In the absence of express contractual terms to the contrary, there should be a presumption that third persons were not intended to be freed from liability. Such an approach, if adopted, would generally add certainty to the law in this area without being unduly harsh. It is a simple matter for the businessman to expressly provide for liability limitation of third parties if he so desires. This is particularly true when it is realized that this problem usually emanates from use of a standardized contract. It would seem, also, that such a presumption best fits the tenor of the law which expects an individual to be responsible for his negligent conduct.

RELIGIOUS FACTORS IN ADOPTION

Adoption agencies have long endeavored to place a child for adoption with parents having the same religion as that of the child. However, in a survey of nine states,[1] in which nearly one-half of the population was Catholic, only one-fifth of all children turned over for adoption were placed with Catholic adoptive parents. Assuming that approximately one-half of the children available for adoption were Catholic, the necessary conclusion is that there were more available Catholic children for adoption than there were eligible Catholic adopters.[2] This situation may be even more pronounced with regard to smaller denominational groups which are in the minority everywhere since their membership is geographically scattered.[3] The consequences of a shortage of adopters of the same religion as the child sought to be placed are obvious. In such a situation, the adoption agency is offered two alternatives: it may recommend adoption by an adopter of a different faith, or the agency may

1. This study, made by the Children's Bureau of the Federal Security Agency, of 1508 children adopted in 1936 shows that only 318 of the children were adopted by Catholics, while 1,031 went to Protestants, the remainder being adopted by persons of other religions. COLBY, PROBLEMS AND PROCEDURES IN ADOPTION 38-39 (Children's Bureau Publication No. 262, 1941).

2. "Indeed, representatives of both Catholic and nonsectarian child-placing agencies reported difficulties in finding enough Catholic adoptive homes to meet the needs of Catholic children available for adoption."

"It is possible that the relatively small proportion of adoptions by Catholics can be explained by the fact that the number of childless Catholic families is known to be small." *Id.* at 39.

3. *E.g.*, "Placement of children in some of the denominational groups such as Mormons, Seventh Day Adventists, etc., do create problems for staff, since there are few such families." Communication to the INDIANA LAW JOURNAL from Mr. Roman L. Haremski, Superintendent, Child Welfare, Illinois Department of Public Welfare.

hold the child in an institution or boarding home until there is a suitable applicant of the same religion.

Few persons will dispute the fact that institutional living and boarding-out plans are inadequate substitutes for the warmth and affection of home and family.[4] Thus, in complying with the primary tenet of all adoption law, that the welfare of the child is of paramount importance,[5] the inevitable answer to the adoption agency's dilemma lies in making placements with persons of a religion other than that of the child.

Many states, however, fearful of a de-emphasis of the element of religion in adoption proceedings, have enacted measures which tend to hinder this solution to a perplexing adoption problem.[6] For example, Massachusetts recently amended its adoption statute by adding a typical protective measure[7] which provides in part that "[i]n making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child."[8] Since church-sponsored agencies ordinarily confine their placements to adopters with the same religious affiliations as those of the child or of his natural parents,[9]

4. FREDERICKSEN, THE CHILD AND HIS WELFARE 3 (1948); HEALY, RECONSTRUCTING BEHAVIOR IN YOUTH 7 (1936); Chapman, *Casework with the Child in Foster Care*, PUBLIC WELFARE IN INDIANA, May, 1949, p. 12, col. 2.

5. *In re* Clark's Adoption, 38 Ariz. 481, 1 P.2d 112 (1931); *In re* Burkholder's Adoption, 211 Iowa 1222, 233 N.W. 702 (1930); Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); Commonwealth v. Ball, 259 Mass. 148, 156 N.E. 21 (1927); Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907); Eggleston v. Landrum, 210 Miss. 645, 50 So.2d 364 (1951); *In re* MacFarland, 223 Mo. App. 826, 12 S.W.2d 523 (1928); *In re* Jackson, 201 Wis. 642, 231 N.W. 158 (1930).

6. These measures take various forms. Rhode Island alone imposes an absolute requirement that if there is a proper or suitable available person of the same religious faith or persuasion as that of the child, to whom orders of adoption may be granted, the child must be placed with that person. R.I. GEN. LAWS, c. 1772, § 26 (1946). Several other states require that "when practicable" (or "when possible") the child must be placed with persons of the same religion. *E.g.*, N.Y. SOCIAL WELFARE LAW § 373; ILL. ANN. STAT. § 19.012(15), (1947). Some states require that the petition for adoption include information about the religion of the petitioners and of the child. *E.g.*, MD. ANN. CODE GEN. LAWS art. 16, § 81 (1951). Some states merely list religion as one of the factors which agencies must investigate in determining the suitability of a particular placement. *E.g.*, CONN. GEN. STAT. § 6867 (1949).

7. MASS. GEN. LAWS c. 737, § 3 (1950).

8. The remainder of this amendment provides: "If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition, and such statement shall be made part of the minutes of the proceedings."

The inclusion of this section indicates the intent of the legislature to stress the element of religion in adoption cases.

9. "In my judgment, we would think it unwise for a Catholic child to be given to Protestant or Jewish influences, and likewise we would object to having a Protestant raised by Catholic or Jewish foster-parents." Communication to INDIANA LAW JOURNAL from James Ross McCain, ex-Moderator, Presbyterian Church in the United States.

Canon 2319, § 4, of the Catholic Church places an extremely serious obligation upon anyone who takes over the child's training and guidance from the parents to see that

the legislation in question is primarily directed at placements made by qualified non-sectarian agencies and at independent placements.[10]

The non-sectarian child-placing agencies include in their desiderata for a suitable adoption[11] such factors as the age of the prospective adopters,[12] their financial ability to support a child,[13] compatability in the adoptive home,[14] and the religious beliefs of the potential adopters,[15] according to each a position of importance.[16] In their determinative process such agencies balance these factors against each other, in an effort to select the most advantageous placement.[17] Consideration is also given to the wishes of the natural parents, which would usually include the desire for the child to be reared in their religion.[18] Thus, non-sectarian agencies

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the child receives a Catholic education. Catholic social agencies, whose work includes supervising adoption, fall into this category. "With this grave obligation they are very careful to see that a Catholic child is adopted into a Catholic home. And their inquiry most frequently assures them that adopting parents are good practicing Catholics before they consent to the adoption." Communication to Mr. E. L. Craig, Reference Librarian, Indiana University, from F. C. McGough, West Baden College.

10. "An 'independent' placement is one made without the aid of an authorized child-welfare agency." Comment, 59 YALE L. J. 715, n.1 (1950).

11. "The Children's Bureau and the Child Welfare League of America provide standards for child-placing agencies. Licensed agencies follow these general standards and develop their own in the light of additional experience and knowledge. Agency workers evaluate the adoptive home on the basis of objective criteria, taking into consideration the religious faith and spiritual quality of the home as an important factor. Non-sectarian agencies place children in homes of the same religious faith as that of the natural parent when it is desirable to do so from the standpoint of the child's well-being." From a communication to the INDIANA LAW JOURNAL from Miss Agnes Anderson, Associate Professor of Social Work, Indiana University.

12. "In any family relationship the age factor is of some significance. . . . Mental and social age, emotional maturity and balance count for more than calendar age." BROOKS, ADVENTURING IN ADOPTION 31 (1939). See also Michaels, *Casework Consideration in Rejecting the Adoption Application,* 28 JOURNAL OF SOCIAL CASEWORK 370 (1947).

13. ". . .([T]here should be enough regular income not only for the basic physical needs but also to guard against too much discussion of ways and means." BROOKS, *op cit. supra* note 12, at 27. See also FREDERICKSEN, *op cit, supra* note 4, at 206-207 (1948).

14. See Clothier, *Placing the Child for Adoption,* 26 MENTAL HYGIENE 257, 266 (1942); Michaels, *supra* note 12.

15. Communication from Professor Agnes Anderson, *supra* note 11; communication to the INDIANA LAW JOURNAL from Miss I. Evelyn Smith, Consultant on Foster Care, Social Division, Children's Bureau.

16. *E.g.,* The Tennessee Department of Public Welfare, which is bound by a "when practicable" clause, fulfills the requirement by according to religion the same weight as is given other investigative factors.

"We have tended to think of religion as one of several elements which has a bearing on the feeling of oneness, especially between adoptive parents and the children adopted.

". . . [W]e have placed emphasis upon the total of the factors in the selection of a home in which grouping religion is one but not a controlling one." Communication to the INDIANA LAW JOURNAL from J. O. MCMAHON, Commissioner, Tennessee Department of Public Welfare.

17. Communication from Professor Agnes Anderson, *supra* note 11.

18. "The customary procedure in adoption is for children of one religious faith to be placed in homes of the same religious faith.

". . .

strive to place the child with adopters of the same religion, but when the child's welfare would be better served by the benefits accruing from a particular mixed-religion placement, they do not hesitate to effectuate that placement.[19] Since such agencies are already following the policy enunciated in the typical religion clause, the question with respect to such a clause is whether the statutory requirement serves a valuable function, or if it is merely a superfluous measure which may be interpreted so as to be detrimental to the child's welfare.

Indicative of the dangers inherent in such legislation is the recent trial court disposition in *Petition of Gally*.[20] There the court, despite its recognition that the Protestant petitioners were qualified adopters, denied their petition to adopt a child of Catholic parentage, solely on the basis of the Massachusetts religion clause.

The Supreme Judicial Court wisely reversed this holding and ordered a decree of adoption to issue, on the grounds that, since no person or persons of the same religious faith as that of the child's mother were seeking to adopt the child, and since there was no evidence that any such person or persons would offer to do so, it certainly would not be practicable to give custody only to persons of the same religious faith as that of the child.

The dissenting justice, however, reiterated the lower court's position by interpreting the religious restriction clause in light of New York decisions which read into similar New York placement statutes a legislative mandate that the child's religion be followed,[21] which forecloses judicial discretion. He justified his position by indicating that he merely sought to further the statutory purpose of emphasizing the weight to be given to the religion of the adoptable child. Though the majority's opinion is sound, the "mandatory" interpretation given the statute by the minority of the court serves as a reminder that today's dissent may be tomorrow's majority.

Seldom is a child's need for religious inspiration disputed. Years of experience in child-placing and -keeping have prompted agencies to encourage children in their religious beliefs, since religion is an integral

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"The primary reason for the practice of placing children in homes with similar religious backgrounds, is that the parent or parents of the child, when releasing him for adoption, prefer to have the child brought up in a home of their own religious faith. . . . An agency assuming responsibility for placement of a child for adoption should give every consideration to the wishes of the parents in this respect." Communication from Miss I. Evelyn Smith, *supra* note 15.

19. Communication from Professor Agnes Anderson, *supra* note 11.

20. 107 N.E.2d 21 (Mass. 1952).

21. *In re* Santos, Application of Southern, 278 App. Div. 373, 105 N.Y.S.2d 716 (3d. Dep't 1951), *appeal dismissed, In re* Santos, 109 N.E.2d 71 (1952); *In re* Adoption of Anonymous, 195 Misc. 6, 88 N.Y.S.2d 829 (Surr. Ct. 1949).

part of child development.[22] Moreover, orphan children have an extraordinary need for the sense of direction and security that religion may give them.[23] Some religions, however, in accordance with their belief that children born into their religion must continue therein, consider the religious factor a dominant one in the adoption of a child.[24] These groups would apply this theory to all children, regardless of age, and therefore consider the religious clause beneficial even when interpreted in a mandatory sense. Their interest in enactment of and strict compliance with the religious restriction in question may be solely one of fulfilling church doctrine.

Other religious bodies would apply this theory, and then with exception, only to the child who has reached the age of awareness of his religious heritage;[25] a change in the religion of that child may create emotional instability.[26] The non-sectarian agencies, while not committed to religious doctrines, adhere to the policy of the latter group, which recognizes the necessity for enabling the child to continue in a religion whose tenets have enveloped him. These agencies, like this second group, realize, however, that under certain circumstances, even an older child, cognizant of his religion, should be placed with adopters of a different faith.[27] Moreover, placing a child with adoptive parents of a different

22. FREDERICKSEN, THE CHILD AND HIS WELFARE, c. 10 (1948).

23. HOPKIRK, INSTITUTIONS SERVING CHILDREN 168 (1944).

24. *E.g.*, the Roman Catholic Church places a very grave obligation upon its members to educate their children in that faith (Canon 1113), to the extent that only upon permission of the Bishop may a Catholic parent send his children to a school other than a parochial school (Canon 1374). See AYRINHAC, MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW 293 (1940).

25. The following statements are personal views of members of various denominations of the Protestant religion:

"It would . . . seem to me that any restriction on adoption of a child because of the religion of its parents should apply only to children who have reached the age of conscious recognition of their religious heritage." Communication to the INDIANA LAW JOURNAL from Reuben E. Nelson, General Secretary of the American Baptist Convention.

"If an adoption is made for a child under a year of age, for example, it would seem to me that the objections raised . . . might be waived and the child placed wherever the best conditions for its spiritual as well as physical well being could be secured." Communication to the INDIANA LAW JOURNAL from James Ross McCain, ex-Moderator of the Presbyterian Church of the United States.

"What the religion of the real parents was should be only of secondary importance. However, if the child himself is old enough to have had considerable religious training and has accustomed himself to a certain religious atmosphere, this fact should be given very great consideration in adoption proceedings." Communication to the INDIANA LAW JOURNAL from Oscar A. Benson, President Augustana Evangelical Lutheran Church.

26. "Certainly to disrupt the child's whole religious background would be injurious to the emotional stability of the child." Communication from Oscar A. Benson, *Ibid.*

27. Professor Agnes Anderson, *supra* note 11, in a personal interview, reported that agencies with which she had been affiliated had always endeavored to place children instilled with certain religious convictions in homes where the same convictions were held. She cites, however, a situation where one agency deemed it wiser to place such

religion when that child is too young to have been imbued with any religious doctrines obviously will not harm him emotionally if the foster parents meet the agencies' qualifications in every other respect.

The purpose behind the passage of the religion clause is to assure that religion will be rendered proper consideration in adoption proceedings. Such a clause, however, if interpreted as the dissenting judge in the *Gally* case urged, operates to the detriment of the adoptable child by postponing its adoption, possibly for an interminable period. And although the statute is couched in discretionary language, its mere existence places social workers under increased pressure to obey its restrictions rigidly so that a placement will not be voided by an overzealous court. Indeed, the imposition of such a clause upon placement procedures may actually subordinate the welfare of the child to the necessity of complying with the statute.

New York provides an excellent illustration of the harms which may result from enactment of a discretionary religious requirement.[28] In a recent case,[29] the Massachusetts Department of Welfare requested New York agencies to conduct a social investigation of certain residents of New York state who had petitioned to adopt a child domiciled in Massachusetts. Every New York agency flatly declined, basing its refusal upon New York legislative policy which does not favor inter-religious adoptions. As a result, a Massachusetts statutory requirement—that calling for a social investigation[30]—could not be complied with, and the Massachusetts court denied the petition for adoption.

Assuredly the religion clause does more harm than good from an earthly welfare standpoint as a restraint on placements by qualified agencies. The question remains, however, whether it can find secular justification as a brake upon independent placements. Only about one-fourth of all placements are actually accomplished through authorized agencies.[31] Of the remaining three-fourths, many are contrived by well-

a child with adoptive parents of a different religion. In that case, a 6-year-old child was removed from his natural parents because of their neglect. The father had been an itinerant preacher in a particular faith. The boy was turned over to an institution sponsored by the same church with which the parents had been affiliated. While in this institution the child suffered several traumatic experiences. Upon interviews with welfare workers, the boy stated and reiterated that he did not want to be placed with persons of the same religion as his parents; he had come to associate his religion with everything evil. He was finally placed with persons of a different faith, and in Miss Anderson's words, "[i]t was a beautiful placement."

28. N.Y. SOCIAL WELFARE LAWS § 373.

29. Krakow v. Dep't of Pub. Welfare, 326 Mass. 452, 95 N.E.2d 184 (1950).

30. MASS. GEN. LAWS, c. 737, § 2 (1950).

31. In 1944, the Children's Bureau of the Federal Security Agency conducted a study of 9,000 children for whom petitions had been filed in fifteen states; information obtained showed that slightly more than 25 per cent of the placements had been made

meaning but inexperienced relatives and friends or by "Good Samaritan" doctors and lawyers.[32] Disposition of the rest of these children is carried on in what has become the bane of the welfare worker's existence, the "black market in babies"; activities here are aimed directly at the securing of financial gain,[33] and consequently, the child's welfare is overshadowed by the profit motive.[34]

The imposition of the religion clause upon courts and welfare agencies may prove to be a factor in the augmentation of the black market. As much as sixty per cent of all adoptions are of illegitimate children.[35] Since three-fourths of all adoptions are arranged by independent placements,[36] many of which fall into the profit-seeking category, it becomes evident that the "market" finds a large source of supply among distressed unwed mothers. Illegal agencies offer her the opportunity to remain anonymous.[37] The requirements of statutory proceedings in most states threaten her with interviews, document-signing, and investigation, all of which she wishes to avoid.[38] The addition of the religion clause, calling for a possible investigation into her religious background, increases the risk that her misfortune will be discovered.[39] While an unwed mother would undoubtedly rather have her child cared for by a

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by authorized agencies. Zarefsky, *Children Acquire New Parents,* 10 CHILD 142, 143 (1946). This figure varies from state to state. A survey of 4,034 adopted children in Indiana for the period of 1948-1949 shows that 35.7 per cent of all placements were supervised by authorized agencies. Communication to Prof. Ralph F. Fuchs, Indiana School of Law, from Miss Helen Daniels, Secretary, Joint Citizen's Committee on Health and Welfare Legislation. On the other hand, Maine reported that only 9 per cent of the placements in that state in 1948 were made by authorized agencies. Comment, 59 YALE L.J. 715, 716, n.3, (1950).

32. Zarefsky, *supra* note 31, at 143.

33. Comment, 59 YALE L.J. 715 (1950).

34. From a personal interview with Leo X. Smith, Chairman of Sub-committee of Joint Citizen's Committee of Indiana on Health and Welfare Legislation.

35. The Children's Bureau 1934 study of 2,041 adoption petitions filed in nine states disclosed that 61 per cent of them were filed for the adoption of illegitimate children. COLBY, *op. cit. supra* note 1, at 10. A later Bureau study showed that, of 9,000 petitions filed in fifteen states in 1944, 58 per cent were for illegitimate children. Zarefsky, *supra* note 31, at 144.

36. Zarefsky, *supra* note 31, at 143.

37. *Social Workers Look at Adoption,* 10 CHILD 110 (1946).

38. *Ibid.*

39. For example, the conscientious social worker, in adhering to the letter of the statute, conceivably may deem it necessary to confer with the officials of the church of the natural parents to determine whether those parents actually are members in good standing of that religion, or are members in name only. Particularly would this be true when the natural parents belong to different churches; the social worker must determine which religion should govern the placement of the child.

The social worker may further be prodded into an extensive investigation because of the feeling that, if there is no more than a nominal attachment of natural parent to church, the statutory restriction would not be violated by placing the child with persons who are members of a different religion from that which the natural parents claim as their own.

qualified accredited agency, the desire to keep her identity a secret often transcends all other considerations.

A possible objective of the religion clause may be to counteract indiscriminate independent placements by striking them down when they reach the judicial level. Admittedly, independent sources place many children with persons of a different religion; but not all of such placements should be nullified. When the very young child is placed without the aid of a qualified agency, there usually is a period of time elapsing until the petition for adoption is filed.[40] Meanwhile the child has become a part of the adoptive home; emotional attachments have been formed between the child and his new parents. Courts unhampered by a religious restriction may deem it wiser to allow the child to remain in that home[41] than to subject it to the trauma which might well result from another change in homes. Courts which interpret the religion clause as a legislative mandate must, of necessity, remove the child from such a home simply because of the religious factor.

Since the adverse effects of the religion clause go hand in hand with any benefits which might accrue, enactment of such a restriction is an improper method to discourage or do away with independent placements. To defeat independent placements, states must go to the very root of the difficulty; their solution lies in statutes requiring licensing of agencies and in mandatory investigations by these qualified agencies in every adoption case,[42] rather than in legislative measures which give conclusive effect to a single investigative factor.

From a secular standpoint, harms accruing from the religious restriction certainly outweigh any possible benefits of such legislation. The underlying reasons for the passage of such restrictions seem to be based

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40. Comment, 59 YALE L.J. 715, 731 (1950).

41. "Even in states requiring the investigation of adoption petitions by the department of welfare or its authorized agencies before the court takes action on the petition, it is frequently difficult to make negative recommendations when a child placed independently has been living with the adopting parents for a long time and his status in the family has been accepted by him, by the adopting parents, and by the community." Zarefsky, *supra,* note 31, at 144.

42. "To protect the child, the natural parents, and the adopting parents . . . the following principles should be observed:

". . .

"2. Placement for adoption should be made only by an agency authorized to make such placements by the State department of public welfare.

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"4. In every proposed adoption of a child the court should have the benefit of a social study and a recommendation made by the State department of public welfare, or by a local department of public welfare or other public or private child-placing agency designated by the State welfare department." ESSENTIALS OF ADOPTION LAW AND PROCEDURE 3-4 (Children's Bureau Publication No. 331, 1949). See also Comment, 59 YALE L.J. 715 (1950); Zarefsky, *supra* note 31.

upon fulfillment of church doctrine rather than furthering the secular welfare of the child. The established principle of separation of church and state should lead to rejection of any purely doctrinal religious considerations which may be advanced in support of a religious clause.[43] In individual cases, not less than in general enactments, the states should be precluded from supporting the cause of any religion for its own sake.[44] States with a religion clause should repeal it. If the clause does remain in the statute, it should be interpreted, as its permissive wording suggests, as a discretionary rather than a mandatory measure. Where the problem of religion enters an adoption case, courts should treat the religious restriction as did the majority in the *Gally* case.[45] Unless faced with definite opposition to a mixed-religion placement, in the form of equally qualified adopters of the same religious faith as that of the child, the court should be at its liberty to negotiate a placement with suitable persons of a different religion.

ADVANTAGES AND LIMITATIONS OF A POWER OF CONSUMPTION IN TESTAMENTARY TRANSFERS OF PROPERTY

A recent amendment to the Internal Revenue Code,[1] clarifying the status and definition of powers of consumption for tax purposes, focuses attention on this testamentary device. Utilization of the legal life estate plus a power to consume the remainder with a gift over of whatever is unconsumed frequently is attempted where a testator desires to allot to his surviving spouse more than a life estate or her intestate share,[2] al-

43. Illinois *ex rel.* McCollum v. Bd. of Education, 333 U.S. 203 (1948); Everson v. Bd. of Education, 330 U.S. 1 (1946); Reynolds v. U.S., 98 U.S. 145 (1879); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918).

44. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1947).

45. For writings in agreement with the dissenting opinion in the *Gally* case, see 32 B.U.L. REV. 448 (1952) and 27 ST. JOHN'S L. REV. 141 (1952). For further discussion of the case, see 27 N.Y.U.L.Q. REV. 848 (1952).

1. 53 STAT. 122 (1939), as amended, 26 U.S.C.A. § 811(f) (Supp. 1951) (Estate Tax—Powers of Appointment). Discussion is reserved to the Tax Section, *infra*.

2. "He [testator] is anxious that his widow have proper support during her lifetime, but at the same time he also desires that his children have the residue of the estate upon her death. He is somewhat reluctant to give the wife a fee and disinherit his children; he fears a life estate with a remainder in fee will not meet all exegencies [sic] of the widow's needs, so he attempts to strike between the two by giving the widow a life estate with power to dispose of such of the property as may be necessary for her maintenance, with a gift of the residue to his children." Summers, *Power of a Life Tenant to Dispose of a Fee*, 6 IND. L.J. 137 (1930). See also, Watkins v. Dean, 52 N.W.2d 498 (Iowa 1952).