. (2d) 878 (1946).

¹⁹ 395 Ill. 273 at 283, 69 N. E. (2d) 878 at 883.

²⁰ 234 Iowa 1294, 15 N. W. (2d) 622 (1944).

²¹ 234 Iowa 1294 at 1303, 15 N. W. (2d) 622 at 627.

are conferred upon the host, the passenger has been held to be a guest within the statute.²² For that matter, courts have also stated that the benefit must be of a definitely tangible nature, that they should not be required to search for the benefit, and, if it is not apparent, then it can hardly be said to be substantial or material.²³ There would, then, be occasion to believe that any benefit to the defendant in the instant case was only an incidental one at best and was secondary to the prime purpose of the transportation.

The mutual benefit idea has, in the past, been fairly closely confined to relationships of a business rather than of a social nature. For example, in the case of *Chumley v. Anderson*,²⁴ a prospective purchaser of an automobile and a dealer drove to Detroit in the dealer's car to expedite the purchase of a new car. The court held that the parties were clearly engaged in a common purpose in which they were jointly interested, the plaintiff to get the new car as soon as possible and the defendant to complete the sale. By contrast, in *Whitechat v. Gryette*,²⁵ the deceased was a passenger in an auto driven by the defendant to a meeting of an association of which both were members. The defendant, being an officer, was required to attend but the decedent, being only a member, could attend or not as he saw fit. The transaction was treated as being of a social rather than of a business nature; the mere fact of concurrence in membership in the same organization being held insufficient to remove the decedent from the guest classification. It would seem more logical, therefore, to conclude that the defendant scoutmaster in the instant case had offered the use of his automobile and trailer as more of a social gesture than a business undertaking for material gain and, while the arrangement may have promoted the mutual interests of both plaintiff and defendant, it did not create a joint business relationship between them.²⁶

Courts deciding cases arising under guest statutes should endeavor to ascertain the intention of the legislature before proceeding to the merits of each individual case. Most such statutes were enacted to protect the motorist from liability for injuries suffered by the guest growing from ordinary negligence unless the motorist, in turn, was compensated for the transportation furnished in a manner substantially commensurate

²² *Boyd v. Miller*, 320 Ill. App. 303, 50 N. E. (2d) 847 (1943).

²³ *Liberty Mutual Ins. Co. v. Stitzle*, 220 Ind. 180, 41 N. E. (2d) 133 (1942).

²⁴ 20 Tenn. App. 621, 103 S. W. (2d) 331 (1936).

²⁵ 19 Cal. (2d) 428, 122 P. (2d) 47 (1942). The case, however, actually turned on the point that a cash payment was made for the ride, hence the passenger was not a "guest" within the meaning of the statute.

²⁶ *Leonard v. Stone*, 381 Ill. 343, 45 N. E. (2d) 620 (1942), reversing 313 Ill. App. 149, 39 N. E. (2d) 388 (1942).

with the hazards of the undertaking.²⁷ The object being, so to speak, to prevent the dog from biting the hand that feeds him, any failure to keep this object in mind is likely to result in decisions such as the one under discussion.

W. J. MEYER, JR.

CRIMINAL LAW — EVIDENCE — WHETHER OR NOT A STATE STATUTE WOULD BE VALID IF IT REQUIRED A PERSON ACCUSED OF CRIME TO ESTABLISH THE DEFENSE OF INSANITY BY PROOF BEYOND A REASONABLE DOUBT — Through the medium of the recent case of *Leland v. State of Oregon*,¹ the United States Supreme Court was presented with a question concerning the validity of an Oregon statute,² first enacted in 1864, one which purported to require a defendant in a criminal case to establish the defense of insanity by proof beyond a reasonable doubt. The defendant there had been arrested for the theft of an automobile and had then freely confessed to the unknown murder of a young girl, even to the point of directing the police to the location of the body and supplying all particulars regarding that crime. At the ensuing trial for such murder, the defendant pleaded not guilty by reason of insanity but was convicted, under a verdict of the jury, of murder in the first degree and, as the verdict was without recommendation, an automatic death penalty was imposed.³ Defendant appealed to the Supreme Court of Oregon but that court, in a comprehensive opinion, affirmed the conviction, adhering to some previous decisions of that court which had stated that the court was not convinced that the legislature lacked the power to promulgate the statute in question. On further review, the Supreme Court of the United States also affirmed, holding that the policy of the state, as expressed in the statute, did not violate generally accepted standards of justice, hence could not be said to operate in violation of due process requirements.⁴

The decision accents a fundamental difference in concept as to the operation of the defense of insanity in criminal cases. The majority of the court took it to be the prevailing view, both in England and in a

²⁷ *Miller v. Miller*, 395 Ill. 273, 69 N. E. (2d) 878 (1946).

¹ 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952), affirming 190 Ore. 598, 227 P. (2d) 785 (1951). Justice Frankfurter wrote a dissenting opinion concurred in by Justice Black.

² Ore. Comp. Laws 1940, § 26-929. The statute states: "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt."

³ *Ibid.*, § 23-411.

⁴ U. S. Const., Amend. 14, § 1.

number of American jurisdictions, that the defense of insanity should be treated as a separate issue with the burden of proving such defense resting on the defendant. Such being the case, a requirement that the proof should reach the level of proof beyond a reasonable doubt was said to be merely one of degree and not, therefore, of such fundamental character as to involve a violation of constitutional rights. The dissent, on the other hand, took the basic position to be one under which it was the responsibility of the prosecution to prove culpability as an essential element in every charge of murder, so any attempt to shift that burden, as by requiring the defendant to ultimately establish lack of culpability, would expose the defendant to the hazard of being deprived of his life without due process of law. While the decision appears to be clear and determinative, it is not as thorough an evaluation of the problem as might be desired.⁵

As it has generally been regarded to be the policy of the Anglo-American law to treat an accused person as being innocent until proven guilty, there may be occasion to wonder why legal principles should be so fundamentally divergent over the nature of the issue of insanity in a criminal case. A summary of this contradiction might, therefore, be appropriate. Outstanding among the earlier cases in the field is the comment supplied in *McNaghten's Case*⁶ wherein an English court adopted the same general principle as that which underlies the majority decision in the instant case, to-wit: the defense of insanity is one in the nature of a confession and avoidance, with the defendant having the burden of "clearly proving" to the jury that he was insane. That principle remains the English view today.⁷

In this country, the principle was picked up by the Alabama Supreme Court holding in the case of *State v. Marlen*.⁸ The court there expressed itself as being of the opinion that the defendant should be obliged to offer "clear and convincing" proof before raising a "reasonable doubt" as to the sufficiency of his sanity. A few years later, in *Commonwealth v. Rogers*,⁹ a Massachusetts court modified the principle by requiring "satisfactory" proof on the part of the defendant, with a "preponderance" being otherwise sufficient. The Supreme Court of Maine, in *State v. Lawrence*,¹⁰ took much the same view and the prin-

⁵ See, for example, the discussion of this problem in *Davis v. United States*, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895).

⁶ 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

⁷ Stephens, *Digest of Criminal Law* (Sweet & Maxwell, London, 1926), Art. 39, pp. 33-4.

⁸ 2 Ala. 43, 36 Am. Dec. 402 (1841).

⁹ 48 Mass. (7 Met.) 500, 41 Am. Dec. 458 (1844).

¹⁰ 57 Me. 574 (1870).

ciple was again well stated, in *State v. Pagels*,¹¹ where a Missouri court said: "The law requires the defendant to prove the defense of insanity to the reasonable satisfaction of the jury."¹²

The opposite of this view appears to have been first expressed by the Michigan Supreme Court in *People v. Garbutt*.¹³ It there stated the law to be that the defendant had only to overcome the presumption of sanity by "any" evidence and, since the burden of proof was on the prosecution, the prosecution would then have to prove the defendant sane, as well as otherwise guilty, by proof beyond a reasonable doubt. This principle was accepted in the early Illinois case of *Hopps v. People*,¹⁴ but it was not until about the turn of the century that two cases appeared which crystallized the two opposing principles in comprehensive and well stated opinions.

In one of these cases, that of *Davis v. United States*,¹⁵ the United States Supreme Court stated the federal rule to be one under which the burden of proving all the elements of a crime rests on the prosecution and, since mental capacity is an element of most federal crimes, the burden of proving mental capacity on the part of the defendant also necessarily rests on the prosecution. While the ordinary presumption of sanity will suffice to sustain this burden in the bulk of cases, the court indicated that whenever a defendant raises a doubt as to his sanity the jury must acquit unless the prosecution comes forward with convincing evidence that the defendant was sane at the time the criminal act occurred.

Despite this, in the second case, that of *State v. Quigley*,¹⁶ the Rhode Island court, after analyzing the conflicting doctrines, rejected the premise that sanity *per se* was an essential element to a crime. It took the position that malice and intention, the specific elements required, could exist independently of sanity; that proof of insanity would not necessarily affect inferences to be drawn from the defendant's acts; and that if the defendant relied on the claim of insanity to negative malice or intention, he would have to treat the defense as one in the nature of a confession and avoidance.

In the light of this background, it is not surprising that the law on this point should remain inconsistent and confusing, with approximately twenty states accepting the English principle, so thoroughly evaluated in

¹¹ 92 Mo. 300, 4 S. W. 931 (1887).

¹² 92 Mo. 300 at 315, 4 S. W. 931 at 937.

¹³ 17 Mich. 9 (1868).

¹⁴ 31 Ill. 385 (1863). Walker, J., wrote a dissenting opinion.

¹⁵ 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895).

¹⁶ 26 R. I. 263, 58 A. 905 (1904).

the Rhode Island case, but with the federal courts and approximately twelve states accepting the contrary view.¹⁷ Such being the case, it can be seen why the federal supreme court, in the instant case, should approve a state statute which did no more than codify one of these views, although its own opinion regarding due process might differ from that followed in the state in question. The decision, however, might not serve as a binding precedent if one of the other states should attempt to make the switch by legislative enactment.

The question in issue, in the absence of a statute, has been before the Illinois Supreme Court on many occasions but nothing has been done to change, in substance, the original alignment adopted in the leading case of *Hopps v. People*.¹⁸ Judge Breese there stated that sanity and intention were inseparable; that the burden could not shift to the defendant to disprove an essential element of the prosecution's case; that the defendant had no more than a responsibility to go forward with sufficient evidence to rebut the presumption of sanity; and that, if this was done, the prosecution then had the primary burden of proving the defendant sane beyond a reasonable doubt. There was present, however, a strong dissent to the effect that the defendant ought to be required to establish the claim of insanity by a preponderance of evidence and the confusion became more evident, a few years later, when the case of *Chase v. People*¹⁹ reached the court for decision. Judge Breese then admitted a failure to achieve clarity in expression so he there restated the rule to be one requiring the defendant's evidence to "raise a reasonable doubt" as to his sanity. In all other respects, the view of the Hopps case was affirmed and it was followed in the succeeding cases of *Montag v. People*²⁰ and *Hornish v. People*²¹ with further elaboration being provided in *Jamison v. People*²² where it was said the "reasonable doubt" had to be raised from "all the evidence."²³

Although, in *People v. Casey*,²⁴ the court stated the burden of proof issue was not vital, and that the defense of insanity could be established in the same manner as a justification or an alibi, it was not until the

¹⁷ Wigmore, Evidence, 3d Ed., Vol. 9, § 2501, provides not only an analysis of the two principles but also a list of the jurisdictions applying either of them.

¹⁸ 31 Ill. 385 (1863). Walker, Jr., wrote a dissenting opinion. It would seem important to read this case with the qualifying opinion written by the same judge in *Chase v. People*, 40 Ill. 352 (1866), for the Hopps case has been quite generally cited as being authoritative of the American view.

¹⁹ 40 Ill. 352 (1866).

²⁰ 141 Ill. 75, 30 N. E. 357 (1892).

²¹ 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237 (1892).

²² 145 Ill. 357, 34 N. E. 486 (1893).

²³ See also *Lilly v. People*, 148 Ill. 467, 36 N. E. 95 (1894).

²⁴ 231 Ill. 261, 83 N. E. 278 (1907).

decision in *People v. Krauser*²⁵ that an instruction requiring the defendant to "clearly prove" his insanity was held to be erroneous. Since then, the court has wavered over the point of the quantum of proof which might be sufficient. In *People v. Saylor*,²⁶ "any evidence to raise a reasonable doubt" was said to be sufficient for an acquittal.²⁷ In *People v. Skoock*,²⁸ the emphasis was against requiring the defendant to "clearly prove" the defense. Within a year, however, in *People v. Pugh*,²⁹ the court went further than it had ever done before in stating that insanity was to be treated as a separate issue, much the same as self-defense, but that while there was no hard and fast rule as to the quantum of evidence necessary, the evidence had to be sufficient to overcome the legal presumption of sanity.³⁰ A fair appraisal of the cases, then, would appear to establish the fact that the Illinois Supreme Court is not prepared to depart from the view it adopted ninety years ago.

If legislation on the point should be contemplated, and it could help the problem, there is reason to believe that anything like the Oregon statute considered in the instant case would go too far if it sought to place the same degree of avoidance, by reason of insanity, on the defendant as is generally required in relation to proof by the prosecution. A sounder statute would be one incorporating the reasoning of the Illinois Supreme Court in the Pugh case, to-wit: the defense of insanity is one in avoidance, to be introduced by the defendant, but it is satisfied whenever the defendant has raised a reasonable doubt in the mind of the jury on the point.

C. E. MAHONEY

INSURANCE—RIGHT TO PROCEEDS—WHETHER A SUBSEQUENT AGREEMENT TO A MATURED ENDOWMENT CONTRACT PROVIDING CONDITIONALLY FOR DISTRIBUTION OF PROCEEDS AFTER DEATH IS TESTAMENTARY IN CHARACTER—Recently, in the Washington case of *Toulouse v. New York Life Insurance*

²⁵ 315 Ill. 485, 146 N. E. 593 (1925). In the interim, the court, in *People v. Cochran*, 313 Ill. 508, 145 N. E. 207 (1924), had reaffirmed the view that the requirement for raising a doubt as to sanity had not shifted the primary burden on to the defendant.

²⁶ 319 Ill. 206, 149 N. E. 767 (1926).

²⁷ The Saylor case was followed, in point of time, by *People v. Christensen*, 336 Ill. 251, 168 N. E. 292 (1929). This case has been cited by Wigmore, op. cit., § 2501, as supporting the English view. A careful reading of the opinion would not so indicate.

²⁸ 408 Ill. 276, 96 N. E. (2d) 473 (1951).

²⁹ 409 Ill. 592, 100 N. E. (2d) 912 (1952).

³⁰ It might be noted that, in *People v. DePompais*, 410 Ill. 587, 102 N. E. (2d) 813 (1952), the court expressed the view that while the giving of an instruction requiring the defendant to "clearly prove" insanity would be error, it would not necessarily constitute reversible error.

Company,¹ the insured, subsequent to maturity of a twenty-year endowment policy entitling the insured to the proceeds thereof, entered into a written agreement with the insurer whereby the proceeds, or the remainder thereof not withdrawn during lifetime, were to be distributed after the insured's death to certain beneficiaries irrevocably designated. Plan One, adopted by the insured, of three optional plans for settlement, provided for the retention of the fund by the insurer subject to withdrawal by the insured at will. A further provision, clearly applicable to Plans Two and Three, but questionable as to Plan One,² provided that, unless otherwise agreed in writing, any proceeds remaining at death should be paid to the insured's estate. Following death of the insured and a subsequent demand and refusal, the executor of the insured's estate sued the insurer to recover the proceeds on behalf of the estate, contending that the subsequent agreement was invalid as an abortive testamentary disposition. The insurer defended on the ground the subsequent agreement constituted a valid third party donee-beneficiary contract. The trial court dismissed the action and the Supreme Court of Washington, on appeal by the executor, affirmed on the ground the subsequent agreement was directly connected with the original contract of insurance, had vested rights in the beneficiaries during the lifetime of the insured, and did not amount to a testamentary disposition of an estate.

The validity of so-called supplementary insurance contracts, providing for disposition of proceeds after death, despite the frequency with which they are employed, has not often been passed upon by the courts. In several of the cases in which an agreement of the type here in question has been involved, the courts have assumed the agreement to be valid without inquiry.³ However, in those cases where validity has been

¹ 40 Wash. (2d) 538, 245 P. (2d) 205 (1952). Donworth, J., wrote a dissenting opinion concurred in by Schwellenbach, Ch. J., and Weaver, J. Judge Mallery also wrote a dissenting opinion.

² Another provision immediately following a statement of each of the three optional plans of settlement, stated: "In the event of the death of a payee any unpaid sum left with the company under option 1 shall be paid in one sum; any unpaid installments under option 2, or any installments . . . under option 3 which shall not then have been paid . . . unless otherwise agreed in writing shall be paid in one sum to the executor or administrator of such policy." Unless the clause "and unless otherwise agreed in writing," following the semi-colon, applied to option 1 as well as to options 2 and 3, there was no indication as to whom any unpaid sum left under option 1 should be paid after the death of the insured. The majority opinion held that the quoted language applied to all three options but, if ambiguous, was controlled by the interpretation which the parties had placed on it. The dissenting opinion stressed non-applicability and non-ambiguity. See, on that point, *United States Cas. Co. v. Cream Novelty Co.*, 195 Ill. App. 267 (1915); *State ex rel. Northwestern Mut. Life Ins. Co. v. Bland*, 354 Mo. 391, 189 S. W. (2d) 542, 161 A. L. R. 423 (1945).

³ *Smith v. Smith*, 172 F. (2d) 399 (1949); *Aetna Life Ins. Co. v. Bartlett*, 53 F. Supp. 1005 (1944); *New England Mut. Life Ins. Co. v. Harvey*, 82 F. Supp. 702 (1949).

squarely in issue, the courts have declared such agreements effective, and not testamentary in nature, on the ground that contractual rights and not property rights should govern in determining the nature of the interest created in the beneficiaries.

Since the decision in the leading case of *Lawrence v. Fox*,⁴ the doctrine of the third party donee-beneficiary has become settled law in most American jurisdictions.⁵ The application of the doctrine, however, presupposes an executed contract made for the benefit of the third party where neither control over the subject matter nor power of revocation has been retained by the promisee. The mere fact that the benefit to be derived by the third party beneficiary is made subject to the death of the promisee does not, of itself, deprive the beneficiary of the right to enforce the agreement after death on the ground that the contract is testamentary in nature,⁶ for death of the promisee then becomes no more than a condition precedent to the beneficiary's right to enjoyment. As a present right or interest would be vested in the beneficiary immediately upon the execution of the contract, the effect of such an agreement might well be considered to be analogous to the case of a valid gift *inter vivos* wherein delivery of the subject matter has been made to a third person for the benefit of the beneficiary but is not to be surrendered to the donee until after the donor's death.⁷

While the basic doctrine offers little or no problem to the courts today, each attempted extension thereof has left the courts in disagreement, particularly where the promisee or obligee attempts to retain control over the subject matter of the contract or has reserved a power of revocation over the right or interest created in the beneficiary. As the years have passed, however, the weight of authority would appear to have shifted from the conservative view, one holding that such contracts are not enforceable on the ground they are testamentary in nature, to the more liberal view which declares the true test to be not whether the contract has divested the promisee of all interest in the subject matter but whether a present right has been conferred upon the beneficiary.⁸ In the

⁴ 20 N. Y. 268 (1859).

⁵ Williston, *Contracts*, Rev. Ed., Vol. 2, § 356; Restatement, *Contracts*, Vol. 1, § 135.

⁶ *In re Beyschlag's Estate*, 201 Wis. 613, 231 N. W. 165 (1930); *Sheldon v. Blackman*, 188 Wis. 4, 205 N. W. 486 (1925). See also Whittier, "Contract Beneficiaries," 32 *Yale L. Rev.* 790 (1923).

⁷ *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005 (1909); *Taylor v. Harmison*, 179 Ill. 137, 53 N. E. 584 (1899).

⁸ *Thomas v. Singer Sewing Machine Co.*, 105 Minn. 88, 117 N. W. 155 (1908); *In re Murphy's Estate*, 193 Wash. 400, 75 P. (2d) 916 (1938), rehearing denied 195 Wash. 695, 81 P. (2d) 779 (1938). See also annotations in 11 A. L. R. 39 and 76 A. L. R. 640.

New York case of *Seaver v. Ransom*,⁹ for example, decided in a jurisdiction traditionally conservative in its attitude toward third party donee-beneficiaries, the court departed slightly from the traditional view to settle these questions by principles of property law¹⁰ when it held that, if the beneficiary and the promisee should be within certain degrees of relationship,¹¹ the beneficiary could enforce the obligation even though some measure of control had been retained by the obligee.¹² So too, a federal court sitting in New York, but applying what was presumed to be the California law on the point,¹³ in *Robinson's Women's Apparel, Inc. v. Union Bank & Trust Company of Los Angeles*,¹⁴ held a similar contract to be valid and enforceable by the beneficiary after the death of the promisee despite a reservation by the promisee of a life interest.¹⁵

The instant case goes even farther. The endowment contract here concerned had matured during the lifetime of the insured so that any interest or right which had contingently been conferred upon the named beneficiaries in the event the insured died before maturity had become completely extinguished at maturity.¹⁶ The original contract of insurance no longer existed except to serve as consideration for the exercise of an option which the insured, as a matter of contract right, could compel the insurer to perform with regard to the retention of the endowment proceeds and a mode of settlement which he might select in conformity therewith. This, necessarily, would require a subsequent agreement which, while following as a natural consequence from the right created by the option, could in no way be considered as being a part of the original contract of insurance. As a consequence, any present right or interest conferred upon the beneficiaries who might be named in the

⁹ 224 N. Y. 233, 120 N. E. 639 (1918).

¹⁰ *Townsend v. Rackman*, 143 N. Y. 516, 38 N. E. 731 (1894); *Butler v. Sherwood*, 196 App. Div. 603, 188 N. Y. S. 242 (1921); *Priester v. Hohloch*, 70 App. Div. 256, 75 N. Y. S. 405 (1902). A note in 53 *Harv. L. Rev.* 1060 summarizes the New York cases.

¹¹ The third party beneficiary has traditionally had to show some obligation due him from the promisee before he could enforce a contract made for his benefit: 29 *Corn. L. Q.* 109.

¹² The later New York case of *McCarthy v. Pieret*, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), would appear to have overlooked the liberal implication of the *Seaver* case, for the court there, on finding that the promisee had reserved a life interest to himself as well as a power of revocation, settled the question by applying property law, thereby reaching the result that the purported transfer was testamentary in character. See also *Sliney v. Cormier*, 49 R. I. 74, 139 A. 665 (1928).

¹³ *Patterson v. Chapman*, 179 Cal. 203, 176 P. 37, 2 A. L. R. 1467 (1918); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914); *Gould v. Van Horne*, 43 Cal. App. 145, 187 P. 35 (1919).

¹⁴ 67 F. Supp. 395 (1946).

¹⁵ Accord: *Baldi v. Baldi*, 325 Pa. 177, 189 A. 490 (1937).

¹⁶ *Vance, Handbook of the Law of Insurance* (West Publishing Co., St. Paul, 1930), § 144-5.

subsequent agreement would not flow from the original contract but would stem from the subsequent agreement itself, that is, would come from a disposition which the insured made of funds which were then his to deal with as he saw fit. The majority opinion, adopting the liberal view for the first time in that jurisdiction, nevertheless failed to meet this issue squarely or to treat it precisely with respect to its wider implications. In view of the narrow margin supporting the decision, it would seem hardly likely that the court would have arrived at the same conclusion had not the subsequent agreement, in some way, been derived from the original contract of insurance.

Rightly holding that no gift of the proceeds had been intended by the insured during his lifetime, so that need for a delivery, either actual or symbolic, sufficient to divest the donor of dominion or control, was not an element which needed determination,¹⁷ the majority reached the conclusion that the subsequent agreement was not an attempt to transfer property. It was, instead, deemed to be evidence of a desire to create a present right in the beneficiaries which would enable them to enforce the promise originally made to the insured. Departing from its conservative view toward such agreements,¹⁸ the court found the subsequent agreement to be, in reality, a supplementary insurance contract, one which conferred upon the beneficiaries a vested right not in any specific property but in the performance of the contract by the insurer, much as if they have been named beneficiaries at the start in an ordinary life insurance contract. The fact that the insured had retained full control over the proceeds during his lifetime, or had reserved the power to completely extinguish the benefit by exercising his ability to withdraw the proceeds in full, did not render the supplementary contract invalid as testamentary in nature since the right which had vested in the beneficiaries, and which had vested immediately upon the execution of the supplementary contract, was based on the contractual obligation of the insurer to do what it had promised to do for a good consideration, to-wit: pay to the beneficiaries any of the proceeds remaining in its possession upon the death of the insured.

Even while the Washington court extended the doctrine to the point it did, it fell short of that point reached in the case of *Mutual Benefit Life Insurance Company v. Ellis*.¹⁹ A federal court, there applying what

¹⁷ But see *Kansas City Life Ins. Co. v. Rainey*, 353 Mo. 477, 182 S. W. (2d) 624, 155 A. L. R. 168 (1944), discussed hereafter at note 21, post.

¹⁸ *Decker v. Fowler*, 199 Wash. 549, 92 P. (2d) 254, 131 A. L. R. 961 (1939). See also *In re Lewis' Estate*, 2 Wash. (2d) 458, 98 P. (2d) 654, 127 A. L. R. 628 (1940).

¹⁹ 125 F. (2d) 127, 138 A. L. R. 1478 (1942), cert. den. 316 U. S. 665, 62 S. Ct. 945, 86 L. Ed. 1741 (1942).

it believed was the law of Colorado, upheld a subsequent agreement which was in no way derived from the exercise of any of the options offered in the original contract of insurance. That court indicated there was nothing in law to prevent the insured promisee from entering into a new agreement with the insurer whereby the proceeds of a policy should be retained by the insurer subject to a life interest in the promisee, with a power of revocation upon three-months' notice in writing, and with provision for payment of the remainder to named beneficiaries upon the death of the insured. The decision, predicated on third party donee-beneficiary contract principles, indicated that the present rights in the beneficiaries were derived not from the original contract of insurance, nor from the exercise of any option, but from the new agreement exclusively.²⁰

In much the same way, the Missouri Supreme Court, in *Kansas City Life Insurance Company v. Rainey*,²¹ had occasion to consider the effect of an annuity contract under which the annuitant reserved the power to change the beneficiary at will, to surrender the policy after three years for its full cash value, or to withdraw up to one-half of the principal amount at any time. In reply to a contention by the annuitant's executor that this was not an insurance contract, since no element of risk was involved, and was invalid as being testamentary in nature, the court held that it was a contract for the benefit of the third party regardless of the element of risk and would have been so considered even if it had been made with a bank, a corporation of any sort, or with an individual. The issue was decided in favor of the beneficiary purely on property law theories. The payment of the money by the annuitant to the insurance company was said to operate to transfer title thereto immediately to the company, thereby divesting the annuitant of control and simultaneously vesting in the beneficiary an immediate interest in the fund itself subject, however, to the postponed right of enjoyment until after the death of the annuitant. The conditions of revocation and defeasance

²⁰ As to the contractual rights of life insurance beneficiaries, see *Hall v. Capitol Life Ins. Co.*, 91 Colo. 300, 14 P. (2d) 1006 (1932), and *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 P. 414, L. R. A. 1916A 868 (1914). The dissent in the instant case expressed the view that the holding in the *Ellis* case had been based on an erroneous belief as to the Colorado law, which error had been exposed in *Urbancich v. Jersin*, 123 Colo. 88, 226 P. (2d) 316 (1950). The two cases would, however, appear to be easily distinguished. The money involved in the *Urbancich* case had been deposited in a bank in the joint names of the promisor and promisee but upon the express understanding it was to be the exclusive property of the promisee, not to be withdrawn until the death of the promisee and then only for the purpose of transmittal to the named beneficiaries. The agreement was between the promisor and promisee, not between promisee and the bank; no consideration passed between the parties; and no present rights were vested in the beneficiaries. The situation clearly constituted an abortive testamentary disposition.

²¹ 353 Mo. 477, 182 S. W. (2d) 624, 155 A. L. R. 168 (1944).

were treated as being no different than those which might be involved in the creation of an *inter vivos* trust.²² While the court found little difficulty in arriving at a conclusion wholly in accord with the more liberal approach to this problem, it did so without the necessity of completely departing from a conservative attitude based entirely on principles of property law.

Use of the third party beneficiary device as a means of transferring property has not been confined to insurance or similar contracts. Perhaps the most fertile field in which this problem has presented itself in recent years has been in connection with the purchase of United States Savings Bonds. In some instances, contract principles have controlled; in others, property doctrines have prevailed. In *Warren v. United States*,²³ for example, it was held that certain war savings certificates, payable to beneficiaries therein named after the death of the registered owner, were regulated purely by the contract between the registered owner and the United States. The Supreme Court of Washington, however, thirteen years before deciding the instant case, had held, in *Decker v. Fowler*,²⁴ under circumstances almost identical with the Warren case, that as the bonds had remained in the possession of the registered owner at all times there was no delivery sufficient to divest the owner of his present control and dominion, hence no present right or interest had been created in the beneficiary which would permit the latter to enforce the contract between the deceased owner and the obligor. The only question considered was whether a valid gift *inter vivos* had been executed and, finding none, the court held the bond agreement to be testamentary in nature. The overwhelming weight of authority today, at least as to savings bonds, is that the payment-on-death provision found therein does create a present vested, though defeasible, right in the beneficiary contemporaneous with and subject to the deceased's superior right.²⁵ Where this has not been obtained by decision, it has been successfully effectuated by statutory provision.²⁶

²² *Williams v. Collier*, 120 Fla. 248, 158 So. 815 (1935); *Bear v. Milliken Trust Co.*, 336 Ill. 366, 168 N. E. 349, 73 A. L. R. 173 (1929), noted in 26 Ill. L. Rev. 821. See also Scott, "Trusts and the Statute of Wills," 43 Harv. L. Rev. 521 (1930).

²³ 68 Ct. Cl. 634 (1930), cert. den. 281 U. S. 739, 50 S. Ct. 346, 74 L. Ed. 1154 (1930).

²⁴ 199 Wash. 549, 92 P. (2d) 254, 131 A. L. R. 961 (1939), noted in 14 Wash. L. Rev. 312, 27 Minn. L. Rev. 411, 4 Mont. L. Rev. 61.

²⁵ *In re Murray's Estate*, 236 Iowa 807, 20 N. W. (2d) 49 (1945); *Harvey v. Rackliffe*, 141 Me. 169, 41 A. (2d) 455, 161 A. L. R. 296 (1945), noted in 44 Mich. L. Rev. 317; *Ervin v. Conn.*, 225 N. C. 267, 34 S. E. (2d) 402 (1945); *In re Disanto's Estate*, 142 Ohio St. 223, 51 N. E. (2d) 639 (1943), noted in 42 Mich. L. Rev. 944.

²⁶ See, for example, Thompson, N. Y. Cons. Laws, 1943 Supp., p. 178, for Section 24 of the Personal Property Law, which provides that the right of a beneficiary named in a non-transferrable government savings bond to receive payment after the death of the registered owner shall not be defeated or impaired by any rule

A thorough search of the law in Illinois has failed to disclose adjudication on the precise issue here involved from which a lawyer interested in this problem could reasonably arrive at a conclusion as to how the courts of this state might hold. The generally conservative attitude displayed by Illinois courts would more naturally incline one to believe that, if confronted with the problem, the court would most likely apply those principles requiring complete divestment of dominion and control of the subject of the contract as a condition precedent to enforcement by the beneficiary after the death of the promisee. In *Felter v. Erwin*,²⁷ for example, the decedent had made several deposits of money in a bank which were evidenced by certificates of deposit made payable to the depositor, to the beneficiary, or to the survivor in the event of the death of the depositor before that of the beneficiary. The Appellate Court held the whole transaction to be an attempted testamentary disposition. Despite the apparent intent of the depositor to vest some quantum of present right in the beneficiary at the time each deposit was made, the court failed to recognize even the slightest possibility of a third party donee-beneficiary transaction. While the decision was reversed by the Supreme Court, the reversal was based on the ground the certificates were so worded as to clearly indicate an intention to create a joint tenancy, so there is nothing in the ultimate decision which could be interpreted as controverting the idea that complete divestment may be required as a condition precedent to the creation of a present right or interest under a third party beneficiary transaction.

By deciding the issue on other grounds, the Supreme Court may have silently voiced tacit approval of that view. Whatever interpretation a local lawyer may desire to place upon this silence, more than slight consideration should be given to recent decisions in other jurisdictions, such as the one in the instant case. They would tend to indicate that it is possible to extend third party beneficiary contract doctrines so as to implement the apparent intent of the promisee to create enforceable rights in those whom he designates as beneficiaries in his transactions.

I. FRANK

of law governing the transfer of property by will, gift, or intestacy. A legislative note annexed to the bill stated that its purpose was to remove doubt resulting from the decision in *Deyo v. Adams*, 178 Misc. 859, 36 N. Y. S. (2d) 734 (1942), noted in 27 Minn. L. Rev. 401. See also *In re Deyo's Estate*, 180 Misc. 32, 42 N. Y. S. (2d) 379 (1943).

²⁷ 206 Ill. App. 518, L. R. A. 1918E 776 (1917), reversed in 283 Ill. 36, 119 N. E. 926 (1918).

TAXATION—LEGACY, INHERITANCE AND TRANSFER TAXES—WHETHER A DECEDENT'S BENEFICIAL INTEREST IN A TRUST OF FOREIGN REALTY IS OF SUCH CHARACTER AS TO BE SUBJECT TO AN INHERITANCE TAX IMPOSED BY DECEDENT'S DOMICILIARY STATE—In the recent case entitled *In re Stahl's Estate*,¹ the Supreme Court of Michigan was asked to determine the validity of a Michigan claim to an inheritance tax on the transfer of proceeds arising from the sale of real estate located in Illinois held as the corpus of a trust in which the decedent was a beneficiary. The decedent, who had died a resident of Michigan, had been designated as beneficiary in a common form of land trust, set up in Illinois with an Illinois trustee for certain Illinois real estate, which described the beneficiary's interest as a personal one.² Following the death of the beneficiary, the trustee sold the land in question and delivered the proceeds to an organization named in the trust agreement by the beneficiary to succeed to his interest. The administrator of the decedent's estate then petitioned the Michigan court for an order to the effect that no Michigan inheritance tax was due. It determined otherwise, but on trial *de novo* the decision was reversed. On further appeal by the Michigan Department of Revenue, the Supreme Court of Michigan affirmed the holding on the ground that as the beneficiary possessed all the attributes of a fee ownership, except for the power to sign instruments of conveyance, the interest of the beneficiary was essentially one in foreign land, hence not subject to an inheritance tax imposed by the state of decedent's domicile.

It is axiomatic to state that the due process clause of the Fourteenth Amendment places definite limitations upon the power of an individual state to impose taxes. Thus, it has been established that it is inconsistent with the Fourteenth Amendment to allow a state to tax property which is outside its limits and within the jurisdiction of another state.³ The latter doctrine has also been extended to apply to the common inheritance tax, which technically is not a tax upon the property itself but rather is a tax upon the transfer of the property at the death of the owner. Despite the technical difference, inheritance tax, for all practical purposes, is treated as an *ad valorem* property tax and thus is subject to the

¹ Sub nom. *Tucker v. Department of Revenue of Michigan*, 334 Mich. 380, 54 N. W. (2d) 691 (1952).

² In general, the trust agreement provided that the interest of the beneficiary should consist solely of a power of direction to deal with the title to the property and the right to receive the proceeds from rentals or sales. The trustee was not to deal with the property unless authorized to do so in writing signed by the beneficiary.

³ See, for example, *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936); *Adams County v. Northern Pac. Ry. Co.*, 115 F. (2d) 768 (1940).

same constitutional restriction.⁴ The underlying reason for such treatment is basic in that, once it has been established that property is situated in a particular state, that state has entire dominion over it and may "regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it."⁵ It follows that, when dominion over property is vested in one state, that dominion operates to the exclusion of all other states and the laws of another state cannot affect such property.⁶ Stated succinctly, the principle of law which has been established by the courts is that no state can tax the testamentary transfer of property which lies wholly beyond its power.⁷

It was with this principle in mind that the Michigan court, in the case at hand, approached the question presented by the litigation. It therefore became necessary to determine whether or not the property which was transferred was within the jurisdiction of that state. Such a determination depended, in turn, upon the nature of the decedent's interest under the trust. Clearly, there were two possibilities which a construction of the trust agreement could have disclosed, each of which carried with it a different tax consequence. If the interest of the decedent were determined to be a purely personal one, as designated in the trust agreement, the property interest would be an intangible one and, following the doctrine of *mobilia sequuntur personam*, the situs of the property would be that of the domicile of the decedent and thus taxable by that domiciliary state.⁸ Since Michigan was the domicile of the decedent, it could then have property assessed a tax. On the other hand, the court could have determined that the decedent's interest was essentially one in real estate lying beyond its borders and thus not subject to tax under the principles aforementioned. Of these two possibilities, the court determined the latter to be correct.

It is the effect of the decision which presents a problem for some consideration. As has already been indicated, the trust agreement under which the decedent's interest existed provided specifically that the beneficial interest should be deemed to be personal property. At this point it is clear that there was an intention to work an equitable conversion of any legal or equitable interest in the land itself into a purely personal interest. Although there was no apparent consideration of this problem by the

⁴ Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316 (1925).

⁵ Story, Conflict of Laws, § 550.

⁶ Pullman Palace Car Co. v. Commonwealth of Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1890).

⁷ Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926).

⁸ Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749 (1928).

court, its ultimate decision in the case had the practical result of giving no recognition to the intention to convert. The question arises, then, whether there was such an equitable conversion which should have gained the recognition of the court in reaching its decision.

The doctrine of equitable conversion rests on the old maxim that equity regards that as done which ought to be done, and is a fiction in law which is invoked to effectuate a declared intention.⁹ The law seems to be well settled that in order to create an equitable conversion of realty into personalty there must be a clear intention that the property is to be so converted.¹⁰ It appears that words in a trust agreement to the effect that the interest of the beneficiary shall be deemed to be personal property do not, in themselves, create an equitable conversion, but merely aid in disclosing the intention of the settlor.¹¹ Therefore, it would seem that when the courts declare that there must be an intention which, in itself, would be sufficient to create a conversion, that intention must take the form of a direction to sell, since it is generally conceded that the true test of conversion is whether or not a sale has been directed.¹² However, there are cases which seem to indicate that there need be no specific direction to sell the land in order to convert it into personalty if the direction to sell may arise from the nature of the instrument.¹³

Whichever view is accepted, the direction to sell does seem to be essential. Furthermore, the direction that the land be sold must be more than a mere authorization to sell¹⁴ under certain circumstances;¹⁵ it must be a mandatory direction to sell at a definite time,¹⁶ although the time of sale may be indefinite to the extent that it is measured by the occurrence

⁹ Equitable conversion has been defined as "the exchange of property from real to personal, or from personal to real, which takes place under some circumstances in the consideration of the law, such as to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change actually takes place." See 18 C. J. S., Conversion, § 1, p. 45.

¹⁰ *Tait v. Dante*, 78 F. (2d) 303 (1935); *Lockner v. Van Bebbler*, 364 Ill. 636, 5 N. E. (2d) 460 (1936); *Wollard v. Sulier*, 55 N. M. 326, 232 P. (2d) 991 (1951).

¹¹ *Smith v. Bank of America Nat. Trust & Savings Ass'n*, 14 Cal. App. (2d) 78, 57 P. (2d) 1363 (1936); *Harrison v. Kamp*, 395 Ill. 11, 69 N. E. (2d) 261 (1946); *Baker v. Commissioner of Corporations and Taxation*, 253 Mass. 130, 148 N. E. 593 (1925).

¹² In *Bartlett v. Gill*, 221 F. 476 at 484 (1915), the court said: "You cannot impress upon real estate the character of descendability according to rules applicable to personal estate without directing the estate to be sold." See also *Tait v. Dante*, 78 F. (2d) 303 (1935); *Lynch v. Cunningham*, 131 Cal. App. 164, 21 P. (2d) 154 (1933); *Equitable Trust Co. v. Ward*, 29 Del. Ch. 206, 48 A. (2d) 519 (1946).

¹³ *Goodhue v. State Street Trust Co.*, 267 Mass. 28, 165 N. E. 701 (1929); *Jenson v. Ballmer*, 121 Neb. 488, 237 N. W. 613 (1931); *In re Stephenson's Estate*, 171 Wis. 452, 177 N. W. 579 (1920).

¹⁴ *Swisher v. Swisher*, 157 Iowa 55, 137 N. W. 1076 (1912).

¹⁵ *In re Phelps's Estate*, 287 N. Y. S. 490, 159 Misc. 92 (1936).

¹⁶ *Gallagher v. Drovers Trust & Savings Bank*, 404 Ill. 410, 88 N. E. (2d) 870 (1949); *State v. O'Connell*, 121 Wash. 542, 209 P. 865 (1922).

of some event which is sure to happen.¹⁷ In those instances where an equitable conversion has been created, the conversion is regarded as having taken effect from the date the intention or direction to sell was expressed.¹⁸

Having thus established what seems to be the law applicable in determining whether or not an equitable conversion has been created, it is appropriate to examine the circumstances of the case at hand to see if they fulfill these requirements. As has been indicated, two basic elements must be present in order to create the conversion. First, an intention to so convert; second, a mandatory direction to sell at some definite time. As for the first of these elements, the intention to convert is made obvious by the declaration in the trust agreement that the interest of the beneficiary shall "be deemed to be personal property" and that "no beneficiary should have any right, title, or interest in said real estate as such, but only an interest in the proceeds, it being the intention to vest the full legal and equitable title to the premises in the trustee."¹⁹ It would be impossible to express an intention any more emphatically than was done.

In addition to the intention, however, there must also be a direction of sale at some definite time. The opinion in the principal case fails to state clearly whether or not there was a mandatory direction to sell. It would not be unreasonable to assume, in that regard, that there was a provision to the effect that any property remaining in the trust twenty years from the date of the trust instrument should be sold by the trustee for such a provision has been utilized consistently in the type of land trust agreement under discussion. Aside from that fact, it would appear that the direction in the agreement that the beneficial interest was to pass to another would be sufficient to give rise to an implied direction to sell which, as has been indicated,²⁰ may operate in such a manner as to have the same effect as an explicit direction. Under either situation, the time of sale would be definite, *i. e.*, either at the end of twenty years or upon

¹⁷ See, for example, *In re Baldwin's Estate*, 120 Misc. 226, 198 N. Y. S. 86 (1923), where it was held that an equitable conversion was created when the land held in trust was directed to be sold upon the death of the survivor of two out of three trustees.

¹⁸ It would be more accurate to say that the conversion operates from the time the instrument in which the intention is expressed becomes effective. That is to say, in the case of an *inter vivos* instrument, such as a trust agreement, from the time it is dated and signed; in the case of a will, from the date of the testator's death. See *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, L. R. A. 1916F 352, Ann. Cas. 1913B 62 (1911); *In re Cantagalli*, 92 N. Y. S. (2d) 829 (1949); *Langrick v. Rowe*, 126 Misc. 256, 212 N. Y. S. 240 (1925).

¹⁹ The exact text of the instrument is not set out in the opinion. The quotation is drawn from the court's statement of facts: 334 Mich. 380, 54 N. W. (2d) 691 at 692.

²⁰ See cases cited in note 13, *ante*.

the death of the principal beneficiary. Thus, from all indications, it would appear that an equitable conversion had occurred.

Since the opinion of the court does not specifically indicate why the conversion was not recognized, it might be well to point out possible reasons for the court's conclusion. The first of these is necessarily conjectural for the opinion of the court in no way openly reflects the fact that it might have had some bearing. At any rate, it is worthy of note that there has been some discussion as to the propriety of invoking the doctrine of equitable conversion for purposes of taxation.²¹ Some thought has been expressed to the effect that a state should not enlarge its jurisdiction by means of a fiction and thus subject property to a succession tax which otherwise would not have been taxable.²² Despite the desirability of a uniform system of taxation, it would seem to be more desirable to be consistent in the application of settled law. Fictional though it may be, if the doctrine of equitable conversion is to be recognized, its application should occur in those instances where it has been provided for without regard to peculiar circumstances.

It is also interesting to note one other factor which no doubt was instrumental in leading to the decision. It is a purely mechanical one which stems from an obvious error on the part of the court. In answer to the contention of the Department of Revenue that the decedent's interest should have been determined according to the law of Illinois, which state was the situs of the land in question, the court quoted from *Senior v. Braden*²³ wherein it was stated that, where the validity of a state tax is challenged under the federal constitution, the court must determine for itself the nature and incidence of the tax. Obviously, the court misconstrued the words "nature and incidence of the tax" to mean nature and incidence "of the property sought to be taxed." The error is made more apparent when it is realized that it has been universally accepted that the doctrine of *lex rei sitae* controls in determining whether an interest in land is personal or real.²⁴ Had the court adopted the latter view, a different result might have been obtained since the Illinois courts have repeatedly held that an agreement creating an interest in the profits or

²¹ The annotation in 78 A. L. R. 793 contains a discussion of the cases dealing with this question.

²² In re Phelp's Estate, 159 Misc. 92, 287 N. Y. S. 490 (1936).

²³ 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520 (1935).

²⁴ *Clarke v. Clarke*, 178 U. S. 186, 20 S. Ct. 873, 44 L. Ed. 1023 (1900); *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. (N. S.) 780, 11 Ann. Cas. 492 (1907); *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237 (1899); In re *Wiley's Estate*, 150 Neb. 898, 36 N. W. (2d) 483 (1949); *Fidelity Union Trust Co. v. Ackerman*, 123 N. J. Eq. 556, 199 A. 379 (1938); In re *Chapman's Estate*, 110 N. Y. S. (2d) 26 (1951); *Lydon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N. W. 255 (1908). See also Restatement, Conflict of Laws, § 209.

proceeds of sale of real estate creates no interest in, or lien upon, the land itself.²⁵

Viewed within the bounds of established legal reasoning, then, the principal case can be said to have added to a certain amount of confusion already generated by the decision in the case of *Masters v. Smythe*.²⁶ In that case, the owner of an undivided one-half interest in land conveyed her interest to a trustee for her benefit by means of an agreement which embodied substantially the same provisions as those contained in the agreement here under discussion. It was there held that the beneficiary had sufficient equitable title to maintain partition proceedings, but the merits of the basis for that decision may be somewhat doubted since it was the contention of the court that, by the filing of the suit for partition, the beneficiary had thereby given sufficient direction to the trustee to reconvey the property, in equity, to her.²⁷ Considering the decision in that light, it could also be said to fail to grant recognition to the conversion of the realty into personalty.

The problem so presented is of interest from another viewpoint. If there is a failure to give effect to the equitable conversion, it would then follow that the interest of the beneficiary would be one in realty, placing the trust in the category of those trusts which, potentially at least, might be executed by the Statute of Uses.²⁸ That possibility was discussed in the case of *Chicago Title & Trust Company v. Mercantile Trust & Savings Bank*,²⁹ but the danger of such execution was minimized by the determination therein that a trust of the type under discussion was to be considered as an active one. It would appear to be well established that where the trustee's duties are to convey, to make deeds, to sell after twenty years, to divide the proceeds, or to otherwise deal with the property, an active trust would arise. It has, for that matter, been expressly stated that a trust created for some particular purpose, as to convey real

²⁵ *Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank*, 300 Ill. App. 329, 20 N. E. (2d) 992 (1939). The case involved a trust agreement apparently identical to the one involved in the principal case. The case of *Duncanson v. Lill*, 322 Ill. 528, 153 N. E. 618 (1926), should prove interesting for it was there held that direct appeal to the Supreme Court of Illinois was improper because no interest in a freehold estate had been vested in the beneficiaries of a trust similar to the one under discussion. See also *Marshall v. Solomon*, 335 Ill. App. 302, 81 N. E. (2d) 777 (1948).

²⁶ 342 Ill. App. 185, 95 N. E. (2d) 719 (1950).

²⁷ See, however, *Breen v. Breen*, 411 Ill. 206, 103 N. E. (2d) 625 (1952), where partition was denied, even though the twenty-year period had elapsed and a sale had not yet occurred. The court indicated that a reasonable time would be allowed after the time for sale had arrived, during which a sale could be effectuated, and that, during such period, the beneficiaries had no legal or equitable interest in the land which would entitle them to maintain partition proceedings.

²⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 3.

²⁹ 300 Ill. App. 329, 20 N. E. (2d) 992 (1939).

estate, would be one which the Statute of Uses would not execute,³⁰ and it is immaterial, for this purpose, that the trustee's duties are merely formal or ministerial.³¹

The doctrine of equitable conversion is not one to be treated lightly, both in view of its long established recognition and because of its effect in various fields of law. As has already been shown, it is important in determining individual rights for purposes of taxation and trusts. But it is not limited to those fields. It can readily be seen that it is important also in the matter of descent since, if an equitable conversion of realty into personalty has been effected, the interest thus created would pass to the personal representative of the deceased rather than to the heirs at law. It may also have a direct bearing upon the right of an individual to maintain a partition proceeding where it would be essential that the party seeking partition should have either an equitable or legal interest in the land as such. So, too, it is an element for a creditor to consider in determining whether his attachment should be made pursuant to the law pertaining to personal property or to real property. The doctrine is important enough, therefore, to merit specific reason for its nonrecognition. If the decision in the principal case was intended to apply only to the tax question involved, the court should have so stated. There is a danger that the case may be used as authority for something not intended.

F. C. VISSER

TORTS—INTERFERENCE WITH OR INJURIES IN PERSONAL RELATIONS—WHETHER OR NOT THIRD PERSONS ARE LIABLE FOR MALICIOUSLY INTERFERING WITH A CONTRACT TO MARRY SO AS TO CAUSE BREACH THEREOF—An interesting and novel question became the subject of litigation in the case of *Brown v. Glickstein*,¹ recently decided by the Appellate Court for the First District of Illinois. The complaint therein alleged, among other things, that the defendants, two brothers and a sister of plaintiff's fiancée, had maliciously induced a breach of contract to marry existing between plaintiff and the principal defendant.² The lower court sustained a motion

³⁰ *Crow v. Crow*, 348 Ill. 241, 180 N. E. 877 (1932); *In re Rothwell's Estate*, 283 Mass. 563, 186 N. E. 662 (1933); *Phillips v. Vermeule*, 88 N. J. Eq. 500, 102 A. 697 (1917).

³¹ *Gardner v. Baxter*, 293 Ill. 547, 127 N. E. 717 (1920).

¹ 347 Ill. App. 486, 107 N. E. (2d) 267 (1952).

² One count, not involved in the appeal, charged the principal defendant with breach of promise to marry. The statute which, at one time, declared the bringing of such suits to be criminal having been declared unconstitutional in other respects, it can no longer be deemed effective although not expressly repealed: Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 246.1 et seq. Subsequent legislative revision on the point has been limited in character: Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, §§ 34-47.

to strike the complaint and the suit was dismissed as to these defendants. The Appellate Court, on plaintiff's appeal, affirmed the decision, holding that a malicious interference with a contract to marry may not be regarded as actionable as against close relatives. It thereby established, for the first time in this state, what constitutes an exception to the general rule on the subject.

Tort liability for interfering with contractual obligations originally applied only in those cases where the relationship of master and servant was affected for, at one time, only the enticing away of the apprentice or employee of another was deemed to be a legal wrong.³ In 1853, however, the doctrine was extended by the precedent-making case of *Lumley v. Gye*⁴ to the point where interference with the general contractual relationships of others became classed as torts even though the relationship of master and servant was not present in its usual form. That rule having been sanctioned by the English Court of Appeal in the case of *Bowen v. Hall*,⁵ liability thereafter reached to the point where, under the general rule now prevailing, anyone who, otherwise than in the enforcement of his own rights, procures a breach of a general contract may be held in damages to the injured party.⁶ The right to perform, and to have performance, under the ordinary form of contract being deemed a property right, interference therewith will expose the wrongdoer to liability for all injuries suffered in the breach of such a contract.⁷

There is a difference, however, between ordinary contracts and agreements to marry for the latter, at least at one time, operated to create a status which could not be rescinded or changed by mere agreement; resulted in a merger of the legal identity of the parties; called for the application of different tests regarding capacity; and were not protected against state legislation which would tend to impair contractual obligations.⁸ It has, therefore, come to be the generally accepted American view that there should be an exception by reason of which there is no liability simply for an interference with an agreement to marry.⁹

³ See *McGurk v. Cronenwett*, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561 (1908).

⁴ 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 706 (1853).

⁵ L. R. 6 Q. B. Div. 333, 1 Eng. Rul. Cas. 717 (1881).

⁶ *Bobbs-Merrill Co. v. Straus*, 147 F. 15, 15 L. R. A. (N. S.) 766 (1906), affirmed in 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086 (1908); *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 68 Am. St. Rep. 203 (1898).

⁷ *Bloom v. Bohemians, Inc.*, 223 Ill. App. 269 (1921). The rule has been held applicable to interference with construction contracts, *Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55 (1893), as well as to agencies for the sale of goods, *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 62 L. R. A. 962, 97 Am. St. Rep. 914 (1903), to note but two illustrations.

⁸ In general, see Vernier, *American Family Laws* (Stanford University Press, 1931), Vol. 1, § 14, p. 51.

⁹ The annotation in 47 A. L. R. 442 lists the cases so holding.

Judge Cooley once stated the exception in the following words: "The prevention of a marriage by the interference of a third person, cannot, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action for slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*."¹⁰ It is interesting to note that he cites no direct authority, for the only cases he listed were all more nearly in the nature of suits for slander tending to produce the breaking off of the contract to marry plaintiff.¹¹ As a consequence, his statement has been exposed to criticism¹² on the ground it is wholly without basis. It did, nevertheless, become the foundation for the doctrine of non-liability that has developed in the United States,¹³ and has since been justified on the ground that engaged persons should be free to take advice from their relatives and friends and the latter should have a right to give advice¹⁴ without fear of incurring liability.¹⁵

A distinction in language has been made where the suit is against a parent rather than a mere stranger to the person who broke the engagement. In such cases, courts are prone to speak in terms of an absolute,¹⁶ a perfect,¹⁷ or a lawful¹⁸ right to advise. In *Minsky v. Satenstein*,¹⁹ for

¹⁰ Cooley, Torts (Callaghan & Co., Chicago, 1906), 3d Ed., p. 494.

¹¹ See, for example, *Southold v. Daunston*, Cro. Car. 269, 79 Eng. Rep. 834 (1632); *Nelson v. Staff*, Cro. Jac. 422, 79 Eng. Rep. 360 (1617); *Davis v. Gardiner*, 4 Coke 16B, 76 Eng. Rep. 897 (1593).

¹² The criticism is expressed in a note in 10 Corn. L. Q. 259 to the case of *Stiffler v. Boehm*, 124 Misc. 55, 206 N. Y. S. 187 (1924).

¹³ *Leonard v. Whetstone*, 34 Ind. App. 283, 68 N. E. 197, 107 Am. St. Rep. 252 (1903); *Homan v. Hall*, 102 Neb. 70, 165 N. W. 881, L. R. A. 1918C 1195 (1917); *Clarahan v. Cosper*, 160 Wash. 642, 296 P. 140 (1931); *Ableman v. Holman*, 190 Wis. 112, 208 N. W. 889, 47 A. L. R. 440 (1926).

¹⁴ *Homan v. Hall*, 102 Neb. 70, 165 N. W. 881, L. R. A. 1918C 1195 (1917).

¹⁵ *Conway v. O'Brien*, 269 Mass. 425, 169 N. E. 491, 73 A. L. R. 1448 (1926). See also, in that regard, *Ryther v. Lefferts*, 232 App. Div. 552, 250 N. Y. S. 699 (1931). A suit based on a theory of seduction and alienation of affections would, according to *Davis v. Condit*, 124 Minn. 365, 144 N. W. 1089, 50 L. R. A. (N. S.) 142, Ann. Cas. 1915B 544 (1914), have to fail for lack of the essential right to consortium, a right which would not be present until the marriage had, in fact, taken place. See also *Stiffler v. Boehm*, 124 Misc. 55, 206 N. Y. S. 187 (1924). A promise to pay money if one of the engaged persons would break the engagement was, however, held to be invalid in *Attridge v. Pembroke*, 235 App. Div. 101, 256 N. Y. S. 257 (1932), on the ground the contract was opposed to public policy.

¹⁶ *Nelson v. Melvin*, 236 Iowa 604, 19 N. W. (2d) 685 (1945).

¹⁷ *Leonard v. Whetstone*, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. Rep. 252 (1903).

¹⁸ *Overholtz v. Row*, 152 La. 9, 92 So. 716 (1922).

¹⁹ 6 N. J. Misc. 978, 143 A. 512 (1928).

example, another case of first impression, the court held that a parent would not be liable for inducing a breach of contract to marry, not even if the advice was motivated by express malice, so long as the parent was not guilty of saying anything slanderous or libelous in character. It was there intimated that if the speaker had only a qualified right, motive could be inquired into and such a person could be held liable for an injury resulting from malice,²⁰ but the statement was no more than *obiter dictum* and represents a view not yet attained by any American court.²¹

While there has been a total absence of American cases allowing recovery for inducing a breach of a contract to marry, whether against a parent, a rival lover, or a mere meddler, a few instances of recovery may be found in the Canadian reports. Cases from Quebec may be ruled out because of the civil law rules there followed,²² but in the case of *Gunn v. Barr*,²³ where suit was brought against a brother of the breaching party, an Alberta court adopted an earlier statement of Lord Macnaghten to the effect that "a violation of legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."²⁴ An argument predicated on the idea that at least a conditional privilege should have been extended to a collateral relative gained support only in a dissenting opinion.

In the application of rules of this nature, one is led to question whether the American view has attained an equitable result. Granted that a parental right to advise should be recognized, should probably be absolute in character, and should not be subject to inquiry, is it not enough to allow others no more than a conditional privilege? Rival lovers who

²⁰ A full discussion of the difference between absolute and qualified rights, and examples thereof, is contained in an annotation in 29 L. R. A. (N. S.) 869.

²¹ It could be observed that the defendants in the instant case were only collateral relatives, yet the court said ". . . no cause of action will lie . . . for causing a breach of contract to marry, *even though instigated maliciously.*" 347 Ill. App. 486 at 487, 107 N. E. (2d) 267. Italics added.

²² In *Internoscia v. Bonelli*, 28 Que. Super. 58 at 60 (1905), Judge Doherty said: "I can see no reason why the father is not responsible for the damages resulting from the breach of promise to marry on the part of his minor child, in precisely the same way that he is responsible for the damages caused in any other way by such minor child." See also *Delage v. Normandeau*, 9 Quebec Q. B. 93 (1899), where the suit was against the father for inducing the breach, with a second count predicated on a statute creating vicarious liability. While the attempt to hold the father liable failed, the court did say it was dismissing the appeal "without, however, affirming as one of the motives that a father is never responsible for a breach of promise by his minor daughter." The Louisiana case of *Overholtz v. Row*, 152 La. 9, 92 So. 716 (1922), decided in a jurisdiction where a similar vicarious tort statute is present, held the statute to be inapplicable in suits of this nature.

²³ 1 D. L. R. 855, 1 B. R. C. 503 (1926). Beck, J., wrote a dissenting opinion.

²⁴ *Quinn v. Leathem*, [1901] A. C. 495 at 510.

have in good faith brought about a reconsideration by one of the parties to the contract, as well as relatives and friends acting without malice, could be protected. At the same time, parties to the contract would be afforded a safeguard against meddlers who, with malicious intent, induce a breach of the engagement. No dire harm to public policy would appear to be imminent if contracts of this type were to be given the same protection as is accorded to business contracts. The holding in the instant case would, then, appear to be more harsh than it ought to be, particularly from a court free to write its own views on a matter of first impression.

R. FORTUNATO