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Agency—Imputed Liability—Loan of Automobiles; Constitutional Law—Equal Protection of Laws—Small Loan Companies; Easements—Creation by Implication—Severance of Ownership; Evidence—Confessions—Talking Pictures; Evidence—Present Recollection Revived—Use of Copies; Taxation—Inheritances—Gifts in Contemplation of Death

J. P. H.

S. C. S.

R. A. H.

W. C. I.

RECENT CASES

AGENCY—IMPUTED LIABILITY—LOAN OF AUTOMOBILES. The defendant, a teacher in an Idaho high school, on the day preceding a football game to be played at a neighboring town, asked the coach if he had enough cars to transport the team, and upon being informed that he needed one more car, defendant told the coach that he might use her car if he drove it himself. No compensation was requested and none was received. While the coach was driving the car next day en route to the game, he was killed and the plaintiff, one of the players, was injured. Admitting negligence on the part of the coach and no contributory negligence on plaintiff's part, the court *held* defendant liable in a suit for personal injuries brought against her by the plaintiff on the ground that the coach was the agent of the defendant. *Gorton v. Doty*, 69 P. (2d) 136 (Ida., 1937).

The soundness of the decision may be questioned for the reason that the facts do not warrant the application of the rule announced. The court stated and applied the rule that, "agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT, AGENCY (1933) § 1. See: *Sullivan v. Finch*, 140 Kan. 399, 36 P. (2d) 1023 (1934); *Georgeson v. Neilsen*, 24 Wis. 191, 252 N. W. 576 (1934). The finding that the coach was defendant's agent presents a too liberal interpretation of the rule, for agency requires that the agent be acting for and in behalf of his principal. 2 C. J. 419; *State v. Hubbard*, 58 Kan. 791, 51 Pac. 290 (1897); *Steele v. Lawyer*, 47 Wash. 266, 91 Pac. 958 (1907).

According to the rule applied and the great weight of authority there must be a showing that the agent was acting for and in the behalf of his principal. See cases cited *supra*. From the evidence in the instant case the Idaho court has traveled a long distance to find this relationship. If there was a benefit from the loan of the car it appears that the benefit accrued to the coach or to the school district rather than to the defendant, thus making the coach or the school district the gratuitous bailee of loaned property and exonerating the defendant from liability. Accordingly, in *Packard-Louisville Motor Co. v. O'Neal*, 248 Ky. 438, 58 S. W. (2d) 630 (1933), where the owner gratuitously loaned a car for a funeral, it was held that the owner was not liable for the driver's negligence. Also, in *Sharples v. Watson*, 157 Miss. 236, 127 So. 779 (1930), where the owner gratuitously permitted a student to take the owner's daughter and others to a track meet, the owner was held not liable for the driver's negligence.

Specifying the driver who is to operate the car tends to show neither that it is on the owner's behalf nor that the driver is under his control. In a case where the owner loaned his car to a driver with the understanding that the owner's son should make the trip the owner was held not liable for the driver's negligence. *Culpepper v. Holmes*, 170 Miss. 235, 154 So. 726 (1934). See also: *Gochee v. Wagner*, 257 N. Y. 344, 178 N. E. 553 (1931); *Marsh v. Sasanoff*, 9 N. J. Misc. 545, 154 Atl. 751 (1930); *Beville v. Taylor*, 202 Ala. 305, 80 So. 370 (1918); *Braverman v. Hart*,

105 N. Y. S. 107 (1907); *Limbacher v. Faunon*, 102 Misc. Rep. 703, 169 N. Y. S. 490 (1918); *Jones v. Harris*, 122 Wash. 69, 168 Pac. 863 (1917), L. R. A. 1918B, 498.

Thus the majority of courts follow the rule as illustrated in the above cases, and hold that in the absence of liability imposed by statute, the owner of an automobile is not liable for the negligence of the party to whom the property is loaned, when using it upon an enterprise of his own. It would seem that the use of an automobile under conditions as in the instant case creates a gratuitous bailment rather than an agency relationship. It is accordingly submitted that the case is erroneously decided and the transaction should have been considered a gratuitous bailment of the automobile rather than an agency relationship, with resultant non-liability on the part of the defendant.

J. P. H.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—SMALL LOAN COMPANIES. Plaintiff finance company brought an action to test the constitutionality of WASH. LAWS 1937, chap. 213, p. 1034, designed to regulate the activities of small loan companies. That act makes it a gross misdemeanor to charge more than twelve per cent per annum simple interest on loans under three hundred dollars and exempts from its operation any bank, trust company, building and loan association, credit union, industrial loan company, licensed pawnbroker, one making casual loans of his money, or retail merchant selling under conditional sales contracts. *Held:* The statute is unconstitutional under the equal protection clause of the Fourteenth Amendment as a special act aimed at a limited class, there being no warrant for so arbitrary a classification. *Acme Finance Co. v. Huse*, 92 Wash. Dec. 92, 73 P. (2d) 341 (1937). Two judges dissented.

There may be a denial of equal protection of the laws under the Fourteenth Amendment when the classification made by the legislature in the exercise of its police power is not reasonable. *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 Sup. Ct. 124 (1921). To be reasonable, the classification need only show an inherent and substantial difference germane to the subject and purpose of the legislation. *State v. Cannon*, 125 Wash. 515, 217 Pac. 18 (1923). The legislature may strike at the evil where it is most felt, and the court should differ with it only where the classification is palpably unreasonable and arbitrary. *Radice v. New York*, 264 U. S. 292, 68 L. ed. 690, 44 Sup. Ct. 325 (1924).

The exemption of banks and pawnbrokers from the operation of statutes authorizing higher rates of interest on small loans has been upheld over the objection of the bank that it was denied equal protection. *Family Finance Co. v. Allman*, 174 Ga. 467, 163 S. E. 143 (1932); *Cole v. Franklin Plan Co.*, 176 Ga. 561, 168 S. E. 261 (1933). Likewise the exemption of banks, auto finance companies, credit unions, building and loan associations, and licensed pawnbrokers from statutes regulating money lending and prohibiting high rates of interest on loans under three hundred dollars has been upheld. *Nat. Acct. Co. v. Dorman*, 11 Fed. Sup. 872 (1935); *Mutual Loan Co. v. Martell*, 77 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. 74 (1911); *State v. Hill*, 168 La. 761, 125 So. 317, 69 A. L. R. 574 (1929); *State v. Tenn. Finance Co.*, 152 Tenn. 40, 269 S. W. 3 (1925). Some decisions upholding this classification have stated that

small loan businesses are a distinct class of money lenders, inherently different in nature from such as banks, and should accordingly be treated in different ways. *Koen v. State*, 162 Tenn. 573, 39 S. W. (2d) 283 (1931); *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079 (1909). A classification based on the length of time for which the loan is made and on the difference between secured and unsecured loans has been held unreasonable. *Wallace v. Zinnman*, 200 Cal. 585, 254 Pac. 946, 62 A. L. R. 1341 (1927). But discrimination based on the size of the loan as well as on the interest rate is proper in defining the crime of usury. *State v. Sherman*, 18 Wyo. 169, 105 Pac. 299 (1909).

The decision of the Washington court can possibly be explained by the fact that the governor's veto of certain important sections of the law, including the licensing provision, substantially altered the act passed by the legislature. Nevertheless, the dissenting opinion seems to be in line with the great majority of decided cases.

S. C. S.

EASEMENTS—CREATION BY IMPLICATION—SEVERANCE OF OWNERSHIP. Defendant contracted to sell part of a tract of land to Sexauer who went into possession and thereafter built a driveway which encroached four feet upon the property retained by defendant. This driveway was used by both defendant and Sexauer, who assigned his interest under the contract to plaintiff, who completed the payments and was given a deed by defendant. Several years later, defendant commenced to build a fence along the property line between the two tracts and plaintiff brought this action for injunctive relief. *Held:* Injunction granted on the ground that plaintiff had an implied easement over defendant's land. *Hubbard v. Grandquist*, 91 Wash. Dec. 389, 71 P. (2d) 410 (1937).

The Washington court follows the strict view that in order that there be an implied grant of an easement there must be first, a separation of the title; second, that before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. *Bailey v. Hennessey*, 112 Wash. 45, 191 Pac. 863 (1920); *Ashton v. Buell*, 149 Wash. 494, 271 Pac. 591 (1928). In the principal case defendant argued that severance of title took place at the time the contract of sale was made, and since, at that time, the driveway was not in existence, one of the elements which must be present if an easement by implication was to arise was lacking. The court answered this argument by holding that the severance of title occurred at the time the deed was delivered. "The severance of title arose at the time the appellants conveyed the property to respondents, pursuant to the contract which respondents, as assignees of the original vendees, had completely carried out. An ordinary contract for the sale of real estate vests no title in the vendee. It cannot be held that the making of such a contract, whereby the owner of a tract of land agrees to sell a portion of it to another, severs the title." *Hubbard v. Grandquist, supra.*

Generally, there is no dispute concerning the time of severance. The cases are usually concerned with the question of whether at the time of conveyance the quasi-easement was of an apparent, continuous, and necessary character. *Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655

(1914); *Berlin v. Robbin*, 180 Wash. 176, 38 P. (2d) 1047 (1934); *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382 (1909); *Carman v. Dick*, 170 N. C. 305, 87 S. E. 224 (1915); *Dean v. Colt*, 151 Ore. 331, 49 P. (2d) 362 (1935). But, on principle, severance of title for the purpose of determining whether or not there is an implied grant of an easement, may occur as well at the time of the contract of sale as at the time conveyance is made. See note (1926) 24 MICH. L. REV. 315. For an easement is implied on the theory that the parties intended that it should exist and be included in the grant of the land. The courts merely declare in effect that the particular circumstances of the transaction raise a presumption of such intention. 2 TIFFANY ON REAL PROPERTY, (2d ed. 1920) p. 1273. The condition of the land at the time the contract was made should certainly be a controlling circumstance in showing the intention of the parties in this respect. Although there is a paucity of decisions upon this point it has been held that severance of title takes place at the time the contract of sale was made. In *Toothe v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182 (1892), it was held that plaintiff was entitled to an easement which existed at the time of contract of sale but which had been extinguished by the grantor before the deed was delivered. The court said that the plaintiff was entitled to have the premises in the condition in which they were at the time of contract as his right to them vested at that date. See also *Ananias v. Serenta*, 275 Pa. 474, 119 Atl. 554 (1923). The result in the *Toothe* case, *supra*, was placed on the ground that from the time of the contract of sale the vendee was the beneficial owner of the premises, and that the execution of the deed in pursuance to the contract was a ratification and adoption of the contract.

The decision in the instant case is explainable as an outgrowth of *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925). Although that case has been modified by later decisions, the Washington court has never gone so far as to hold that the conditional vendee is beneficial owner of the land, but merely, that he has "rights enforceable against the land which is the subject of the contract." *Culmback v. Stevens*, 158 Wash. 675, 291 Pac. 705 (1930). But for *Ashford v. Reese* the Washington court, in the instant case, would probably have reached the same result as in the *Toothe* case.

R. A. H.

EVIDENCE—CONFESSIONS—TALKING PICTURES. In a trial for murder a sound moving picture had been shown which reproduced a confession made by the defendant to certain police officers. *Held:* It was not error to show the movie to the jury since a voluntary confession may be properly received in evidence. *People v. Hayes*, 71 P. (2d) 321 (Cal. App., 1937).

It is well settled that a confession voluntarily given by a defendant is admissible. *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357 (1903); *People v. Ford*, 25 Cal. App. 388, 419, 143 Pac. 1075 (1914). However, the confession, in order to be admissible, must not have been made under duress. *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044 (1897); *People v. Castro*, 125 Cal. 521, 58 Pac. 133 (1899). It would seem, as pointed out in the instant case, that the danger of duress is lessened where a confession is presented by talking pictures. The defendant is not very

likely to be under duress at the time of an actual filming without its being apparent in the reproduction, whereas a signature on a written confession could be easily procured by threats or promises which did not appear on the face of the signed instrument.

As to the general question of admissibility of talking pictures, it would seem that logically they ought to be admitted. In essence, talking pictures are nothing more than a synthesis of photographs and of phonograph records, both of which have been held admissible in evidence when properly verified. But like pictures and phonograph records, it would seem that talking pictures should be used primarily to supplement, clarify, and authenticate verbal testimony. The court in *Commonwealth v. Roller*, 100 Pa. Super. Ct. 125 (1930) suggests this in parts of its opinion. Even where proper use is made of talking pictures the novelty of this type of evidence carries a danger that the jury will attach undue weight to it. But as pointed out in a note in 78 U. OF PA. L. REV. 565 (1930), novelty soon wears off and, in the meantime, the danger of undue prejudice may be corrected by proper judicial instruction.

In the instant case it is notable that all the objections of counsel were aimed at general faults of moving picture confessions. It was not contended that the particular sound picture did not give an accurate portrayal of what took place. Instead, counsel contended, first, that the movietone reproduction denied defendant the right to confront and to cross-examine the witnesses against him. This objection was not considered by the court and it does not appear to have much merit. Inasmuch as witnesses must always be called to authenticate a photograph or moving picture, the defendant then has the opportunity to cross-examine the witnesses called. True, the actual story is told by the film, which inanimate object is incapable of cross-examination, but the same effect is achieved substantially by cross-examining the parties who took the film.

Counsel also contended that the admission of a confession by movietone is hearsay evidence. The New York courts appear to have held on occasion that moving pictures are hearsay evidence and that the testimony of witnesses at the scene is the only competent evidence. *Feeney v. Young*, 191 N. Y. App. Div. 501, 181 N. Y. Supp. 181 (1920); *Gibson v. Gunn*, 206 N. Y. App. Div. 465, 202 N. Y. Supp. 19 (1923). However, as pointed out in *Commonwealth v. Roller*, *supra*, the reasoning in support of this conclusion loses sight of certain principles underlying the admission of photographs and evidence of that character. In order to make such evidence competent it must be shown that the picture is authentic. When this appears to the satisfaction of the trial judge there is no sound reason to prevent its acceptance in evidence.

The decision in the instant case shows a modern court drawing a weapon for the discovery of truth from the domain of science. The dangers inherent in the use of talking pictures are no greater than in the use of the still photograph, the X-ray, the dictograph, the finger print, the phonograph, or the miscroscope. In each case verification and authentication is necessary to prevent imposition, but once the verification is made, the mechanism is invaluable for the purpose of discovering truth. A few cases have preceded the instant case in permitting the admission of talking pictures in evidence. *Commonwealth v. Roller*, *supra*; *Snyder v. American Car & F. Co.*, 322 Mo. 147, 14 S. W.

(2d) 603 (1929); *Hawkes & Son (London) Ltd. v. Paramount Film Service, Ltd.*, Ch. 593, 604 (1934); *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 Times L. R. 581, 582, 99 A. L. R. 864 (1934). See also *nisi prius* rulings collected in WIGMORE, EVIDENCE, 1934 Supp. pp. 338-40 and in note 4, p. 340. The instant case tends to strengthen the recent trend shown in those cases.

W. C. I.

EVIDENCE—PRESENT RECOLLECTION REVIVED—USE OF COPIES. In a personal injury action the plaintiff's attending physician used a typewritten copy of his office record book to aid him in testifying. An objection on grounds that the original was available was overruled, the trial court ruling as follows: "He is testifying from his own recollection as refreshed by the copy." (See Appellant's Brief 26599, p. 26). The appellate court reversed a judgment in favor of the plaintiff on the sole ground that the trial court erred in its ruling as to the use of the copy, holding: "The rule is that a record which the witness uses, when testifying, to refresh his recollection, must be the original record, if that is procurable." 2 WIGMORE ON EVIDENCE, § 749 is quoted as substantiating this rule. *Clausen et al. v. Jones et al.*, 91 Wash. Dec. 297, 71 P. (2d) 362 (1937).

However, this section of Professor Wigmore's treatise states a rule as to the use of a copy where a "Past Recollection Recorded" is involved which, as he points out, is an entirely different situation from one where the witness refreshes his recollection. By a candid reading of the *Clausen* case and according to the rulings made by both the trial and appellate courts, quoted above, it seems clear that the latter situation is the one involved in that opinion. Professor Wigmore deals with such a situation in succeeding sections under the heading of "Present Recollection Revived" and therein says, "It is worthwhile, therefore, to note that none of the rules just examined for past recollections recorded have any bearings on the present subject. The confounding of the two has led to many misguided rulings." It is imperative, therefore, that the courts distinguish between the two principles.

In the case of a past recollection recorded the witness testifies in substance that he has no present recollection of the event under question but that he had a recollection in the past which he recorded. This prior recollection as embodied in the record or memorandum is offered as evidence, and the witness' only function is to verify and authenticate it by his testimony. However, in the case of a present recollection revived the only purpose of the memorandum is to refresh or stimulate the memory of the witness so that he can testify as a matter of independent recollection. Here the spoken testimony of the witness is the evidence and the memorandum forms no part of it and does not go in as evidence. In the former situation the evidence is the memorandum as verified by the witness; in the latter it is the testimony of the witness as refreshed by the memorandum. See 2 WIGMORE ON EVIDENCE, §§ 734-765. Substantially the same distinctions are made in 1 GREENLEAF ON EVIDENCE, §§ 436-439, 29 R. C. L. 185, and in 4 PHILLIPS ON EVIDENCE, pp. 726-736.

An examination of the local cases clearly indicates that the Washington court has recognized the above distinction. For cases dealing with a past recollection recorded see *State v. Douette*, 31 Wash. 6, 71

Pac. 556 (1903); *Callihan v. Wash. Water Power Co.*, 27 Wash. 154, 67 Pac. 697 (1902); and *Still v. Swanson*, 175 Wash. 553, 27 P. (2d) 704 (1933). For cases involving a present recollection revived see *Frair v. Caswell*, 79 Wash. 470, 140 Pac. 564 (1914); *State v. Mann*, 39 Wash. 144, 81 Pac. 561 (1905); *Kirkpatrick v. Collins*, 95 Wash. 399, 163 Pac. 919 (1917); and *Seattle v. Erickson*, 99 Wash. 543, 169 Pac. 985 (1918).

As to the use of a copy when employing a past recollection recorded, Professor Wigmore states (§ 749) that the original record itself must be used if it is procurable. This rule seems but a typical application of the Best Evidence rule and is almost universally followed. But where a present recollection revived is employed Professor Wigmore states (§ 760) a different rule: "*Writing not Original, but a Copy.* That the paper is a copy, not an original, is also no essential fault. The only question is whether in fact it is genuinely calculated to revive the witness' recollection; and for this purpose a copy may conceivably be entirely satisfactory. The radical difference of principle between this use and that of a copied record of past recollection (*ante*, § 749) is plain; there is here no necessity of accounting for the original in any way." To this section are appended numerous authorities from England and the United States in accord with the principle therein stated and some additional and more recent ones will be found under the same section number in the 1934 supplement to Professor Wigmore's work. Four cases are cited as *contra*, but recent cases leave Illinois as the only jurisdiction cited as being in the minority. Some of the more recent cases in accord are *Terry v. Amer. F. G. Assn.*, 3 Harr. 514 (Del.), 139 Atl. 259 (1927); *Olmstead v. U. S.*, 19 Fed. (2d) 842 (1927); *Fairfield v. State*, 155 Ga. 660, 118 S. E. 395 (1923); *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (1904); and *Commonwealth v. Burton*, 183 Mass. 461, 67 N. E. 419 (1903). See also a note in 98 Am. Dec. 619.

There are no previous cases in Washington raising the same point as the *Clausen* case. However, there is dictum in one case, *Seattle v. Erickson*, *supra*, which would lead one to believe that the Washington court has accepted Professor Wigmore's view, namely, that a copy may be used even though the original is available where the purpose is to refresh the recollection. In that case the court cited with approval a statement by Lord Ellenborough in *Henry v. Lee*, 2 Chitty 124, as follows: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness." This statement emphasizes that the primary concern is whether the memorandum will serve as a stimulant to refresh the memory. Rationally a copy will serve that purpose as well as the original.

A good statement of the applicable rule and a recognition of the distinction pointed out above will be found in *Jewett v. United States*, 15 Fed. (2d) 955 (1926), where the court said, "It was one thing to awaken a slumbering recollection of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record. In the former case it is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient

that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause."

The rule of the *Clausen* case is contrary to the overwhelming majority in the United States and England and seems to be principally predicated upon a section of Professor Wigmore's treatise which deals with a situation not applicable to the point in question. And because that authority explicitly takes a different view from the one stated in the opinion, it is apparent that the instant case will likely lead to confusion in the application of this very important principle of practice.

H. M.

TAXATION—INHERITANCES—GIFTS IN CONTEMPLATION OF DEATH. Decedent, thirteen months before his death, gave $6700 to his niece and her husband, receiving in return a promise from the husband to pay the decedent $134 a year for life. The decedent was in excellent health at the time of the gift and died at the age of 74. *Held:* The gift was not made in contemplation of death within the meaning of REM. REV. STAT. § 11201, and is therefore not taxable. Contemplation of death means ". . . an apprehension of death arising from some existing bodily condition or impending peril . . ." *In re Case's Estate*, 91 Wash. Dec. 6, 70 P. (2d) 806 (1937).

Whether or not a gift was made in contemplation of death is, of course, purely a question of fact. The mere fact that the donor was very old at the time of the gift will not be decisive. *In re Carvill's Estate*, 181 Wash. 627, 44 P. (2d) 768 (1935); *In re Brookes' Estate*, 185 Wash. 294, 52 P. (2d) 307 (1936); *In re Button's Estate*, 190 Wash. 333, 67 P. (2d) 876 (1937). Age is just another matter to be considered. The presence or absence of other motives in making the gift will also have an important bearing. Thus, gifts made to help out relatives in straightened circumstances, and gifts made in consideration of valuable services rendered previously, *In re Brooke's Estate, supra*, and gifts made to interest a nephew more deeply in the family business, *In re Colman's Estate*, 187 Wash. 312, 60 P. (2d) 112 (1936), were held not taxable.

On the question of whether or not it is essential to prove the existence, at the time of the gift, of a bodily condition which gave rise to an apprehension of death, there seems to be a slight difference of opinion. The definition in the instant case is a quotation from 26 R. C. L. 225 which was first used by the Washington court in *In re Carvill's Estate, supra*, and repeated in *In re Culver's Estate*, 185 Wash. 54, 53 P. (2d) 302 (1936), and is in accord with the weight of authority in other jurisdictions. 61 C. J. 1656; 75 A. L. R. 544. The language of the court, then, says that existence of a "bodily condition" *is* an essential fact to be proved. Inspection of the results reached in the Washington cases, though, indicates otherwise. In *In re Carvill's Estate, supra*, the case in which the definition in question was first used, the court proceeded to find the gift taxable, basing its decision on a combination of factors to which it specifically referred, *no one of which was an "apprehension of death arising from an existing bodily condition."* Even without that fact, the court was able to find that the decedent "was anticipating a testamentary disposition of a portion of his estate". Likewise, the gift in *In re Button's Estate, supra*, was held taxable primarily because the decedent had given away everything she owned, that fact indicating that the

transfer was testamentary in nature. And in two of the four remaining cases on this question, in each of which the gift was found not taxable, the court placed more emphasis on the fact that the gifts were not testamentary in nature and on the presence of other motives, than on the absence of "existing bodily conditions". *In re Brookes' Estate, supra; In re Colman's Estate, supra.* In the latter case, for instance, the court specifically said that "undue stress" was laid upon the physical condition of the decedent. In only two out of the six cases on this question in Washington, then, did the court base its decision squarely on the definition under discussion. *In re Culver's Estate, supra;* and the instant case.

Thus, the results reached in the Washington cases indicate that the rule in this jurisdiction, *in effect,* is in accord with what might be called the federal, or minority rule laid down by the United States Supreme Court in *U. S. v. Wells,* 283 U. S. 102, 51 S. Ct. 446, 75 L. ed. 867, in spite of the fact that both in the instant case and in the *Culver* case, the court said that it was not bound by that case (which, however, it had previously cited in support of its decisions in the *Brookes* and *Colman* cases). In the *Wells* case, the United States Supreme Court expressly disapproved the reasoning of the Court of Claims that there must be an apprehension that death is "near at hand" arising from an existing bodily condition, and said that the "thought of death" must be "the impelling cause of the transfer", and that where the motive that induced the gift was of the sort that leads to a testamentary disposition, the gift is taxable.

In other words, a consideration of all the Washington cases on this question leads to the conclusion that the proper test is whether or not the motive of the donor was testamentary in nature. If it was, the gift will be taxable even though there be no proof of "an apprehension of death arising from an existing bodily condition". If the evidence indicates otherwise, the gift will be held not taxable, and the court will very likely refer to the necessity of proof of an "existing bodily condition" to bolster its decision and to relieve it of the necessity of delving too deeply into the extremely difficult and vague question of the state of mind of the donor.

M. K.