meruit. The doctrine of the *Selle* case and the holding of the instant case provoke a fundamental question: Why should specific performance be granted generally when the consideration given by the promisee was personal services, but denied when the promisee has merely paid money?[9]

The object of the court in both types of cases is to make whole the promisee. When money has been paid, that object can be attained by a recovery for money had and received, and there is no need to enforce the oral contract in the face of the statute of frauds. So, too, when services can be compensated accurately by payment of money, as in the *Selle* case, a recovery in *quantum meruit* is adequate. The test should be nothing so mechanical as the relative duration of the services, nor their relative arduousness, though these may be pertinent factors. The question should be: Are the services of such a sort that they can be computed with comparative accuracy in terms of dollars and cents? If so, the statute should be given effect and specific performance denied. When, however, as in the principal case, an attempt to evaluate the services would force the court to weigh imponderables, *quantum meruit* would be at best an inaccurate remedy. In such a case, assuming that the contract has been properly proved, the statute should be disregarded and specific performance granted.[10]

W. L. P.

INSURANCE—ASSIGNMENT TO ONE WITHOUT AN INSURABLE INTEREST—EXTENT OF RECOVERY—[Pennsylvania].—Four policies of insurance were issued by the defendant company on the life of the deceased, payable to his estate. Each policy was subsequently assigned to the plaintiff, who had no insurable interest in the life of the deceased. It does not appear whether the intent to assign was conceived before the policies were issued to the deceased. *Held:* The assignment of an insurance policy to one who has no insurable interest, whether in good faith or not, is as contrary to public policy as the original issuance of a policy to such a person, and the assignee may recover only the amount expended by him in keeping the policy alive. *Werenzinski v. Prudential Insurance Co.*[1]

In limiting the assignee's recovery to the amount paid out by him in keeping the policy in force, even where there was no antecedent agreement to assign, the instant case represents the minority rule.[2] The cases following this rule are founded chiefly on the language of Mr. Justice Field of the United States Supreme Court in *Warnock v. Davis:* "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name."[3] The holding of the *Warnock*

9. See Wheeler v. Dake (1908) 129 Mo. App. 547, 107 S. W. 1105; 2 Williston, *Contracts* (2d ed. 1936) 1432, sec. 494.

10. For a similar view see Note (1930) 19 Ky. L. J. 69.

1. (Pa. 1940) 14 A. (2d) 279.

2. Downey v. Hoffer (1885) 110 Pa. 109, 20 Atl. 655; Taussig v. United Security Life Ins. and Trust Co. (1911) 231 Pa. 16, 79 Atl. 810.

3. Warnock v. Davis (1881) 104 U. S. 775, 779.

case was later limited by the Court in *Grigsby v. Russell*[4] to instances in which the agreement to assign was antecedent to the issuance of the policy. An assignment under the latter circumstances is regarded as a mere subterfuge to enable one having no insurable interest to obtain by indirection a policy on the life of the insured. On the other hand, when there is no antecedent agreement, the insured is the principal actor in the procuring of the policy, and his purpose is merely to aid one whom he deems a proper object of his bounty.[5] Under such circumstances the majority rule is that the assignee may recover and retain the entire proceeds of the policy.[6]

The principal case is in line with previous decisions of the Pennsylvania court.[7] These cases, however, were decided before *Grigsby v. Russell* limited the operation of *Warnock v. Davis* to a set of facts in which there was an antecedent agreement to assign. Since the *Grigsby* case, one Pennsylvania case, by way of *dictum*, indicated that the validity of assignments did not depend upon the question of an antecedent agreement.[8] Another case, however, suggested that perhaps the *Grigsby* case, which limited the *Warnock* case, also limited the Pennsylvania decisions based on the earlier case.[9] The principal case resolves this conflict in favor of the minority rule.

In Missouri the only decision directly in point was in favor of the assignee.[10] The policy in that case was issued without an antecedent agreement to assign, but the court did not consider the conflicting rules. It is interesting to note that although this case was decided prior to the *Grigsby* case and subsequent to the *Warnock* case, the opinion does not refer to *Warnock v. Davis*. Missouri cases subsequent to the Grigsby case have never decided whether the existence of an antecedent agreement would make any difference. The court has said that an assignment to one who has no insurable interest in the life of the insured is *prima facie* voidable as to sums in excess of the advances made,[11] and that the assignment of a life policy to one who has no insurable interest is voidable as falling within the rule against wagering policies.[12] The Missouri courts, however, have also assumed *arguendo* that the assignment is valid, if there was no antecedent agreement.[13]

The minority rule is based on the argument that the holder of an assigned policy, even when there is no antecedent agreement to assign, may be more interested in the death than in the life of the party assured, if he has no insurable interest.[14] A denial of recovery is in accord with the general policy of the law that forbids speculative contracts upon human

4. Grigsby v. Russell (1911) 222 U. S. 149.
5. Patterson, Insurable Interests in Life Contracts (1918) 18 Col. L. Rev. 381, 396.
6. Grigsby v. Russell (1911) 222 U. S. 775.
7. See cases cited supra note 2.
8. Steen v. Lowry (1925) 85 Pa. Sup. 365.
9. Young v. Hipple (1922) 273 Pa. 439, 117 Atl. 185, 25 A. L. R. 1541.
10. MacFarland v. Creath (1889) 35 Mo. App. 112.
11. Locke v. Bowman (1912) 168 Mo. App. 121, 151 S. W. 468.
12. Tripp v. Jordon (1914) 177 Mo. App. 339, 164 S. W. 158.
13. Ibid.
14. Franklin Life Ins. Co. v. Hazzard (1872) 41 Ind. 116.

life.[15] The majority rule, on the other hand, recognizes the practical convenience of giving to life policies some characteristics of property.[16] It also recognizes the fact that assignments are generally made to a "roughly selected class of people, who by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death."[17] It has been suggested that this statement of Mr. Justice Holmes be limited to situations in which the person whose life is insured consents to the assignment and then only when the consent is a "real and an intelligent consent."[18] S. F.

LABOR—FAIR LABOR STANDARDS ACT—TIPS AS WAGES—[Federal].—Plaintiff, as a representative of defendant's "redcap" employees, sued for minimum wages under the Fair Labor Standards Act.[1] Defendant had offered to pay the difference between tips actually received and the minimum wages required under the Act. *Held:* Tips cannot be regarded as part of the minimum wages prescribed under the Act; the defendant was liable for the prescribed wages without deduction for tips. *Pickett v. Union Terminal Co.*[2]

There seem to be several possible bases for this decision, which is the first to hold that under the Fair Labor Standards Act tips are not a part of wages. The court relied to some extent upon two earlier decisions holding that tips belong to the employee, not to the employer.[3] These cases were suits by shoe-shine boys to recover tips which they had paid over to their employers. The court in the instant case found in the supposed Congressional intent underlying the Fair Labor Standards Act a basis for interpreting the word "wages" strictly.[4] This construction is supported by the court's view that tips are a gratuity rather than wages, and also by the fact that the Act uses the mandatory phrase "shall pay" in describing the duty of the employer.[5] In reaching its result the court refused to follow

15. Warnock v. Davis (1881) 104 U. S. 775.
16. Grigsby v. Russell (1911) 222 U. S. 149; St. John v. American Mut. Ins. Co. (1885) 13 N. Y. 31.
17. Grigsby v. Russell (1911) 222 U. S. 149, 155.
18. Patterson, supra note 5, at 392.

1. Fair Labor Standards Act (1938) 52 Stat. 1060, c. 676, 29 U. S. C. A. (Supp. 1939) sec. 201.
2. (D. C. N. D. Tex. 1940) 33 F. Supp. 244.
3. Zappas v. Roumeliote (1912) 156 Iowa 709, 137 N. W. 935; Polites v. Barlin (1912) 149 Ky. 376, 149 S W. 828, 41 L. R. A. (N. S.) 1217. See Manubens v. Leon (1918) 1 K. B. 208, in which tips were included in damages for wrongful discharge.
4. Fair Labor Standards Act (1938) 52 Stat. 1060, c. 676, 29 U. S. C. A. (Supp. 1939) sec. 203(m). "'Wage' paid to any employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees."
5. Fair Labor Standards Act (1938) 52 Stat. 1060, c. 676, sec. 6, 29 U. S. C. A. (Supp. 1939) sec. 206.