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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ADMINISTRATIVE LAW—INTERSTATE COMMERCE COMMISSION—STATEMENT OF LACK OF JURISDICTION AS QUALIFYING PERMISSIVE ORDER OF COMMISSION.—A novel situation arose in the case of Southern Railway Company v. State,\(^1\) recently decided by the Supreme Court of Georgia. The defendant railway company, an interstate carrier running through Georgia, had purchased a short line located wholly within and chartered by the state of Georgia. Thereafter the latter road became a branch line of and was operated by the Southern Railway Company as a part of its system in both intrastate and interstate traffic. Subsequently the Southern filed an application with the Interstate Commerce Commission seeking a certificate of public necessity and convenience authorizing it to abandon a portion of the newly-acquired road. At the hearing of the commission the state of Georgia, its public service commission, and several private citizens, having been duly notified, appeared and protested against the proposed abandonment. They objected that for the defendant to abandon part of the road and at the same time retain its franchise as to the remainder is a violation of the state law, i.e., the charter contract. Following a test

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\(^1\) 4 S.E. (2d) 233 (1939).
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period of one year as ordered by the commission, a finding was made that the public necessity and convenience would permit the proposed abandonment and, accordingly, a certificate was issued. In the report accompanying the certificate, the commission said, "Whether the abandonment would be in violation of the law of Georgia is not a question within our jurisdiction."

Determined to defeat the railway's proposed abandonment, Georgia filed a bill in equity in its own state court to enjoin the defendant from abandoning the road on the ground that it would be a breach of the charter contract, causing irreparable injury to the state and its citizens. The Supreme Court dismissed the proceedings on the ground that the state court had no jurisdiction to enjoin the order of the Interstate Commerce Commission.

If this was an action to enjoin the order of the Commission it would seem that the court ruled correctly in denying itself jurisdiction; nor would it matter that it was an indirect attempt to enjoin the order. The exclusive jurisdiction to issue decrees enjoining or invalidating orders of the Interstate Commerce Commission is vested in the federal district courts. But if, as contended by the state, the relief sought does not conflict with the commission's order, and therefore was not a suit to enjoin it, the state court had jurisdiction and should have adjudicated the rights of the parties. The sole question in the instant case is whether the order was qualified as claimed by the state.

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4 See note 3, supra. 5 See note 1, supra.
9 Note 3, supra. Looking to the Commission's opinion itself, we find first a statement of the financial condition of the road with other facts material to an abandonment proceedings. The Commission refers then to the state's argument that the proposed abandonment would violate their charter right. It is immediately following this that the Commission makes the statement that it has no jurisdiction to determine the validity of the state's claim under its charter. Thereafter come the findings that the public necessity and convenience permits the abandonment and that to continue the operation of the road would impose a burden upon interstate commerce. The Commission concluded with its order, unqualified in terms, granting the defendant permission to abandon the road. Thus it seems rather obvious that the statement in question was made merely in answer to the state's contention immediately preceding it.

That the certificate authorizing abandonment is permissive in nature, and not mandatory, should not lessen its binding effect upon the state. To prevent the railroad from doing what the Commission says it may do is as much an interference with the regulation of interstate commerce as it is to prevent the railroad from doing what the Commission has ordered it to do. See Chicago Junction Case, 264 U.S. 58, 44 S. Ct. 317, 68 L. Ed. 667 (1924); Venner v. Michigan Cent. R.R. Co., 271 U.S. 127, 46 S. Ct. 444, 70 L. Ed. 868 (1925).
The state contended that the commission’s statement to the effect that it had no jurisdiction to determine whether the abandonment would be a violation of the charter should be read into or in connection with the order, which renders it a qualified order. The essence of the order, in its view, is that so far as the Commission is concerned the defendant has its permission to abandon the road but the order shall not be construed as freeing the defendant of its obligation to the state. If by the state’s contention it is meant that the Commission’s statement, denying itself jurisdiction to determine the validity of the State’s charter right, has the effect, in itself, of qualifying the order, then the contention appears to be without merit. It is well settled that the authority of the Interstate Commerce Commission over interstate commerce, is superior to the charter rights of the state and it may abrogate those rights by its order. If, however, the state’s contention is that the Commission’s statement in question implies that the order was intended to be qualified, i.e., that the statement would not have been made unless the order was intended to be qualified, the contention is sound. But that is merely to conclude that the existence of the statement “is evidence” that the order was intended to be qualified; it remains to be determined whether the qualification has been sufficiently proven.

The state relies solely upon this one statement of the Commission to support its contention that the order is qualified. There seems to be no other evidence supporting that contention, while on the contrary, many facts seem to point to an opposite conclusion.

It cannot be doubted that it is within the Commission’s discretion to qualify or condition its orders under the proper circumstances. The Interstate Commerce Act expressly provides therefor where the public necessity and convenience requires it. It would seem to follow that if the circumstances were such that a qualified order would be inconsistent with the requirements of public convenience and necessity it would be improper and an abuse of discretion to issue such an order.


12 49 U.S.C.A. § 20. The Commission shall have power to issue such certificates as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

13 While the Commission’s field of discretion is large its limits are well defined. It is limited to acts, administrative in nature, which tend to promote or regulate
stant case, the Commission found that the public convenience and necessity permit the abandonment of the road. Public convenience and necessity has been defined as an immediate and urgent public need and includes a consideration of both interstate and intrastate requirements. The Commission also found that the continued operation of the road would be a burden upon interstate commerce, and the findings of the Commission as to the financial condition of the road seem to justify this conclusion. It is inconceivable that the burden on interstate commerce could be anything but greater if the railroad abandons only its interstate business and is compelled to continue its intrastate operations. The conclusion that the public convenience and necessity not only permit the proposed abandonment but requires that the railroad be authorized by an unqualified order to abandon, completely, the operation of the road. In this view of the matter it would not only seem improper to issue a qualified order, leaving to the state the ultimate determination, but it is doubtful that the Commission would so disregard its own findings.

Much can be said about the interest of a state in an abandonment proceedings. Generally such proceedings are of vital concern to the state. Many private commercial interests may depend considerably upon the continued operation of the road, cities or towns may have granted special rights or property interest to induce the construction of the road, the state may have special rights acquired in consideration of granting the charter. While these are all factors to be considered in determining what the public necessity and convenience requires, they are not necessarily controlling upon the Commission where the railroad is engaged in interstate commerce. In the instant case, the state and several of its private interests appeared at the hearing and presented their arguments


Wisconsin Telephone Co. v. Railroad Commission, 162 Wis. 383, 156 N.W. 614 (1916); In re Shelton St. Ry. Co., 70 Conn. 329, 38 A. 362 (1897); Public Convenience Application of Utah Terminal Ry., 72 I.C.C. 89 (1922).

Colorado v. United States, 271 U.S. 153 at 168, 46 S. Ct. 454, 70 L. Ed. 884 (1926): "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. . . . The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce."

Colorado v. United States, 271 U.S. 153, 46 S. Ct. 454, 70 L. Ed. 884 (1926), stating that to operate a road at a loss may be to impose a burden upon interstate commerce. See also Sharfman, Interstate Commerce Commission, II, p. 264.

Sharfman, Interstate Commerce Commission, II, p. 266.


against the proposed abandonment. Thus any of the factors which the state might have considered had it been empowered to authorize or reject the application for abandonment were before the Commission when it issued the certificate.

In the instant case, the suit, having been removed to the federal district court, was remanded to the state court on the ground that it was not a case arising under the Constitution or laws of the United States. The state points to this action of the federal court as an adjudication, binding on the defendants, that the action was not one to enjoin the order of the Interstate Commerce Commission. As explained in the majority opinion, the complaint in this case is based upon a supposed contractual right arising from the charter. It is only by an anticipation of the defense and by the answer itself that the federal question arises; that is not sufficient to meet the requirements of the removal statute. In other words the federal court merely decided that the cause of action set out in the complaint did not by itself, raise a federal question; it did not deny that the ultimate purpose of the action was to enjoin the order of the Commission.

In conclusion, the facts do not authorize a dogmatic statement as to what was the intention of the Commission concerning the nature of the order, but the fact that only the one ambiguous statement suggest a qualified order while many factors establish the propriety and probability of an absolute and unqualified order would seem to justify the decision in this case. However, it should be observed that if the order was intended to be absolute and unqualified the statement of the Commission denying itself jurisdiction to determine the validity of the State's contractual right, is not only uncalled for and irrelevant, as characterized by the court, but in fact, based upon an erroneous assumption that the State's right was not subordinate to a conflicting order of the Commission but actually survived it.

W. H. Maynor

Bills and Notes—Construction and Operation—Survival of Doctrine of Descriptio Personae under Negotiable Instruments Law Where Printed Note Bears Joint Promise.—In Kaspar American State Bank v. Oul Homestead Association, the Illinois Appellate Court considered the application of Section 20 of the Uniform Negotiable Instruments Law to the doctrine of descriptio personae. The note in litigation was on the usual printed form and contained the customary confession of judgment clause. It purported to bind the “undersigned jointly and severally,” however, and was signed:

23 28 U.S.C.A. § 71, Gully v. First Nat. Bank, 299 U.S., 57 S. Ct. 96, 81 L. Ed. 70, 109 (1936): “To bring a cause within the removal statute a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or petition for removal . . . nor can the complaint itself be considered in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates a defense.”
1 301 Ill. App. 328, 22 N.E. (2d) 785 (1939).
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"Oul Homestead Association
Albert Hornick, Pres.
James L. Preisler, Sec'y
James Bican, Treas."

Judgment was confessed in the circuit court against not only the association but the three individual signers as well. The circuit court overruled defendants' motion to vacate, and the appellate court sustained. Each of the three justices wrote an opinion. Mr. Justice McSurely, writing the "opinion of the court," sustained the judgment on two grounds; (1), that the doctrine of descriptio personae controls, Section 20 being inapplicable because the joint language of the note indicated an intention to be bound personally; and (2), that the defendants' affidavit to open up the judgment was insufficient. Mr. Justice Matchett concurs, apparently on the second ground only. Mr. Justice O'Connor, "dissenting in part," feels very strongly that Section 20 should control.

Section 20 provides in part: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized. . . ." 3

Prior to the statute, courts gave effect to the doctrine of descriptio personae in a number of decisions of varying degrees of cogency. Some courts say that parol evidence is inadmissible to show the agency. 4 Others say that the question of agency vel non cannot be raised by demurrer. 5 At least one case disposes of the problem by treating the defense of the agent as a personal one, not available against a holder in due course. 6

The opinion relies on the case of Healey v. Storey, 7 but there the note was drawn thus—"We jointly and severally promise"—and was signed by defendants as directors. The court also cites the case of Savage v. Rix; 8 there the words, "jointly and severally," obviously created personal liability, since no principal was named.

Cases holding the agents immune decided before and after the statute have a converse gradation in strength. Some say a defendant's demurrer will suffice. 9 Numerous cases permit the introduction of parol evidence. 10

10 Decowski v. Grabarski, 181 Ill. App. 279 (1913); Tampa Investment & Securities Co. v. Taylor, 272 Ill. App. 541 (1933); Scanlon v. Keith, 102 Ill. 634 (1882);
Some courts say that the note is on its face that of the principal. Besides these, there are numerous cases, not easily catalogued, in which the courts refused to consider the signers liable individually.

It would seem that the instant decision is not only contrary to the weight of authority but against the rising tendency, evident even prior to the statute, toward relieving the agent of liability. Held that the Negotiable Instruments Law abrogated the law merchant on this subject and held the makers not individually liable. As early as 1839, the Massachusetts court, in a well-considered opinion, stated succinctly what would seem to be the modern attitude: "The particular form of executing a contract not under seal, by an agent is not material if it indicate a ministerial act on the part of the agent."

In concluding, it should be reiterated that the opinion giving effect to the doctrine of descriptio personae in preference to Section 20 represents the position of only one justice. This position must be carefully noted, however, inasmuch as it appears in the "opinion of the court," and, being included as such in the headnotes of both the official and unofficial reports, will be perpetuated in the digests.

J. C. Kellogg

Breach of Marriage Promise — Nature and Form of Action — When Action Will Lie in Fraud and Deceit in Jurisdiction Where Action for Breach of Promise Is Abolished by Statute.—The defendant by falsely representing that he was an unmarried man induced the plaintiff to enter into and consummate a void marriage with him. The plaintiff brought a civil action sounding in fraud and deceit to recover damages for this wrong and was met with the defense that actions "based upon alleged

Williams v. Harris, 198 Ill. 501, 64 N.E. 988 (1902); Brief v. Bank, 172 Ala. 475, 55 So. 808 (1911); Planters' Chemical and Oil Co. v. Stearnes, 189 Ala. 503, 66 So. 699 (1914); Western Grocer Co. v. Lackman, 75 Kan. 84, 88 P. 527 (1907); Taylor v. Fluharty, 35 Ida. 705, 208 P. 866 (1922); Carpenter v. Farnsworth, 106 Mass. 561 (1871); Myers v. Chesley, 190 Mo. App. 371, 177 S.W. 326 (1915). In fact, parol evidence was admitted although the note contained the words, "each and every party singing this note as officer or agent . . . also binds himself as principal . . . ." See also Union Machinery & Supply Co. v. Taylor-Morrison Logging Co., 143 Wash. 154, 294 P. 1094 (1927).


14 218 Mass. 324, 105 N.E. 878 (1914).

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... breach of contract to marry" were abolished by statute.¹ It was held in Snyder v. Snyder² that the action was "neither within the letter or the intendment of the law," and the defendant's motion to dismiss the complaint was denied. Sulkowski v. Szweczyk,³ a contrary decision involving a problem identical with that of the Snyder case save for the sole factor that the plaintiff had not entered into the bigamous marriage, was distinguished on that ground.

Attempts to reconcile such decisions construing statutes abolishing or penalizing the use of the action for breach of promise to marry should be made with special regard to the nature of the cause of action. At a time before assumpsit had evolved, the only remedy in the English law for failure to perform a parol agreement was the action in case for property conveyed or expense incurred in reliance upon a promise which was later broken.⁴ Thus breach of an agreement to convey land,⁵ to build a house,⁶ or to marry⁷ was actionable if money had been transferred in reliance thereon. This remedy, it should be noticed, rested solely upon a tort theory and not upon any contractual basis.⁸ As liability ex contractu gradually emerged from liability ex delicto, it seems probable that liability for breach of promise to marry emerged with it⁹ because of a deceiving similarity between engagements and other agreements.¹⁰ Thanks to the doctrine of stare decisis, contractual liability for breach of promise was imposed—although not without protest¹¹—by the American courts, which

¹ New York Laws of 1935, Ch. 263; Civil Practice Act, Art. 2-A, §§ 61-a et seq. Cf. Ill. Rev. Stat. 1939, Ch. 38, §§ 246.1 et seq., imposing criminal penalties upon one filing suit for breach of promise to marry and declaring void all contracts in settlement of such a suit.
² 14 N.Y.S. (2d) 815 (1939).
³ 6 N.Y.S. (2d) 97 (1938).
⁵ Keil. 77, 72 Eng. Rep. 239: "Et auxy si jeo vende x acres de terre pcel de mon Manor, & puis jeo face feoffment del Manor, vous averes bon action vers moy sur vostr case, pur cause del resceit de vre money. . . ."
⁶ Keil. 78, 72 Eng. Rep. 239: "Et si jeo covenant ove un Carpenter de faire un meason, & paie a luy xx 1'. pur le meason a faire p un certeine jour, & il ne face le meason p le jour, ore jeo av bon action sur mon case per cause de paymt de ma money, & encore il ne sound forsq en covenant, & sans paymt de money en cest case nul remedie. . . ."
¹¹ See Short v. Stotts, 58 Ind. 29 (1877), in which the court after some difficulty reached the conclusion that the action would lie. It is submitted that there should be no remedy in contract at all. It must be admitted that mutual promises to marry could be valid consideration for each other. But it must not be forgotten that nothing is consideration which the parties do not regard as such. "It should be noted that not every variation from one's legal duty—not every actual legal detriment incurred by the promisee at the request of the promisor, though intrinsically the stuff of which consideration is made, will constitute a sufficient consideration. It may be a mere incidental or friendly detriment not intended as an ingredient for a bargain, and, therefore, not a bargained-for
have built up a body of law, punctuated with vestigial doctrines reminiscent of the period when the remedy was in tort, retained for reasons of policy. Thus it has been held at common law and under survival statutes not expressly governing promises to marry that the action for breach of promise does not survive the parties to the agreement, contrary to the general rule in regard to contracts but in accordance with the general rule in regard to torts. The type of damages allowed in these cases, including recovery for such things as injury to reputation, mental suffering, and seduction are strikingly tortious in nature. Moreover, it has been consistently decided that no action will lie for malicious interference with an engagement, although it is beyond dispute that such

consideration." Williston, Contracts (Rev. Ed., 1936), I, 322. "The similarity to other mutual agreements originally led the courts into allowing the action. As a fresh matter today it might well be doubted whether the commercial spirit is sufficiently apparent in the exchange of promises to show an intention of creating a contract in the sense in which contracts are enforced by the courts. The action seems peculiar to the common law." Note, 7 Harv. L. Rev. 372. See also N. P. Feinsinger, "Legislative Attack on 'Heart Balm,' " 33 Mich. L. Rev. 979; "Contracts to Marry," note, 25 Col. L. Rev. 343, suggesting that the doctrine of illusory promise might apply; Harter F. Wright, "The Action for Breach of the Marriage Promise," 10 Virg. L. Rev. 361, raising the problem of enforceability of social obligations.

See also Pollock on Contracts (9th ed.), p. 3.; Williston on Contracts (Rev. ed., 1936) I, 38, n. 14, § 21.

12 Stebbins v. Palmer, 1 Pick. (Mass.) 71 (1822), in which the court justified its position by the statement that "the principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling in substance deceit and fraud, than a mere common breach of promise."

13 Warner v. Allen, 126 Wash. 393, 218 P. 260, 34 A.L.R. 1358 (1923); Grubb's adm'r v. Sult, 32 Gratt. (Va.) 203 (1879), where the court stated that "although a breach of promise to marry is a violation of contract, it is yet essentially a tort to the person, and comes so fully within the reason and influence of the principle governing actions ex delicto, it is impossible to distinguish between them." See also, Spence v. Carter, 33 Ga. App. 279, 125 S.E. 883 (1924). The cases all state that the presence of special damages would change the rule, but see notes in 2 Cor. L. Q. 42 and 28 Harv. L. Rev. 701 which indicate that "special damages" are a myth.


15 Harrison v. Swift, 13 Allen (Mass.) 144 (1866).

16 Poehlmann v. Kertz, 204 Ill. 418, 68 N.E. 467 (1903).

17 Leonard v. Whetstone, 34 Ind. App. 383, 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); Guida v. Pontrelli, 186 N.Y.S. 147 (1921); noted in 6 Cor. L. Q. 437, approving the result but disapproving the ground of the decision; Stiffler v. Boehm, 206 N.Y.S. 187 (1924), noted in 10 Cor. L. Q. 259, suggesting that the doctrine is based on an unsupported statement by Cooley and declaring the rule to be unsound as stated, but approving the decision on the ground that the action brought was one for alienation of affections and not for malicious interference with contract, 25 Col. L. Rev. 230, and 34 Yale L. J. 526, criticizing the case for not making clear whether public policy was the basis of the decision and declaring that the prospective right of consortium, in the absence of public policy, is just as worthy of protection as the present right; Ableman v. Holman, 190 Wis. 112, 208 N.W. 889, 47 A.L.R. 440 (1926); Conway v. O'Brien, 269 Mass. 425, 169 N.E. 491, 73 A.L.R. 1448 (1929), placing the decision squarely on the grounds of public policy. But see Minsky v. Satenstein, 6 N.J. Misc. 978, 143 A. 512 (1928), limiting non-
interference with any other contract would be a legal wrong.\textsuperscript{18} Further departures from standard contract principles exist. Thus the defense that the plaintiff has some ailment known to the defendant at the time of the agreement, but which would nevertheless interfere with normal marital relations between the parties, has been allowed.\textsuperscript{19} While infancy is in general a defense,\textsuperscript{20} it has been held that an infant defendant who seduced his betrothed was estopped to set up his infancy.\textsuperscript{21} Where the defendant was married to a third party at the time of his promise to marry the plaintiff, the courts, without reference to estoppel, have decided that consideration was present, although the plaintiff's promise was impossible of performance.\textsuperscript{22} It has also been decided that an oral agreement to marry to be performed more than a year after the formation of the agreement is not affected by the fourth section of the statute of frauds.\textsuperscript{23} It has been truly said: "Promise of marriage may be a contract, but it is one forming its own class, and in its essential features greatly differs from all others."\textsuperscript{24}

The remedy for breach of an agreement to marry has been recently curtailed by state legislation\textsuperscript{25} abolishing the action\textsuperscript{26} and placing criminal penalties upon its use.\textsuperscript{27} The primary motive for this type of legisla-
tion seems to be a desire to eliminate the use of the action as a blackmailing device, although other reasons of almost equal importance exist. Thus fear of a damage suit, rather than love for a prospective spouse, might be the primary motive for a marriage which would probably terminate in divorce. Furthermore, the feeling existed that engagements were social obligations and not legal obligations entitled to legal enforcement. The speculative nature of the allowable elements of damage likewise made possible abuse by sympathetic juries.

Decisions like those in the Sulkowski and Snyder cases must be evaluated in the light of such considerations, tempered by a normal policy in favor of an innocent, guileless plaintiff who has been done a grievous wrong. The fact that the two complaints were framed in tort—probably to avoid the effect of the express language of the statute—is not significant, since the cases decided before the passing of the act allowed recovery in either tort or contract, where the defendant was married to another at the time of his promise to the plaintiff. The courts should disregard the form of the complaint and pierce through to the fundamental nature of the wrongs sought to be remedied to determine whether they were within or outside.

v. Stewart, 212 Ind. 553, 10 N.E. (2d) 619 (1937), which held that the Indiana penal provision was violative of due process. See note, 16 CHICAGO-KENT REVIEW 182.

For material on the policies which led to the passage of these statutes, see Vernier, American Family Laws, I, 23 et seq.; R. C. Brown, "Breach of Promise Suits," 77 U. of Pa. L. Rev. 474 (1929); J. Schouler, "Breach of Promise," 7 South. L. Rev. (N.S.) 37; J. D. White, "Breach of Promise of Marriage," 10 L. Q. Rev. 135; Harter F. Wright, "The Action for Breach of the Marriage Promise," 10 Virg. L. Rev. 361; N. P. Feinsinger, "Legislative Attack on 'Heart Balm,'" 33 Mich. L. Rev. 979. See also notes in 25 Col. L. Rev. 343 and 7 Harv. L. Rev. 372. In this connection it is interesting to note that the presence of the Illinois provision in the criminal code, Ill. Rev. Stat. 1939, Ch. 38, §§ 246.1 et seq., indicates clearly that the primary motive of the Illinois legislature in passing the act was to prevent extortion.

McCormick on Damages, 404, presents a table showing the exaggerated amounts that have been allowed. For an unusual viewpoint, see Ashley v. Dalton, 81 So. 488 (Miss., 1919): "Yet it might be proper to remind others of his type that he who would trip the light fantastic toe with the terpsichorean maid must contribute coin to the man who extracts music from the violin strings, or, in other words, that pleasure must be paid for with coin of the realm; and to remind them of the truth expressed by a minor poet when he said:

'When of 'dough' we get a batch,
The women make us toe the scratch,
And he who courts and does not wed,
She will pull his leg in court instead.'

'Beware of the grass widow when her eyes beam love and the shades are down low. She hypnotizes the reason, and the soul escapes the prison bars of discretion, and 'you float airily on golden clouds to rosy lands of pleasure and joy.' Temporary bliss reigns supreme in the palace of love; but in the end it creates mournful memories, heartache, remorse of conscience, and a burning desire to 'blot out the past.'"


Kelley v. Riley, 106 Mass. 339 (1871); Blattmacher v. Saal, 29 Barb. (N.Y.) 22 (1858). Of course, if the plaintiff knew of the married status of the defendant at the time of the agreement, no recovery would be allowed on the grounds of...
without the intended prohibition of the statute. By following such an approach, it seems that both cases were correctly decided. The Sulkowski decision presents a situation in which the plaintiff, though elements of fraud were present, was primarily seeking recovery for an unperformed promise. In the Snyder case, by contrast, the wrong was not a simple failure to perform a social agreement but a physical violation of the plaintiff's person. By such analysis it also appears that the reasons behind the legislation were satisfied. The former case presents a situation within which the blackmailer may still operate, though with a smaller number of potential victims; the latter presents one which scarcely lends itself to extortion. The action in the former smacks too strongly of enforcing a social agreement, while in the latter the wrong being remedied arises from the personal tort. While the damages in each case would be speculative, the nature of the wrong in the Snyder case makes such damages no more objectionable than they are in other fields of law where they are allowed. This approach enables the courts, by the process of construction, to effectuate the desired purposes of statutes like that involved in the instant cases, and yet still avoid the criticism which flows from having harsh cases made into bad law.

W. L. Schlegel, Jr.

Insurance—Loss by Defects in Title Insured—Measure of Damages in Action by Purchaser Against Title Insurer for Breach of Title Policy Because of Incumbrance on Land.—The case of Beaulieu v. Atlanta Title and Trust Company, recently decided by the Court of Appeals of Georgia, suggests an interesting problem involving the determination of the measure of damages where the purchaser of land sues a title insurance company for a breach of its title policy arising from the existence of an incumbrance on the land.

public policy. See Noice v. Brown, 33 N.J. Law 228 (1876). But the agreement does not become illegal because thereafter the plaintiff discovers the defendant's prior marriage but nevertheless continues the engagement. Cammerer v. Muller, 14 N.Y.S. 511 (1891).

32 The tort of deceit does not seem to be present, since no damage was alleged. "As we read the complaint, the question as to whether the plaintiff may maintain an action to recover articles given to the defendant as presents or the value thereof, does not arise in this action." Sulkowski v. Szewczyk, 6 N.Y.S. (2d) 97 at 99. For a statement of the rule as to requisite damage to the tort of deceit see Restatement of Torts, § 549.

33 The violation of plaintiff's person consisted in the consummation of the marriage. To the defense of consent, the answer is fraud. See Restatement of Torts, § 13 (b), comment g.

34 The only difference between the Sulkowski situation and the average breach of promise action is the married status of defendant, and that makes him all the more choice a victim for extortionists.

35 A plan of extortion under the Snyder situation would require that the victim actually marry the woman; mere embarrassing situations would not suffice as basis for the threatened suit at law and consequent exposure of the victim's frailties. It seems probable that few men would consummate thebigamous marriage, and those who did would be unworthy of protection.

36 McCormick on Damages, § 88.

1 4 S.E. (2d) 78 (Ga. 1939).
In that case the plaintiff had purchased a tract of land and had obtained a title guaranty policy from the defendant to insure himself against all loss or damages arising from a defect in title or the existence of a lien or other incumbrances upon the property. After taking possession of the property and commencing to build a house thereon, the plaintiff discovered the existence of an easement in the nature of a right of way across his land and brought an action against the title insurer for breach of its title guaranty contract, alleging as his damages the difference between the market values of the property incumbered and unincumbered, measured as of the date of the policy. The defendant objected to the plaintiff's allegation of the measure of damages and claimed that the correct measure of damages was the difference between the purchase price and the market value of the incumbered property at the date of the policy. The Georgia Appellate Court overruled the defendant's objections and allowed the plaintiff damages according to his allegation, i.e., measured by the decrease in the market value of the property as a result of the incumbrance.

The court based its decision upon two grounds; first, that, where the purchaser sues the vendor for breach of covenant against incumbrances, the measure of damages is the decrease in market value as a result of the incumbrance, i.e., the actual loss sustained as compared to a mere recovery of a proportionate part of the purchase price with interest, and second, that a title guaranty policy is a contract of indemnity in which the insurer agrees to indemnify the insured vendee for the actual loss he sustains.

The instant case seems sound, and is in accord with the leading authorities as well as with the few other cases discussing the particular

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2 The defendant admitted the breach of the title guaranty contract, and its liability therefor, but attacked, by special demurrer, the matter of damages only.

3 The issue raised becomes significant only where for some reason the purchase price is less than the market value of the property at the date of the policy. Ordinarily the purchase price and the market value are the same and the courts will consider the former as good evidence of the latter. See McCormick, Damages, 693, 4; In re Gordon, 317 Pa. 161, 176 A. 494 (1935); Title Ins. Co. of Richmond v. Industrial Bank of Richmond, 156 Va. 322, 157 S.E. 710 (1931).

4 Murphy v. United States Title Guaranty Co., 172 N.Y.S. 243 (1918), wherein the court said, "In many points the covenants of title contained in a deed and the covenant of indemnity in a title insurance are analogous, and in absence of express words in the contract of insurance the same rules would apply." See also Smith v. White, 71 W. Va. 639, 78 S.E. 375, 48 L.R.A. (N.S.) 623 (1913); Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335 (1871); Morgan v. Smith, 11 Ill. 194 (1849); Hansen v. Pattberg, 206 N.Y.S. 866 (1924); Sutherland, Damages, III, 3093, § 840a.

5 Cyc. of Insurance Law 5, § 3 (Couch on Insurance); Cooley, Insurance, I, 6; 38 Cyc. of Law and Procedure 344; Foeihenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561 (1907); Sutherland on Damages, III, 3093, § 840a.

6 "The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be, in such connection, that the premium is paid to, and accepted by, the company. . . ." Foeihenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561 (1907). See Sutherland on Damages, III, 2875, § 761.

7 Sutherland on Damages (4th ed.), II, p. 2160. The vendee of incumbered land may recover because of the existence of an encroachment the difference between
issue involved. However, it seems unnecessary and of no particular value to treat the liability of the insurer as analogous to the liability of a vendor on his covenant against incumbrances. The more logical basis for determining the measure of damages arises out of the nature of the title policy. A title insurance policy is a contract of indemnity. Therefore, the general rule as to the liability under indemnity contracts is applicable, namely, that the insurer's liability is to indemnify the insured for the actual loss sustained. Consequently the measure of damages adhered to by the plaintiff in the instant case, being the more accurate expression of the actual loss, was correctly approved by the court.

The reviewing courts in Illinois have not been called upon to decide a case involving the question, but it is reasonable to anticipate that Illinois will follow the instant case. In Illinois the business of guaranteeing

the value of the land as it was and as it would have been if there had been no encroachment. 5 Cyc. of Insurance Law 4489, § 1228; 38 Cyc. of Law and Procedure 344; 62 C. J. 1069, 70; Cooley on Insurance, VI, 5727-8. 8 Murphy v. U.S. Title Guaranty Co., 172 N.Y.S. 243 (1918), where the defect was an outstanding 2/35 interest. The court said, "The highest possible measure of damages, in the absence of some clause in the policy fixing a different measure, would be the difference between the value of the premises unencumbered, as shown by the actual sale, and their value incumbered by the lien . . . ." Kentucky Title Co. v. Hail, 219 Ky. 256, 292 S.W. 817 (1927), where the grantor was unable to convey all that the deed described, the court said that the measure of damages was not a proportionate part of the purchase price, but of the market value. Glyn v. Title Guarantee & Trust Co., 117 N.Y.S. 424 (1909), where the defect was an encroachment and the sole question before the court was whether a mere lump sum allegation of damages was sufficient, but the court, after answering in the affirmative, ventured to say that the measure of damages would be the difference in the market value of the property incumbered and unencumbered. Sala v. Security Title Insurance & Guarantee Co., 183 Okla. 534, 81 P. (2d) 578 (1938), where the plaintiff would have been able to recover the decrease in market value but for the insurer taking advantage of the provision in the policy permitting it to clear the title by defending the suit. Narberth Building & Loan Ass'n v. Bryn Mawr Trust Co., 190 A. 149 (Pa. 1937), where a mortgagee obtained a title policy on the mortgaged property, and the measure of damages was held to be the actual loss he sustained as a result of the defect, measured as of the date of the policy. In re Gordon, 176 A. 494 (Pa. 1935). Accord: Montemarano v. Home Title Ins. Co., 258 N.Y. 478, 180 N.E. 241 (1932), holding that insured was entitled to recover actual loss. Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561 (1907), where the insured obtained a policy to insure title to property to which he already had title. Upon discovering that he had only a one half interest in the property he was allowed to recover the value of that interest. Flockhart Foundry Co. v. Fidelity Union Trust Co. 102 N. J. L. 405, 132 A. 493 (1926), where the general rule of the measure of damages supported in the instant case was admitted, but the court said that the insurance policy in question expressly provided for damages as of the time of a re-sale.

9 If the liability of the title company is analogous to that of the vendor, the liability would vary with the nature of the defect. For a complete discussion of the measure of damages in actions against the grantor for the various types of defects see McCormick, Damages, Ch. 28.

10 See note 5, supra.


12 As argued by the defendant in the instant case, the measure of damages
titles is considered an insurance business, and the insurance contract has been held to be a contract of indemnity in which the aforementioned general rule as to liability applies. It follows therefore that in Illinois, also, the measure of damages should be the actual loss sustained, which in this instance, would be the difference between the market value of the property as incumbered and its unincumbered value, measured as of the date of the policy.

W. H. MAYNOR

MARRIAGE—STATUTORY REQUIREMENTS—EVASION OF REQUIREMENT OF EXAMINATION FOR VENEREAL DISEASE AS INVALIDATING MARRIAGE.—A forward step toward the eradication of communicable venereal diseases in Illinois was the passage of the so-called Saltiel Act, providing for a pre-marital examination of all candidates before the issuance of a license to marry, in order to prevent the unwitting communication of venereal diseases from one spouse to the other and to the coming generation. Other jurisdictions already had similar legislation, some providing for a pre-marital examination of the male only, but the Illinois act requires examination of both the male and female. The constitutionality of similar enactments has been upheld, the court in Peterson v. Widule stating as a reason that "society has a right to protect itself from extinction and its members from a fate worse than death."

The presence of such legislation, desirable though it be, seems to invoke in the human mind a desire to avoid its beneficent safeguards and too frequently drives the engaged couple into other jurisdictions where marriage is easier to contract. The social consequences thereof are ob-

could be the difference between the purchase price and the market value of the incumbered property measured as of the date of the policy. The above rule, or the one adopted in the instant case, might be changed to the extent that the market value be determined as of the date of the suit or of resale. Neither rule would be correct in the case of defects by way of permanent incumbrances; the contract is breached at the time of the conveyance and the damages should be measured as of that time. However, where the incumbrance is pecuniary, e.g. a lien or mortgage, the purchaser should be limited to nominal damages until he has removed the incumbrance, or has been evicted by an enforcement of the lien.

15 Curtis v. Baugh, 79 Ill. 242 (1875).
1 Ill. Rev. Stat. 1939, Ch. 89, § 6a.
2 The act was amended July 29, 1939, Laws 1939, p. 706 et seq., to allow issuance of a license, "... (a) where the woman is pregnant at the time of such application, or (b) when the woman has, prior to such application, given birth to an illegitimate child which is living at the time of such application and the man making such application makes affidavit that he is the father of such illegitimate child... or (c) upon a finding that such marriage may be consummate without serious danger to the health of either party. ..."
3 Wis. Stats. 1937, Title 23, § 245.10.
5 Moline Daily Dispatch, Feb. 2, 1940: "The (Illinois State Health) department released compilation by counties showing the downward trend in the marriage
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previous; the legal ones have now been given some attention in Boysen v. Boysen.6 There two persons were domiciled and were residents of Illinois. They went into Indiana apparently with the sole intent of evading the provisions of the Illinois Marriage Act and were married in compliance with the laws of that state. In a suit to have the marriage annulled, it was held that such relief should be denied.

The general rule undoubtedly is that a marriage valid or void by the law of the state in which it is solemnized will be recognized as valid or held void in every other jurisdictions, unless it is a polygamous or an incestuous marriage prohibited by natural law, or otherwise declared void

license business since 1936, the last full calendar year prior to the effective date of the hygienic marriage act.” Statistics show the following number of licenses issued:

<table>
<thead>
<tr>
<th>Year</th>
<th>Licenses Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1936</td>
<td>98,320</td>
</tr>
<tr>
<td>1937</td>
<td>76,496</td>
</tr>
<tr>
<td>1938</td>
<td>46,917</td>
</tr>
<tr>
<td>1939</td>
<td>51,181</td>
</tr>
</tbody>
</table>

The decrease was sharper down state. In Cook County Mr. Sidney Summerfield of the marriage license bureau reports licenses issued:

<table>
<thead>
<tr>
<th>Year</th>
<th>Licenses Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1936</td>
<td>43,775</td>
</tr>
<tr>
<td>1937</td>
<td>39,617</td>
</tr>
<tr>
<td>1938</td>
<td>31,106</td>
</tr>
<tr>
<td>1939</td>
<td>35,113</td>
</tr>
</tbody>
</table>

In Rock Island County the licenses issued:

<table>
<thead>
<tr>
<th>Year</th>
<th>Licenses Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>1,696</td>
</tr>
<tr>
<td>1937</td>
<td>1,102</td>
</tr>
<tr>
<td>1938</td>
<td>312</td>
</tr>
<tr>
<td>1939</td>
<td>409</td>
</tr>
</tbody>
</table>

In Henry County the licenses issued:

<table>
<thead>
<tr>
<th>Year</th>
<th>Licenses Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1936</td>
<td>382</td>
</tr>
<tr>
<td>1937</td>
<td>348</td>
</tr>
<tr>
<td>1938</td>
<td>180</td>
</tr>
<tr>
<td>1939</td>
<td>170</td>
</tr>
</tbody>
</table>

In Whiteside County the licenses issued:

<table>
<thead>
<tr>
<th>Year</th>
<th>Licenses Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1936</td>
<td>558</td>
</tr>
<tr>
<td>1937</td>
<td>392</td>
</tr>
<tr>
<td>1938</td>
<td>125</td>
</tr>
<tr>
<td>1939</td>
<td>160</td>
</tr>
</tbody>
</table>

Chicago Tribune, 2/2/40—Vol. XCIC. No. 29, p. 8. An Indiana law, effective March 1, 1940, will demand a blood test made by a state approved laboratory before a license is granted.

6 301 Ill. App. 573, 23 N.E. (2d) 231 (1939). See also, in support of this case, Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920). Also involved was the problem whether the equitable maxim that he who comes into equity should come with clean hands should be applied. It was held that such maxim is not to be invoked where its enforcement would result in sustaining an act declared to be void or against public policy. See also Simmons v. Simmons, 19 F. (2d) 690 at 691 (1927); Snell v. Snell, 191 Ill. App. 239 (1915); Arado v. Arado, 281 Ill. 123, 117 N.E. 816, 4 A.L.R. 28 (1917); Szlauzis v. Szlauzis, 255 Ill. 314, 319, 99 N.E. 640; but contra, see Berry v. Berry, 114 N.Y. S. 497 (1909), which is limited by Brown v. Brown, 138 N.Y. S. 602 (1912).
by positive law.\textsuperscript{7} Kent in his Commentaries\textsuperscript{8} pointed out that there is an exception to this rule, that where two parties intending to evade the law of the domicile go elsewhere and marry, the courts of the lex fori would not be bound to hold the marriage valid, because it would be an act \textit{ad ever-sionem juris nostri}. In opposition to this opinion is the decision of the Court of Delegates in England in 1768, involving a minor who ran away to Scotland without obtaining his guardian’s consent as required by English law, and there married, but the marriage was held valid by the English court.\textsuperscript{9} An exceptional case is \textit{Cunningham v. Cunningham},\textsuperscript{10} in which a New York court stressed the power of the domiciliary state over the citizen and held that, in case the parties deliberately left the state to evade the law of the domicile, the law of the lex fori should apply. But today the courts generally hold that marriages valid where celebrated are valid everywhere, subject to the two exceptions before mentioned: (1) where the marriage violates natural law, and (2) where a marriage between two parties is declared void in the state of domicile by a positive statute.

The Uniform Marriage Evasion Act was promulgated to prevent persons domiciled in one state from going into a sister state and marrying wherever a local statute declares a marriage between such persons to be absolutely void. Illinois enacted such a statute,\textsuperscript{11} but “the only marriages which by that act are made null and void are marriages which are contracted in a foreign state or country by residents of this state because they are prohibited and declared void by the laws in this state.”\textsuperscript{12} The Marriage Evasion Act was properly held to have no application in the Boysen case to persons who leave Illinois to marry in order to evade the statute requiring a pre-marital examination for venereal disease, since marriage in violation thereof is not expressly declared void.\textsuperscript{13}

E. Young

Mines and Minerals—Nature of Estate Granted—Nature of Interest Created by Deed Conveying Oil and Gas Under Land.—In \textit{Triger v. Carter Coal Company},\textsuperscript{1} the Supreme Court of Illinois, in construing the nature of the estate created by a mineral deed conveying the oil and

\textsuperscript{7} Loughran v. Loughran, 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934); Wilson v. Cook, 256 Ill. 460, 100 N.E. 222 (1912); Reifsneider v. Reifsneider, 241 Ill. 92, 89 N.E. 255 (1909); State v. Fenn, 47 Wash. 561 at 563, 17 L.R.A. (N.S.) 800, 92 Pac. 417 (1907); Van Voorhis v. Brintonnell, 86 N.Y. 18 (1881); Story, Conflicts of Law (1846), 84; Rest. on Conflicts of Laws, § 115, 131, and 132.

\textsuperscript{8} Vol. 2 (12th Ed.), pp. 92, 93.

\textsuperscript{9} Compton v. Bearcraft, 2 Hagg. Cons. 443, 444. This decision was gravely questioned. Lord Mansfield a few years before had strongly intimated that he was in favor of the other view, although he admitted the point was undecided in England. Kent Commentaries, Vol. 2 (12th Ed.), 92, 93.

\textsuperscript{10} 206 N.Y. 341, 99 N.E. 845 (1912).

\textsuperscript{11} Ill. Rev. Stat. 1939, Ch. 89, § 19.

\textsuperscript{12} Schwartz v. Schwartz, 236 Ill. App. 336 at 338 (1925).

\textsuperscript{13} The only legal consequences attached to a violation of this provision are a fine on the clerk issuing the license and either fine or imprisonment or both on the person securing the same. Ill. Rev. Stat. 1939, Ch. 89, § 6a. By contrast see Ill. Rev. Stat. 1939, Ch. 89, § 1, involving incestuous marriages.

\textsuperscript{1} 372 Ill. 182, 23 N.E. (2d) 55 (1939).
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gas under a certain tract of land, decided that a freehold corporeal interest in the land itself was the result. The court seemingly based its conclusion upon the fact that the deed also granted the right to the grantee to enter upon the land for the purpose of prospecting and operating wells, and expressly dismissed the theory that the title to the oil and gas in place vests in the grantee by stating, "Oil and gas in place are minerals, but by reason of their fugacious qualities they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land."

This decision is the leading case construing such a deed although the principle followed has been heretofore laid down in connection with the nature of an estate created by an oil and gas lease. The ordinary oil and gas lease contains the provision that the lessee is to have and to hold the premises for a definite term and so long as oil and gas are produced therefrom in paying quantities. The courts of Illinois construe this provision as creating a freehold estate in the land, inasmuch as the lease may last for an indefinite time.

Although "it is no longer doubted that oil and gas within the ground are minerals," they have peculiar attributes not in common to other minerals. They are fugitive in nature and have a vagrant habit and disposition to wander or percolate and possibly escape from beneath one part of the surface of the earth to another. These tendencies have all been taken into consideration by the courts in determining the nature of


3 Bruner v. Hicks, 230 Ill. 536, 82 N.E. 888 (1907); Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908); Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46 (1908); People ex rel. Carrell v. Bell, 237 Ill. 332, 86 N.E. 593 (1908); Ohio Oil Co. v. Daughety, 240 Ill. 361, 88 N.E. 818 (1909); Illinois Kaolin Co. v. Goodman, 252 Ill. 99, 96 N.E. 887 (1911); Daughety v. Ohio Oil Co., 263 Ill. 518, 105 N.E. 308 (1914); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1921).

4 Although there are three principal types of oil and gas leases, the courts of Illinois have not distinguished between them in applying their construction of the nature of the lessee's estate in the oil and gas. Types of leases may: (1) grant the exclusive right to explore for oil and gas. See Cortelyou v. Barnsdall, 236 Ill. 138, 86 N.E. 200 (1908). (2) grant the land for the sole purpose of searching for oil. See Bruner v. Hicks, 230 Ill. 536, 82 N.E. 888 (1907); Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908). (3) grant the oil and gas itself. See Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46 (1908).

5 See note 3, supra.

6 Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915).
the estate created by the conveyance or lease of oil and gas and have been the basis for comparison with subterranean water\(^7\) and even with animals ferae naturae,\(^8\) resulting in the conclusion that oil and gas are not subject to ownership except when reduced to actual possession by extraction from the land.

Other courts have determined that these physical characteristics create in the lessee or grantee an incorporeal hereditament in the nature of a profit à prendre\(^9\) or a mere license or right to explore for oil and gas.\(^10\)

However, the majority of the courts,\(^11\) while taking into consideration the physical nature of oil and gas, treat them much like coal and other solid minerals. They hold that, while oil and gas is in place, it constitutes a part of the realty and the landowner is regarded as having title thereto in place. His title embraces necessarily the privilege or right to take them from the ground. When nothing is said in the conveyance of the land, the oil and gas passes with the surface. But the landowner may sever his estate in the oil and gas from his estate in the surface by a grant of the oil and gas or by an exception of the oil and gas in a conveyance of the surface. The privilege or right to go upon the surface for the purpose of exploring and producing should be necessarily implied in a grant or exception of said oil and gas.\(^12\) The possibility that the oil and gas may escape is the basis for the theory that there can be no separate ownership of oil and gas in place underneath the surface of the earth. The majority dismiss this argument by treating the conveyance as of no effect where oil and gas are not beneath the land, which is similar to the treatment of a conveyance of solid minerals where there are in fact no solid minerals present beneath the land.\(^13\)

Under this majority view, the estate created may be a fee simple, or it may have a lesser duration, such as a determinable fee which results in the lessee under an ordinary oil and gas lease in the ownership theory state of Texas.\(^14\)

The remedy under the ownership theory to determine the title to the oil and gas is logically trespass.\(^15\) The equitable actions for protection from actual or threatened injury generally accorded to the owner of real estate would also be available.\(^16\)

In Illinois, however, although “the owner of minerals [coal] may in-

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7 People's Gas Co. v. Tyner, 131 Ind. 277, 31 N.E. 59 (1892).
9 Rich v. Doneghy, 71 Okla. 204, 177 P. 86 (1918).
10 Rechard v. Cowley, 202 Ala. 337, 80 So. 419 (1918); Thomas v. Standard Development Co., 70 Mont. 156, 224 P. 870 (1924).
11 See note 2, supra.
12 Weaver v. Richards, 156 Mich. 320, 120 N.W. 818 (1923).
14 Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915); Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).
voke the same remedies to assert or defend his rights and protect his title as may the owner of a free estate in land generally,"17 the owner of the oil and gas rights is not entitled to ejectment or other real action.18 His remedy is in equity to prevent waste and irreparable injury.19

The result of the severance under the theory in Illinois and the ownership theory seem to have the same general effect upon litigants in that the oil and gas both become personal property when reduced to possession apart from the land. Also, both courts recognize the fact that a severance takes place between the surface and oil and gas rights, which precludes the adverse possessor of the surface from acquiring any rights to the oil and gas after a conveyance or lease of the latter has taken place.20

V. Krauchunas

PARENT AND CHILD—Actions Between Parent and Child—Right of an Unemancipated Minor to Recover from Parent Under Wrongful Death Statute—The right of an unemancipated minor child to recover damages for the wrongful death of one parent from the surviving parent was questioned in the Pennsylvania case of Minkin v. Minkin.1 As late as 1935 in that state, tort liability of a parent to a child was denied because of public policy, and the minor’s sole remedy was declared to be the criminal prosecution of the parent, in the event of malice.2 The Minkin case, however, by a four to three decision, sustained the minor’s right to sue and rejected the older public policy doctrine.3 The court based its decision primarily upon a Pennsylvania statute of 1851,4 amended in 1855,5 which provided in part “that the persons entitled to recover damages for any injuries causing death, shall be the husband, widow, children or parents of the deceased, and no other relatives.” The court pointed out that there was no exception in the statute depriving the unemancipated minor of the right to sue where the surviving parent was the tortfeasor, and the court refused to read such an exception into the act, despite the public policy against allowing a child to sue his parent in tort.6

17 Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N.E. 144 (1898).
18 Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908); Carter Oil Co. v. Liggett, 371 Ill. 482, 21 N.E. (2d) 569 (1939).
19 Gillespie v. Fulton Oil and Gas Co., 236 Ill. 188, 86 N.E. 219 (1908); Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N.E. 818 (1909); Carter Oil Co. v. Liggett, 371 Ill. 482, 21 N.E. (2d) 569 (1939).
20 Renfro v. Hanon, 297 Ill. 353, 130 N.E. 740 (1921).
1 Minkin v. Minkin, 336 Pa. 49, 7 A. (2d) 461 (1939).
3 See note 1, supra.
4 P. L. 669, par. 19; 12 P.S. par. 1601 (April 15, 1851).
5 P. L. 309, as amended, 12 P.S. par. 1602 (April 26, 1855).
6 The dissent expressed the opinion that the public policy which has denied tort recovery in other cases since the passage of these Acts should be read into the statute. A concurring opinion treated the infant’s right as a property right granted by statute, rather than a personal right of action, hence properiy allowed on the ground that it is familiar law that a child may sue the parent for wrongful disposition of the child’s property. Kreigh v. Cogswell, 45 Wyo. 531, 21 P. (2d) 831 (1933). Paskewie v. East St. L. & L. Ry. Co. 281 Ill. 385, 117 N.E. 1035, L.R.A. 1918 C 52 (1917).
Notwithstanding a recently developed minority view, the great weight of authority is still against the decision in the Minkin case, and even those decisions in minority jurisdictions do not carry implications as far reaching as those of the Pennsylvania decision. The seeds of a public policy which permits tort actions between parent and child were planted in a North Carolina dissenting opinion in 1923, were carried into similar dissents in Wisconsin in 1927 and in New York in 1928, and flowered in 1930 in the then revolutionary decision of Dunlop v. Dunlop. There a New Hampshire court permitted a minor child to recover insurance compensation as an insured servant of the father, and the child’s disability to sue was held not to prevent action where family harmony was not endangered. Two years later, in Lusk v. Lusk, the Supreme Court of West Virginia reached a similar conclusion in a case in which the parent’s automobile liability insurance carrier was involved, holding “that when no need exists for parental immunity, the courts should not extend it as a mere gratuity.” In the same year, the Appellate Court of Missouri permitted a mother to sue her minor child in tort, the insurance factor having been deemed material. The state of Virginia was the last to join this growing minority group, when it permitted the minor daughter of the owner of a bus line to maintain an action against her father for injuries sustained while a passenger in the father’s bus. It appears that prior to the instant case the minor’s right of recovery was limited to situations in which the parent’s insurance carrier was the real defendant and situations where the child’s injury was received when he was a servant or passenger of the parent. None of these considerations were present in the Minkin case, and hence it presents the first clear-cut rejection of the older view, at least in wrongful death cases.

Historically there seems to be no basis for the rule forbidding a child

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7 Dunlop v. Dunlop, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913).


13 Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).


15 Worrell v. Worrell, Va. 4 S.E. (2d) 343 (1939).

16 The matter of damages was also determined; for by the statute in question, the tort-feasor was also entitled to a portion of the recovery both as widow and as successor to another, afterwards deceased, minor child. It was held that the verdict, if favorable to the plaintiff, should exclude recovery to the widow who, as tort-feasor, should receive nothing from her own wrong.
to sue its parent for personal tort, and the common law recognized the right of the child to bring an action for injury to property against the parent. In this country, prior to 1891, suits between parent and child were rare and were decided without much discussion of the ground of liability. An early Louisiana case established ground work for the nonliability rule by charging the parent with the duty of the child's training and support and granting an incidental privilege to chastize subject to criminal liability for abuse. The case, however, which is the first judicial precedent for the nonliability rule is Hewlett v. George, where the action was for the wrong of false imprisonment. It is significant that the decision in the Hewlett case was put squarely on the ground that such suits were prohibited by public policy, since this doctrine has been followed and approved by the majority of the states. The rule as thus established was adopted by many courts, some of which have added further reasons for denying liability. Tennessee, New Jersey, Maryland, Minnesota, Georgia, South Carolina, North Carolina, Ohio, and Rhode Island all deny recovery as a matter of policy. Iowa, Michigan, California, and Nebraska, in upholding the nonliability rule have added the doctrine that a person precluded from recovery for personal injury, since he and the tort feasor are members of a family group, cannot recover from the employer of the tort feasor. The Supreme Court of Washington denied civil recovery where the father had been convicted of the rape of his daughter and sentenced to prison, the court basing its decision on the policy of the preservation of domestic tranquility. Connecticut,

17 Faulk v. Faulk, 23 Texas 653 (1859); Keeney v. Henning, 58 N.J. Eq. 74, 42 A. 807; Fyffe v. Fyffe, 350 Ill. 620, 183 N.E. 641 (1932).
18 37 American Centennial Digest, Par. 140, Pp. 2241.
20 Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891).
24 Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Miller v. Pelzer, 159 Minn. 735, 199 N.W. 678 (1924); Lund v. Olsen, 183 Minn. 515, 237 N.W. 188 (1931).
32 Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Ledgerwood v. Ledgerwood, 114 Cal. App. 538, 300 P. 144 (1931).
33 Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927).
despite the fact that it permits tort actions between husband and wife,\textsuperscript{35} adheres to the majority nonliability rule in regard to parent and child, although it has been indicated that compulsory automobile insurance laws might lead to a different rule.\textsuperscript{36} Indiana\textsuperscript{37} also follows the majority trend, although one appellate court case permitted a father to recover in tort against his minor child.\textsuperscript{38} Louisiana has specifically incorporated the non-liability rule into the Code,\textsuperscript{39} however, a decision citing \textit{Dunlop v. Dunlop}\textsuperscript{40} with approval permitted minor children to recover statutory death damages from their deceased father’s estate for the death of their mother.\textsuperscript{41}

In Illinois, no case in point has ever been before the Supreme Court. Two appellate court cases have approved the majority nonliability rule, but both controversies were decided on different grounds. In \textit{Foley v. Foley}\textsuperscript{42} the prevailing rule is briefly stated without any consideration of the grounds upon which it is supposed to rest, and in \textit{Meece v. Holland Furnace Company},\textsuperscript{43} the action was dismissed on the ground that the parent, in performing the acts which injured the minor child, was acting outside the scope of his authority as agent of the defendant furnace company. The Illinois act\textsuperscript{44} providing an action for wrongful death is almost identical with that of Pennsylvania, including the lack of any exception where the surviving parent is the tort feasor. The doctrine of the Minkin case could be applied to our statute, if the courts of this state should decide that a change in policy is warranted.

In denying actions between family members, the courts of New York,\textsuperscript{45} Wisconsin,\textsuperscript{46} and Massachusetts,\textsuperscript{47} following the parent and child nonliability rule, have based their denial on the desirability of preserving parental authority and domestic tranquility. Yet, in recent decisions, both the New York\textsuperscript{48} and Wisconsin\textsuperscript{49} courts have permitted suits between children of the same family. Both cases discuss the effect of liability in-

\textsuperscript{36} Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929). The Connecticut court in denying recovery says, “When compulsory insurance in Automobile cases is required, and the legislative enactment provides that recovery can be had directly from an insurer by one injured through the negligence of the insured, the child might recover of the insurer for the negligent injury inflicted by his parent.”
\textsuperscript{37} Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).
\textsuperscript{38} McKern v. Berk, 73 Ind. App. 92, 126 N.E. 641 (1920).
\textsuperscript{39} Section 104 of Louisiana Code of Practice.
\textsuperscript{40} Dunlop v. Dunlop, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930).
\textsuperscript{41} Ruiz v. Clancy, 162 La. 935, 162 So. 734 (1935).
\textsuperscript{42} Foley v. Foley, 61 Ill. App. 577 (1895).
\textsuperscript{43} Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933).
\textsuperscript{44} Ill. Rev. Stat. 1939, Ch. 70, §§ 1, 2.
\textsuperscript{46} Wick v. Wick, 192 Wis. 260, 212 N.W. 787, 52 A.L.R. 1113 (1927).
\textsuperscript{47} Luster v. Luster, 13 N.E. (2d) 438 (Mass., 1938).
\textsuperscript{49} Munsert v. Farmers Mutual Automobile Insurance Company, 229 Wis. 581, 281 N.W. 671 (1938).
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Rozell v. Rozell, the New York court said: "Insurance as protection to sufferers is a matter of common knowledge. But this fact alone creates no right where one otherwise would not exist." If the presence of insurance is to materially affect this matter adequate legislation should be provided, as has been done in Wisconsin, for the joinder of the parent's insurance carrier. Fictions could then be disregarded and the child's right to sue the parent could be squarely placed on the ground that no injury to the family could result.

TRUSTS—Expense of Administration—Whether the Cost of Investment Counsel Is an Expense Properly Chargeable to Trust Estate.—The problem of whether or not a trustee may properly charge the trust estate with the cost of the services of investment counsel is disposed of in summary fashion by the Surrogate's Court of New York in a single page opinion handed down in the recent case of In re Gutman's Estate. The court apparently sees no reason for hesitating to hold that the trustee may not employ the services of investment counsel and expect the trust estate to stand the expense, saying that it is "not willing to open the door to the abuses which certainly would follow the establishment of the principle that fiduciaries may engage the services of investment counsel at the cost of the estate" and "if in his opinion a fiduciary is not competent to discharge his duties properly he may always retire on application and proper accounting."

No cases are cited in the opinion but seemingly the court feels that the trustee is here seeking to delegate to an investment counsel an essential function in the administration of the trust. If such was the intent of the trustee and if such would be the effect of granting his request, then clearly the court's decision is in line with authority, for it is established that a trustee cannot properly employ an agent to select investments for the trust. This view is in line with the general rule that the discretionary duties of a trustee may not be delegated, a rule resting squarely on the theory that his office is one of confidence, that he has been selected by the settlor because of his personal fitness and qualifications, and that he should not be permitted to avoid that responsibility by foisting on another the very discretionary powers that he was chosen to perform. So the courts have refused to permit trustees to delegate duties involving discretion although

50 Ibid.
51 Wisconsin Statutes—(Procedure in Civil Actions)—Chap. 260, Par. 260.11.
52 The validity of such a doctrine, i.e., that parent's liability is to depend upon the presence or absence of insurance protection is one well open to question. See Ill. Central R. Co. v. Hicklin, 131 Ky. 624, 115 S.W. 752, 23 L.R.A. (N.S.) 870 (1909).
1 14 N.Y.S. (2d) 473 (1939).
2 Scott, Trusts, II, 916; Restatement of Law of Trusts, § 171h. says, "A trustee cannot properly delegate to another power to select investments." For cases, see City of Boston v. Curley, 276 Mass. 549, 177 N.E. 557 (1931); In re Shintaffer's Estate, 134 Kan. 101, 4 P. (2d) 764 (1931), holding an executor grossly negligent for authorizing another person to invest and reinvest the estate's funds; Rowland v. Witherden, 3 Mac. & G. 568, 42 Eng. Rep. 379 (1851); Bostock v. Floyer, L.R. 1 Eq. 26 (1866); Winthrop v. Attorney General, 128 Mass. 258 (1880).
3 Note, 50 A.L.R. 214.
there has been no ban on the appointment of agents to perform purely ministerial acts.

The well established policy of characterizing the act as either discretionary or ministerial and thus determining whether or not it is a properly delegable duty is bemoaned by some of the current writers on the subject. Professor Bogert decries the arbitrary cleavage between acts involving discretion and those merely ministerial, feeling that in so holding the courts assume a simple and clean cut division whereas in reality the line is difficult to draw with any degree of certainty. Acts totally devoid of discretion are few.

It would seem that the Surrogate's Court of New York, in considering the petition of this trustee for permission to hire an investment counsel should, instead of applying the discretionary-ministerial test, have followed the more supportable approach to the problem and taken into consideration the question of whether or not the cost of investment counsel would be an expense that might reasonably be incurred by the trustee in the administration of the estate. There was no need for the court to enter into a discussion of the problem of delegation since it is fair to assume here that the trustee sought to obtain advice and counsel to aid him in the exercise of his discretion, not to delegate that discretion to another. The only question the court was called upon to decide was whether or not the expense involved was reasonably proper in the administration of the estate. It has been said that "a trustee can properly incur expenses in employing attorneys or brokers or other agents or servants so far as such employment is reasonably necessary in the administration of the trust." The test is whether or not the service was reasonably necessary, and, in determining that, the court have been wont to apply (as in other trust problems) the "reasonably prudent man in a similar situation" test.

4 Bogert, Trusts and Trustees, III, 1766.
5 Restatement of Law of Trusts, § 171f. "Although a trustee cannot properly delegate to another, he can properly consult with and take advice from others provided he personally makes the final decision in the matter."
7 Scott, Trusts, II, 1004.
8 "Prudent man in his own affairs" test applied by the court in Halstead's Ex'rs v. Ingram, 163 Va. 223, 175 S.E. 898 (1934), using this language: "Nothing more is
Says Professor Bogert, "If the business man would employ an outside expert, or use a regularly employed agent or servant, then the trustee is given similar liberty." 

Applying the prudent man test to the instant case, particularly in the light of common business usage, could not the court, without doing violence to rational thought or to the precedent of trust law, have deemed this to be an allowable expense? Though no identical factual situation has been considered by the higher courts, analogous problems would indicate that the trustee's petition here should have been allowed. Courts have consistently allowed reasonable attorney fees as a charge against the trust estate where the litigation involved or legal advice sought was reasonably necessary to the preservation and protection of the estate. 

There are also cases permitting a trustee to hire the services of accountants and charge the estate with the expense where the accounts involved are so complicated as to make the services of an accounting firm a proper expense in the administration of the estate. 

So also have trustees been permitted to hire, at the expense of the trust estate, realty brokers to locate possible purchasers of trust property, stock brokers for the same purpose, construction experts when the trust involved constructing a large office building, and other agents to aid the trustee in his administration of the estate. Of course, the facts and necessities of each case must be weighed by the court, in light of established trust tenets, before the particular expense item submitted for approval is allowed. In one case the court, in applying the prudent man test, might lay particular emphasis on the size of the trust estate, whereas in another the controlling factor might well be the individual or corporate character of the trustee. 

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**notes:**

9 Bogert, Trusts and Trustees, III, 1766. And 65 C.J. 666 embodies the same thought in saying that "in a number of cases the employment of agents has been upheld chiefly upon the ground that such employment arose through necessity or was justified by the common usages of business," citing several cases.


15 A case shedding an interesting sidelight on the instant case is that of In re Schinasí's Estate, 294 N.Y.S. 400 (1936), where the court disallowed a claim of $5,000 to cover the salary expense of two hotel experts who had conducted a survey of the problems of hotel management, rehabilitation etc., for the corporate trustee involved. The court there said that a corporate trustee is presumably equipped to handle difficult problems, that it holds itself out as having facilities not
In any event, it would seem that where a trustee can show that the best interests of the trust estate will be served by his employing investment counsel to aid him in his selection of investments so that the estate may be properly administered and preserved, he should be allowed to pay a reasonable fee for such services and charge the estate accordingly. If, instead, the courts are going to impose on the trustee the burden of devoting individual and personal attention to each and every investment transaction without permitting him to lean on assistants for technical and professional help as would a reasonably prudent business man in a similar situation, then they are employing a short-sighted policy of trust administration such as will inevitably work a serious hardship on the entire field of trusts. Responsible men will shun trust appointments if they are not permitted the use of assistants as sanctioned by common business usage.16

J. C. BERGHOFF

TRUSTS — SPENDTHRIFT TRUSTS — WHETHER INTEREST OF DEFAULTING TRUSTEE-BENEFICIARY CAN BE REACHED BY SURETY-ASSIGNEE OF CLAIM OF TRUST ESTATE.—In the Massachusetts case of Blakemore v. Jones, Janet H. Jones, one of two trustees, being also a beneficiary, was charged for losses suffered by the trust estate as a result of the bad judgment of the co-trustee, now deceased. Her surety paid $32,000 to the succeeding trustee, receiving a release and an assignment of the claim of the trust estate against Janet H. Jones, including any right to reach her interest as beneficiary. The trust deed contained a typical spendthrift trust provision.2 The surety made demand on the trustee for all income due and to become due the defaulting trustee-beneficiary under the trust. Miss Jones was without other means of support. The trustee petitioned for instructions.

The Massachusetts court rejected the rule of the Restatement of the Law of Trusts, which declares that the beneficiaries of a spendthrift trust available to individuals and that it is thus bound, when the need arises, to draw upon its own personnel at no additional expense to the trust estate. The inference of the opinion is that the right of the individual trustee to employ expert assistants is broader and freer than that enjoyed by the corporate trustee. In the instant case we have as trustee the widow and brother of the deceased settlor, individuals chosen primarily because of love and affection, secondarily perhaps because of sound business ability and honesty, but certainly not because of any holding out of special ability in the field of investments.

16 By way of appendage it should be noted that although the court's entire opinion is concerned with delegation of discretion, and this comment has necessarily discussed the opinion as written, the attorney's record does show that the court made an observation during the course of the argument to the effect that the income of the estate had thus far been very satisfactory and that therefore there appeared to be no necessity for employment of investment counsel. Perhaps the court was thinking in terms of necessary expense rather than of delegable powers, but the language of the opinion certainly belies such a possibility.

1 22 N.E. (2d) 112 (Mass., 1939).

2 "All payments both principal and income made under the provisions of this will shall be made directly to the several beneficiaries named on his or her personal receipt only or applied to his or her benefit without power of anticipation or assignment and without liability for his or her debts or obligations."
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are entitled to a charge on the interest of a defaulting trustee-beneficiary, saying, "The quoted statement of principle, we think, has application only where the interest of trustee as beneficiary is in its nature liable to be reached by creditors!" The court holds that the trust estate is only a creditor, though perhaps a secured one, and as a creditor cannot reach the income, so that the trust estate is without power to withhold it from the beneficiary.

The court claimed to be following a previous decision by the same court in "resisting encroachments" on the spendthrift trust doctrine, citing Bucknam v. Bucknam, in support. Comparison shows that the court in the instant case has gone to much greater lengths to uphold the spendthrift provision. The court in the Bucknam case, while deciding that a divorced wife with dependent child could not reach the beneficiary's interest in an action to apply it to a judgment debt or to enforce her rights as assignee, specifically refused to decide the question of whether recovery might be had on the theory that the settlor intended to support his son's family as well as the son. The court there cited Eaton v. Eaton, where recovery was allowed on the presumption that the settlor intended by use of the word "support" to include the means for supporting the son's family as well as himself, indicating that on a proper showing this presumption would be followed.

Some support for the instant decision may be found in Overman's Appeal, which decided that the interest of a defaulting trustee-beneficiary could not be withheld from him although his account had been surcharged for mismanagement. Here the court refused to vary from the "expressed intent" of the settlor, but as an exculpatory clause was included in the provisions of the trust deed, there were much stronger grounds there for finding that such an intent existed.

The result in the instant case is founded on the court's construction of the will to the effect that the settlor has manifested an intention to provide for the support of the trustee-beneficiary regardless of any equity which might be created in favor of the other beneficiaries to have restitution. To reach this result the court has to say that the other beneficiaries have only a creditor's claim and not an equitable charge as the Restatement indicates. It is in effect saying that the written provisions of the settlor must be given this chosen effect regardless of the fact that the provisions are inconclusive, although the result disregards the equity of the other beneficiaries and tends to encourage careless trust administra-

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3 Restatement of the Law of Trusts, § 257: "If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust." Comment f: "Rule stated in this section is applicable though the interest of the trustee beneficiary is not transferable by him or subject to the claims of his creditors. Although his ordinary creditors cannot reach his interest . . . other beneficiaries can."


6 88 Pa. 276 (1879).
tion by trustee-beneficiaries. Other authorities join the Restatement in disagreeing with such a holding.\(^7\)

The Illinois courts have not yet been faced with the case of the defaulting trustee-beneficiary, but decisions in spendthrift trust cases show a tendency to allow "encroachments" in the spendthrift trust doctrine. The Illinois Appellate Court has held that the income from a spendthrift trust may be reached by a divorced wife in a suit to enforce payment of alimony\(^8\) and that fees and costs incurred by an attorney in establishing a beneficiary's interest are payable out of his interest.\(^9\) In these decisions, the Illinois court has shown an unwillingness to be bound by a narrow interpretation of the settlor's intent, instead broadening the meaning of the term "support" to include these items. These decisions have also drawn support from the usual public policy considerations pertaining to spendthrift trusts—an unwillingness to allow the inalienability feature to create public burdens—and from the realistic view that the settlor's intent is a true test only where an intent is indicated, ordinary equitable and legal principles dictating the construction in other cases.

To include the case of the defaulting trustee-beneficiary in the class of "encroachments" on the spendthrift trust doctrine does not require the finding of a "presumed intent" nor does it require the overriding of an express intent. It requires only that the spendthrift provision be limited to its natural intendment—that the benefits accruing to the cestuis shall not be available to creditors nor to the cestuis by anticipation. It is more reasonable and certainly more equitable to limit the effect of the spendthrift provision to this than to say that the spendthrift provision plus the fact that this beneficiary is made trustee is tantamount to an exculpatory clause.

\(^7\) See Griswold, Spendthrift Trusts (Matthew Bender & Co., 1938), §§ 350: "The trustee of a spendthrift trust may withhold the income due a beneficiary who was also a co-trustee to make good breaches of trust committed by the beneficiary when he was a co-trustee." Scott, Trusts, II, § 257.1: "The interest of a beneficiary may be inalienable, either by the terms of the trust or by statute, although the beneficiary is also a trustee. Although the interest of the trustee-beneficiary of a spendthrift trust cannot be reached by his creditors, it can be impounded for the benefit of the other beneficiaries to make good a breach of trust committed by him."

Cited by both authorities is the leading case of In re Burr's Estate, 257 N.Y.S. 654 (1932), in which the New York court held that a trustee's claim to the interest of a defaulting trustee-beneficiary was valid and was superior to the claim of the trustee-beneficiary's wife's claim to alimony, no intent to the contrary having been shown. The court there called up the "established rule of equity that the rights of a beneficiary of an estate to restitution, as against a defaulting trustee, are superior to those of the trustee in his capacity as life tenant, or as owner of an outright share of the estate, or as against his assignees or creditors." The court construed the New York statute (Personal Prop. Law, § 15, as amended by laws 1911, c.327) against alienability of such interests as not applicable in such cases, since otherwise great inequity would be done.


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Where, then, there is no expression of intent by the settlor as to the rights of the trustee-beneficiary when he is in default, ordinary rules of equity will take hold. It is well known that equity requires of a trustee the strictest performance of his duty before it will support his beneficial interest against those otherwise prejudiced by his conduct as trustee. In an ordinary trust, the trustee has no right to his compensation or his benefits as cestui until his account has been accepted. It is plain that equity should reject an interpretation which clearly encourages laxity and even intentional wrongdoing by trustees. Especially is this true in light of the equitable doctrine which requires a showing of well defined intention by the settlor to support a spendthrift trust in any case, on the ground that making property inalienable and limiting the rights of creditors is not in accord with the best interests of the public.

In the instant case the court was influenced, as the language of the decision shows, by the fact that the defaulting trustee-beneficiary was a nominal trustee only, her wrong being one of omission rather than of commission. In allowing this fact to influence the decision, however, the court has allowed a hard case to establish a dangerous precedent.

D. G. MACDONALD

10 Bogert, Trusts and Trustees, 192: "A cestui who is also a trustee of the same trust holds his interest under it subject to an equity that sums lost to the trust by reason of his defaults shall be deducted from his share before any payment is made to him out of trust funds. His interest under the trust is incumbered with an existing equity to make up actual past defaults, and with a potential or possible equity to restore money lost or stolen in the future."

11 See Erwin N. Griswold, Spendthrift Trusts, 243, adding other grounds.