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ever, the court stated it rejected them as a basis for making its decision²⁷ and instead construed the Florida statutory definition of "motor vehicles"²⁸ by utilizing the Wisconsin statutory rule²⁹ of interpreting words and phrases according to common and approved usage. This approach of the court is in complete accord with the opinion of the *McBoyle* case, which the court cited as final support for its conclusion.

In view of the decisions of the two cases on point,³⁰ the result reached by the Wisconsin court was correct. However, the decision could have had stronger support, as it was rendered without regard for either of these decisions. The opinion also failed to take into consideration the expression of the 1949 Florida Legislature not to consider airplanes as motor vehicles. This was shown by the enactment of a separate section in the Florida Statutes to deal with crimes in the operation of airplanes rather than include them in the section dealing with motor vehicle crimes.³¹ With the ever increasing use of private aircraft in Florida, it is ventured that the Florida courts will have this question to decide in the very near future. It is probable that the aforementioned act of the Florida Legislature will be of foremost importance in the decision rendered. However, this question could become moot if the Florida Legislature would enact an aircraft statute similar to its guest statute governing motor vehicles as already enacted by several states.³²

MARVIN H. GILLMAN

NEGLIGENCE: NOTARY'S LIABILITY TO BENEFICIARY OF INVALID WILL — ABSENCE OF PRIVITY

A notary public prepared a testamentary instrument which named plaintiff as *sole* beneficiary and failed to have it properly attested, which resulted in its invalidity and denial of probate. The intended beneficiary

27. 3 Wis. 2d 623, 89 N.W.2d 286, 288 (1958) "they seem to us so evenly balanced that collectively they are of little help."

28. FLA. STAT. tit. 22, § 320.01 (1) (1957) "Motor vehicle" includes automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state"

29. WIS. STAT. tit. L., § 990.01 (1) (1957) "All words and phrases shall be construed according to common and approved usage; . . ." (Also applied in Florida by court decision. E.g., *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950).)

30. *In re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953); *Hanson v. Lewis*, 11 Ohio Op. 42, 26 Ohio L. Abs. 105 (C.P. 1937).

31. FLA. STAT. § 860.13 (1957).

32. CAL. PUB. UTIL. CODE § 21406; SMITH-HURD ILL. ANN. STAT. ch. 15½, § 22.83 (1951); BURNS IND. STAT. ANN. tit. 14, § 924 (1957); NEV. REV. STAT. ch. 41.190 (1957); OHIO REV. CODE ANN. tit. 45, ch. 4561.151 (1958); ORE. REV. STAT. tit. 3, ch. 30.120 (1957); CODE OF LAWS OF S.C. tit. 2, § 21 (1952); S.D. CODE tit. 2, ch. 203, § 2.0310 (1952); UTAH CODE ANN. tit. 2, ch. 1, § 33 (1957); MICH. PUB. ACTS No. 114, § 259.180a, at 121 (1958).

brought an action for negligence against the notary. *Held*, the failure of the notary to have the instrument properly attested constituted actionable negligence and rendered him liable to the beneficiary notwithstanding the absence of privity of contract. *Biankanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16 (1958).

More than a century ago in *Winterbottom v. Wright*,¹ it was held that the duty of care of a contracting party was limited by privity. In the past this rule has been closely followed;² however, the trend is toward liability where injury to the plaintiff was reasonably foreseeable.³ Since the turn of the century, liability has been imposed in the absence of privity, where the injury was *personal*⁴ or to a *property*⁵ interest. The imposition of liability for injuries to an *economic* interest, although often

1. [1842] 10 M. & W. 109, 111, 11 L. J. Ex. 415, 416, "It is the general rule, that wherever a wrong arises merely out of the breach of a contract, . . . whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, . . . run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. *The only safe rule is to confine the right to recover to those who enter into the contract*: if we go one step beyond that, there is no reason why we should not go fifty." (Emphasis added.)

2. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895); *Michel v. Murphy*, 147 Cal. App.2d 718, 305 P.2d 993 (1957); *Moch Co. v. Renselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928), "Everyone making a promise having the quality of a contract is under a duty to the promisee by virtue of the promise, but *is not under another duty, apart from contract, to an indefinite number of potential beneficiaries* when performance has begun. The assumption of one relation cannot mean the involuntary assumption of a series of new relations, inescapably hooked together. The law does not spread its protection so far." (Emphasis added.); *Robertson v. Fleming*, [1861] 4 Macq. H. L. Cas. 167 at 167, 1 Paterson 1057, 1058, concerning the liability of an attorney to the legatee, for having negligently prepared a will, the court said: "He only who by himself or another, as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, . . ."

3. *Stroud v. Southern Oil Transp. Co.*, 215 N.C. 726, 3 S.E.2d 297 (1939), a truck owner could have foreseen injury to a service station attendant resulting from the dangerous condition of his truck wheels; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916), "[T]he presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

4. *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1 (1948) (building contractor); *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481 (1931) (manufacturer of ladders); *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P.2d 1013 (1932) (elevator maintenance company); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (automobile manufacturer); see PROSSER, TORTS (2d ed. 1955).

5. *Kolberg v. Sherwin-Williams Co.*, 93 Cal. App. 609, 269 Pac. 975 (1928) (damage to orange trees); *Brown v. Bigelow*, 325 Mass. 4, 88 N.E.2d 542 (1949); *Ellis v. Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929) (damage to livestock); *Dunn v. Ralston Purina Co.*, 38 Tenn. App. 229, S.W.2d 479 (1943) (damage to livestock); *Cohan v. Associated Fur Farms*, 261 Wis. 584, 53 N.W.2d 788 (1952); see PROSSER, TORTS 501 (2d ed. 1955).

allowed,⁶ has been refused where the third party's interest was incidental⁷ or his existence unknown prior to the injury.⁸

The California Supreme Court in *Buckley v. Gray*,⁹ held that an attorney, who negligently drew a will, was not liable to a disappointed beneficiary, due to lack of privity. Other cases involving the negligence of attorneys and notaries in preparing testamentary instruments have also adopted this rule.¹⁰ In *Biankanja v. Irving*,¹¹ however, the court refused to follow this authority and allowed recovery to the intended beneficiary.¹² The notary in preparing the will was engaged in the unauthorized practice of law;¹³ however, this was not relied on to establish

6. *Doyle v. Chatham & Phoenix Nat. Bank*, 253 N.Y. 369, 171 N.E. 574 (1930), a trustee who negligently certified corporate bonds was liable to good faith purchasers; *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), a public weigher was liable to a buyer for an error in weighing though there was no contract between them; *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (1890); *Anderson v. Spriestersbach*, 69 Wash. 393, 125 Pac. 166 (1912), abstractor liable to third person whom he knew would rely on his statement; RESTATEMENT, TORTS § 552, comment f (1938); *accord*, *Western Union Tel. Co. v. Bowman*, 141 Ala. 175, 37 So. 493 (1904); *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N.E. 894 (1887); *McPherson v. Western Union Tel. Co.*, 189 Mich. 71, 155 N.W. 557 (1915); *Barker v. Western Union Tel. Co.*, 134 Wis. 147, 114 N.W. 439 (1908).

7. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), a public accountant was liable only to those persons who engaged his professional services.

8. *Phoenix Title & Trust Co. v. Continental Oil Co.*, 43 Ariz. 219, 29 P.2d 1065 (1934), a third party, whose existence was unknown to abstractor at the time he issued the abstract of title, could not sue for abstractor's negligence in preparing the abstract; *MacKown v. Illinois Publishing & Printing Co.*, 289 Ill. App. 59, 6 N.E. 2d 526 (1937), newspaper held not liable for injuries to reader resulting from the use of a formula for dandruff remedy recommended in a newspaper article; *Ohmart v. Citizens' Savings & Trust Co.*, 82 Ind. App. 219, 145 N.E. 577 (1924) (abstractor not liable to subsequent purchaser for defects in abstract); *Jaillet v. Cashman*, 235 N.Y. 511, 139 N.E. 714 (1923), a company which published ticker-tapes was deemed to have the same relation to the public as the publisher of a newspaper and was not liable to one with whom it had no contract or fiduciary relationship for an unintentional mistake in its report.

9. *Buckley v. Gray*, 110 Cal. 339, 344, 42 Pac. 900, 901 (1895), in holding that an attorney, who negligently drew a will, was not liable to a disappointed beneficiary, the court said: "The limit of the doctrine relating to actionable negligence, is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect." (Emphasis added.)

10. *Mickel v. Murphy*, 147 Cal. App.2d 718, 305 P.2d 993 (1957), a notary public, who prepared a will, and negligently failed to have it properly attested, was not liable to the intended beneficiary, due to lack of privity; *Robertson v. Fleming*, [1861] 4 Macq. H. L. Cas. 167, 1 Paterson 1057 (attorney); *Re Fitzpatrick*, [1923] 54 Ont. L.R. 3, [1923] 1 D.L.R. 981 (1924).

11. 49 Cal. App.2d 647, 320 P.2d 16 (1958).

12. *Id.* at 651, 320 P.2d at 19.

13. *Biankanja v. Irving*, 49 Cal. App.2d 647, 651, 320 P.2d 16, 19 (1958), the CAL. BUS. & PROF. CODE § 6125, provides as follows: "No person shall practice law in this State unless he is an active member of the State Bar"; § 6126, "any person advertising himself as practicing or entitled to practice law or otherwise practicing law, . . . who is not an active member of the State Bar, is guilty of a misdemeanor."; *People v. Woodall*, 128 Cal. 511, 265 P.2d 233 (1954), bank cashier, who prepared and caused a will to be executed, was engaged in the unauthorized practice of law; *People v. Hanna*, 127 Cal. 481, 258 P.2d 492 (1953), a public stenographer, who

the basis for liability.¹⁴ The court, motivated by equitable considerations, based its decision primarily on public policy, together with the degree of negligence of the notary and the foreseeability of harm to the plaintiff.¹⁵

The effect of the instant case, is a further "assault upon the citadel of privity."¹⁶ In its inception, the requirement of privity was intended to prevent a multiplicity of suits by strangers, following the breach of a contractual duty.¹⁷ The instant case is one in a series, involving economic interests, which depart from the older rule and allow recovery in the absence of privity.¹⁸

Writers,¹⁹ who have interpreted the *Biankanja* decision as overruling *Buckley*,²⁰ and having laid the foundation for liability of attorneys in the future for similar negligent acts, are in error. The holding in *Biankanja* did not mitigate an attorney's right to the defense of privity. It is generally held that a layman performing professional services is not liable if he complies with the standard of care required by the profession.²¹ The court was most emphatic and clear in holding that the notary, in performing the functions of an attorney, did not maintain the standard of care necessary to avail himself of civil immunity.²² Limitations on liability, such as *privity*, are extended to certain persons upon whom the *public is dependent*. A lawyer or accountant could not engage in their professions if services, which rendered a reasonable commission, potentially subjected them to

prepared a will for a fee, was engaged in the unauthorized practice of law; *People v. Newer*, 125 Cal. 304, 242 P.2d 615 (1952), a layman, who drew a will and accepted compensation therefor, was engaged in the unauthorized practice of law; cf. *People v. Merchants' Protective Corp.* 189 Cal. 531, 209 Pac. 363 (1922); *People v. Sipper*, 61 Cal. App. 2d 844, 142 P.2d 960 (1943); *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1948); *State v. Hardy*, 61 Wyo. 172, 156 P.2d 309 (1945).

14. *Biankanja v. Irving*, 49 Cal. App.2d 647, 651, 320 P.2d 16, 19 (1958).

15. *Id.* at 651, 320 P.2d. at 19.

16. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), the trend toward a mitigation of the privity doctrine was well recognized by Cardozo, C. J.: "*The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion.*" (Emphasis added.)

17. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895); *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); *Winterbottom v. Wright*, [1842] 10 M. & W. 109, 11 L. J. Ex. 415.

18. Cases cited note 6 *supra*.

19. See Notes, 27 *FORDHAM L. REV.* 290, 293 (1958), 9 *HASTINGS L.J.* 330, 333 (1958), 5 *U.C.L.A. L. REV.* 681, 682 (1958).

20. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895).

21. *Kelly v. Carrol*, 36 Wash.2d 482, 219 P.2d 79 (1950), an unlicensed drugless healer was adjudged as if he were a doctor where he assumed to act as one; cf. *Johnston v. Black Co.*, 33 Cal. App. 363, 91 P.2d 921 (1939) (unlicensed nurse); *Lexchin v. Mathews*, 269 Mich. 120, 256 N.W. 825 (1934) (unlicensed osteopath); *Janssen v. Mulder*, 232 Mich. 183, 205 N.W. 159 (1925) (unlicensed chiropractor); *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197 (1926) (unlicensed chiropractor); *Rudman v. Bancheri*, 260 App. Div. 957, 23 N.Y.S.2d 584 (1940) (unlicensed pharmacist); *Grier v. Phillips*, 230 N.C. 672, 55 S.E.2d 485 (1949) (unlicensed dentist); *Hardy v. Dahl*, 210 N.C. 530, 187 S.E. 788 (1936) (unlicensed naturopath). *Contra*, *Thomas v. Studio Amusements, Inc.*, 50 Cal. App. 2d 538, 123 P.2d 552 (1942).

22. *Biankanja v. Irving*, 49 Cal. App.2d 647, 651, 320 P.2d 16, 19 (1958).

infinite liability.²³ Jurisprudence does not sanction the rendering of legal services by unauthorized persons. Consequently, the court in the present decision defined the peril at which one acts when he undertakes to perform a professional service for which he is not qualified.

RICHARD MULHOLLAND

23. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 188, 174 N.E. 441, (1931), in holding an attorney *not liable* for losses resulting from a negligently made certificate, the court said: "Liability for negligence if adjudged in this case will extend to *many callings* other than an auditor's. *Lawyers*, who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, *will become liable to the investors*, if they have overlooked a statute or decision, . . ." (Emphasis added.); *accord*, *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 901 (1895). See textual material *supra* note 9.