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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ADOPTION—CONSENT OF PARTIES—WHETHER OR NOT CONSENT FOR ADOPTION GIVEN BY NATURAL PARENT MUST STRICTLY FOLLOW STATUTORY FORM AND, HAVING ONCE BEEN GIVEN, BECOMES FINAL AND NOT SUBJECT TO WITHDRAWAL—In the case of *Petition of Thompson*,[1] the Appellate Court of Illinois for the Second District recently had occasion to construe, for the first time, certain sections of the recently enacted Adoption Act dealing with the manner and form by which parental consent to adoption

[1] Sub nom. Thompson v. Burns, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949).

is evidenced.[2] One Sarah Burns, the natural mother of the child there involved, executed a written consent for the adoption of her child by the petitioners. The form was witnessed by a licensed attorney but not one who had been specifically designated for that purpose. After custody of the child had been surrendered to the petitioners, proceedings for adoption were begun. Sarah Burns appeared therein, retracted her consent, and demanded that the child be returned to her, claiming (1) that such consent was void because not acknowledged in the manner required by statute, or (2) that she had the right to, and did, withdraw her consent prior to the time the court acted upon the petition. The trial court, however, granted adoption by the petitioners. That decree, on direct appeal taken by the mother,[3] was reversed on the ground that the alleged consent, not being in conformity with the mandatory requirements of the Adoption Act, furnished no valid ground for a finding that the mother had consented to the adoption of her child, particularly when such finding was questioned on direct appeal from the decree. It was further added, by way of dicta, that a parent has the right to withdraw any consent that may have been given so long as the withdrawal occurs at any time before the court has actually acted upon it.

The process of adoption, or the establishment of an artificial parent and child relationship, being a process unknown to the common law, can exist only when so authorized by state statute.[4] In the absence of specified exceptions not here applicable, the consent of either the natural parent, the legal guardian, or of an authorized welfare agency is deemed essential to establish the relation.[5] An examination of the various state statutes, however, would indicate that there is no agreement on the point as to the form or manner by which this requisite consent must be made manifest.[6] One authority in the field of domestic relations, when discussing the subject, once grouped the statutes into three categories: (1) those

[2] Ill. Rev. Stat. 1947, Ch. 4, § 3—6, reads: "Whenever in this Act, the consent of any person is required, such consent shall be in writing and shall be acknowledged by the person signing the same in open court, or before the clerk of the court in which the petition is filed, or such signature shall be witnessed by the duly authorized probation officer of such court or a representative of a licensed welfare agency, or by any other person designated by the court." The statute contains further directions as to consents executed outside of Illinois. Section 3—7 provides that no decree shall be entered, except under designated circumstances, without such consent.

[3] Appeal is permitted by Ill. Rev. Stat. 1947, Ch. 4, § 7—2. But see Zacharias, "Judicial Review of Adoption Decrees," 23 CHICAGO-KENT LAW REVIEW 233-49 (1945).

[4] 2 C. J. S., Adoption of Children, § 2. An ancient and curious case which might indicate that the contrary is true, is discussed at length in Zane, "A Mediaeval Cause Celebre," 1 Ill. L. Rev. 363 (1907).

[5] 1 Am. Jur., Adoption of Children, § 36.

[6] Compare, for example, Deering Cal. Civ. Code 1941, Div. 1, Tit. 2, Ch. 2, § 224m, with Minn. Stat. Ann. 1945, Vol. 17, Ch. 259, § 259.03.

which require a signed writing verified by either acknowledgment in open court, before some authorized person, by being witnessed, or supported by affidavit; (2) those which require an informal written consent or call for the presence of the parents in open court; and (3) those which require no specific form but merely state that the parents must consent.[7] As a matter of fact, three state statutes do not make specific reference to consent[8] while one requires that the consent be set out in the petition.[9] Of the remainder, some twenty-five fall in the first category,[10] sixteen in the second,[11] and only three in the third.[12] There is some indication, from the language of the more recently enacted statutes, of an apparent trend toward the first or more detailed type of consent which may some day lead to a nationwide similarity,[13] consequently there is justification for the assumption that the question arising in the instant case is likely to occur, if it has not already occurred, in a widening range of jurisdictions.

Turning from statutory language to judicial decisions on the point, it may be noted that the reasoning of the Supreme Court of Idaho in the case of *Vaughn* v. *Hubbard*[14] is based on an Idaho statute which requires

7 Vernier, American Family Laws (Stanford Univ. Press, California, 1936), Vol. 4, p. 395, § 260.

8 Fla. Stat. Ann. 1941, Vol. 6, Ch. 72, §§ 72.01-72.06; Flack, Ann. Code Md. 1939, Vol. 1, Art. 16; S. C. Code 1942, Vol. 1, § 255(19).

9 Ga. Code 1933, Ch. 74, § 74-402.

10 Ark. Stat. 1947, Tit. 56, Ch. 1, § 56-106; Deering Cal. Civ. Code 1941, Div. 1, Tit. 2, Ch. 2, § 224m; Del. Rev. Code 1935, Ch. 88, § 2; Ida. Code 1948, Tit. 16, Ch. 25, § 1601; Ill. Rev. Stat. 1947, Ch. 4, § 3—6; Burn's Ind. Stat. Ann. 1933, Vol. 2, Ch. 1, § 3-120; Iowa Code 1935, Vol. 1, Ch. 473, § 10501-3; Ky. Rev. Stat. 1948, Ch. 405, § 405.200; Dart La. Gen. Stat. 1939, Vol. 3, § 4827; Mich. Stat. Ann. 1943, Vol. 23, Ch. 266, § 27.3178; Miss. Code 1942, Vol. 2, Tit. 10, Ch. 2, § 1269; Mo. Rev. Stat. Ann., 1948 Supp., Vol. 20, Ch. 56, § 9609; Neb. Rev. Stat. 1943, Vol. 3, Ch. 43, § 104-6; Nev. Comp. Laws 1938, Vol. 4, § 9476; N. J. Stat. Ann. 1939, Tit. 9, Ch. 3, § 9:3-4; McKinney Consol. Laws N. Y. Ann. 1941, Vol. 14, Art. 7, § 112.5; Page Ohio Gen. Code Ann. 1938, Vol. 7, Ch. 12, § 10512-19; Ore. Comp. Laws Ann. 1940, Vol. 8, Tit. 126, § 126-328; Williams Tenn. Code Ann. 1934, Vol. 3, Ch. 14, § 4733; Utah Code Ann. 1943, Vol. 1, Ch. 4, § 4; Va. Code Ann. 1942, Ch. 216A, § 5333d; Vt. Stats. 1947, Ch. 420, §§ 9940 and 9947; W. Va. Code Ann. 1943, Ch. 48, § 4755; Wis. Stat. 1947, Vol. 2, Ch. 322, § 322.04; Wyo. Comp. Stat. Ann. 1945, Vol. 4, Ch. 58, § 58202.

11 Ariz. Code 1939, Vol. 2, Ch. 27, § 27-203; Col. Stat. Ann. 1935, Ch. 4, § 1; Conn. Gen. Stat. 1949, Vol. 3, Ch. 335, § 6866; Kan. Gen. Stat. 1935, Ch. 38, § 105; Me. Rev. Stat. 1944, Vol. 2, Ch. 145, § 36; Ann. Laws Mass. 1932, Vol. 6, Ch. 210, § 2; Rev. Laws N. H. 1942, Vol. 2, Ch. 345, § 2. N. M. Stat. Ann. 1941, Vol. 2, Ch. 25, § 23-207; Rev. Code Mont. 1935, Vol. 3, Ch. 9, §§ 5859-61; Gen. Stat. N. C. 1943, Vol. 2, Ch. 48, § 48-5; Okla. Stat. Ann. 1336, Tit. 10, Ch. 2, § 44; Purdon Pa. Stat. Ann. (perm. ed.), Tit. 1, §§ 2-3; Gen. Laws R. I. 1938, Ch. 420, § 2; S. D. Code 1939, Vol. 1, Ch. 14, § 14-0403 and § 14-0406; Vernon's Tex. Civ. Stat. 1947, Vol. 1, Art. 46a, § 6; Remington's Rev. Stat. Wash. 1932, Vol. 3, Ch. 5, § 1696.

12 Ala Code 1940, Tit. 27, Ch. 1, § 3; Minn. Stat. Ann. 1945, Vol. 17, Ch. 259, § 259.03; N. D. Rev. Code 1943, Vol. 2, Ch. 14-11; § 14-1104.

13 Vernier's compilation, made in 1936, listed seven states in the third group. It now contains only three.

14 38 Ida. 451, 221 P. 1107 (1923). The decision turns on what is now Ida. Code 1948, Tit. 16, Ch. 25, § 1601.

the presence of the parents in open court if they reside in the county but authorizes the acceptance of a formal written consent acknowledged before an authorized officer if they are non-residents thereof. Such an acknowledged consent had been presented to the court in that case at the time the adoption decree was granted but the record failed to disclose either that the parents were present in court or that they were non-residents. When the decree was subjected to attack some six months later by means of a petition for habeas corpus, the Idaho Supreme Court struck it down on the ground that the statutory provisions were mandatory in character and that strict compliance therewith was essential to establish jurisdiction. Exclusive of the holding therein, and in the instant case which adopts that reasoning, only one other reported case, that of *Martin* v. *Fisher*,[15] can be found which deals with the point as to whether or not the consent requirements are mandatory ones.

There is ample authority, however, for what seems to be an established general rule that where an attempt is made to terminate the natural parent and child relationship and to substitute the adoptive status in its place, the statutes must be strictly construed and the specific requirements thereof must be strictly carried out.[16] Aside from the fundamental concept that statutes in derogation of the common law should be strictly construed, the reasoning in support of the rule seems to stem from the fact that the rights of the natural parents, if not somehow forfeited, are to be regarded as paramount to those of other persons, hence are in need of such emphatic protection. Only in *Owles* v. *Jackson*,[17] a leading Louisiana case, can it be said that the court found sufficient justification for its adherence to such general rule without making reference to these paramount rights of the natural parents, preferring to rest its decision on the fact that adoption, being a creature of the law, could be established only by strict compliance with the law. Although there is no authority contrary to this general rule, it should be noted that the unanimity of decision exists only where the effect of the granting of an adoption decree is to terminate the former parental relationship. If, then, there is no

[15] 25 Ohio App. 372, 158 N. E. 287 (1927). Although the court there said that the statute was mandatory, it upheld an adoption decree based on a consent that was not acknowledged in statutory fashion by saying that the presumption of compliance was not overcome since the consent could have been given in some other manner.

[16] In re McGrew, 183 Cal. 177, 190 P. 806 (1920); Vaughn v. Hubbard, 38 Ida. 451, 221 P. 1107 (1923); Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947); Zalis v. Ksypka, 315 Mass. 479, 53 N. E. (2d) 104 (1944); In re Whitcomb, 271 App. Div. 11, 61 N. Y. S. (2d) 1 (1946); In re Holder, 218 N. C. 136, 10 S. E. (2d) 620 (1940); In re Rubin's Adoption, 6 Ohio Supp 26 (1941); Adoption of Capparelli, 180 Ore. 41; 175 P. (2d) 153 (1946).

[17] 199 La. 940, 7 So. (2d) 192 (1942).

such complete break, there may be occasion to doubt the force of such reasoning.[18]

There is no apparent compelling reason, then, why the Illinois court should see fit, in the instant case, to find the statute to be of mandatory character, for the statutory wording, although admitting of such construction, does not necessarily demand it.[19] Perhaps the most favorable aspect of such a finding rests in the fact that it leaves no occasion for any doubt whatsoever as to the status of the Illinois law on the particular problem. In spirit, at least, the decision achieves a result in complete conformity with the majority attitude.

When the Illinois Appellate Court added that the natural parent had a right to retract the consent at any time before the petition for adoption had been acted upon by the trial court, it made a clearly unnecessary statement for, if the consent was invalid, there was nothing to retract. While the statement may bear scrutiny, it is in agreement with a rule once followed elsewhere but which, in the light of several recent cases, is undergoing considerable modification. A clear majority of the cases on the point do not question the right of a parent to withdraw a prior consent,[20] although there is some divergence of opinion as to just how long this right continues.[21] At one time, only two minority cases

18 The Illinois statute, Ill. Rev. Stat. 1947, Ch. 4, § 5—1, does not purport to change the rule laid down in Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), noted in 16 CHICAGO-KENT REVIEW 198, concerning the duty owed to the child by the natural parent despite the fact that adoption has taken place. If that decision still stands, although based on a statute which was repealed at the time the present statute was enacted, the process of adoption in Illinois cannot be said to produce a complete termination in the parent-child relationship.

19 The repetition of the word "shall" in Ill. Rev. Stat. 1947, Ch. 4, § 3—6, may connote a legislative desire to insist upon technical compliance, but it has not always had that effect. Compare, for example, the language in Ill. Rev. Stat. 1947, Ch. 89, § 6a, regarding observance of eugenic provisions as a prerequisite to obtaining a license to marry, and the holding in Boysen v. Boysen, 301 Ill. App. 573, 23 N. E. (2d) 231 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 206.

20 In re McDonnell's Adoption, 77 Cal. App. (2d) 805, 176 P. (2d) 778 (1947): Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947); In re Anderson, 189 Minn. 85, 248 N. W. 657 (1933); Wright v. Fitzgibbons, 198 Miss. 471, 21 So. (2d) 709 (1945); Application of Graham, 239 Mo. 1036, 199 S. W. (2d) 68 (1947); In re Cohen, 155 Misc. 202, 279 N. Y. S. 472, 128 A. L. R. 1041 (1935); State ex rel. Scholder v. Scholder, 22 Ohio L. Rep. 608 (1944); Paschke v. Smith, 214 S. W. (2d) 205 (Tex. Civ. App., 1948); State ex rel. Towne v. Sup. Ct. for Kitsap County, 24 Wash. (2d) 441, 165 P. (2d) 862 (1946). While the case of In re White's Adoption, 300 Mich. 378, 1 N. W. (2d) 579, 138 A. L. R. 1034 (1942), allowed withdrawal where the parent had a change of mind, and is commonly cited as support for the general rule, the court clearly indicated that no vested rights had intervened.

21 Where there are special statutory periods before a final decree can be entered or within which a petition for rehearing can be filed, three states allow withdrawal until the end of that period: Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947); Re White's Adoption, 300 Mich. 378, 1 N. W. (2d) 579 (1942); In re Burke's Adoption, 60 N. Y. S. (2d) 421 (1946). Two states allow withdrawal until the instrument of consent is acted upon: State ex rel. Scholder v. Scholder, 22 Ohio L. Rep.

clearly held that a parent could not arbitrarily withdraw a prior consent without just cause.[22] Several well-reasoned recent decisions, however, have held that the right to withdraw is not absolute and cannot be exercised out of the mere whim or caprice of the parent who has previously consented.[23] These cases subject the parental right of withdrawal to other equitable considerations such as those concerning the best interests of the child and those involving equities arising out of the bona fide acts of the persons seeking the adoption.

In the Kentucky case of *Lee* v. *Thomas*,[24] for example, an expectant mother signed a consent for the adoption of her illegitimate child prior to its birth, the adopting parents assuming responsibility for the medical expenses and the care and custody of the child. Some fifteen months later, when the adopting parents filed a petition for adoption, the natural mother appeared and sought to withdraw her consent. It was held that she could not bar the adoption by attempting to withdraw her consent after it had been acted upon and adoption proceedings had been instituted, especially so in view of the equities favoring the adopting parents and the evident service to the child by permitting the adoption.

There is occasion, then, to doubt if the court in the instant case did a service by taking a stand on a proposition which is far from settled at a time when such action was not squarely required of it for the purpose of settling the issues over which it was concerned.

H. H. BENEDICT

DAMAGES—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES—WHETHER OR NOT PAYMENT FOR COVENANT NOT TO SUE, MADE BY ONE AGAINST WHOM TORT LIABILITY WOULD LIE, MAY BE USED TO MITIGATE DAMAGES IN SUIT AGAINST ANOTHER WHOSE TORT LIABILITY ARISES FROM SAME CIRCUMSTANCES—The plaintiff in *Aldridge* v. *Morris*[1] sued as ad-

608 (1944); Paschke v. Smith, 214 S. W. (2d) 205 (Tex. Civ. App., 1948). Three states allow it before decree or final approval: Application of Graham, 239 Mo. 1036, 199 S. W. (2d) 69 (1947); Adoption of Capparelli, 180 Ore. 41, 175 P. (2d) 153 (1946); In re Nelms, 153 Wash. 242, 279 P. 748 (1929).

22 Re Adoption of a Minor, 79 App. D. C. 191, 144 F. (2d) 644, 156 A. L. R. 1001 (1944), a case of questionable authority because based on special statutory provisions, and Wyness v. Crowley, 292 Mass. 461, 198 N. E. 758, 138 A. L. R. 1041 (1935).

23 Skaggs v. Gannon, 293 Ky. 795, 170 S. W. (2d) 12 (1943); Lee v. Thomas, 297 Ky. 858, 181 S. W. (2d) 457 (1944); Kalika v. Munro, — Mass. —, 83 N. E. (2d) 171 (1948); Erickson v. Raspperry, 300 Mass. 333, 69 N. E. (2d) 474 (1946); Adoption of Capparelli, 180 Ore. 41, 175 P. (2d) 153 (1946). The case of French v. Catholic Community League, 69 Ohio App. 422, 44 N. E. (2d) 113 (1943), does not follow the earlier Ohio cases for it indicates that the right to withdraw is conditional.

24 297 Ky. 858, 181 S. W. (2d) 457 (1944).

1 337 Ill. App. 369, 86 N. E. (2d) 143 (1949). Leave to appeal has been denied.

ministratrix to recover for the wrongful death of the decedent arising in a collision between a car driven by the defendant, in which the decedent rode as a guest, and a truck driven by an employee of an oil company. Prior to suit, the administratrix had accepted a substantial sum from the oil company in return for a covenant not to sue. The trial jury, over objection, was allowed to hear evidence concerning the payment for the covenant not to sue. Despite this, it found that defendant, while negligent, was not wilfully or wantonly so, as is required before a non-paying guest can recover from the driver,[2] and judgment passed for defendant. On plaintiff's appeal therefrom, the lower court judgment was upheld by the Appellate Court for the Second District on the ground that (1) the evidence concerning the covenant not to sue was admissible, and (2) the finding of the jury in defendant's favor was not contrary to the weight of the evidence. The opinion of the court, written by Bristow, J., considered the fundamental issue to be "whether the covenant not to sue, entered into between plaintiff and the oil company should have been introduced in the proceedings." After a thorough analysis of the Illinois cases in point, the court noted that Illinois decisions have been cited as authority on both sides of the question,[3] found that unimportant factors have been used as bases for some of the decisions, and came to a well-reasoned conclusion that such factors were without sound support and should not be followed.

That a release given to one of two or more joint tort feasors will serve to release all is well settled.[4] Difficulty arises, however, in determining whether the consideration furnished by one of the tort feasors was given for a release or merely for a covenant not to sue.[5] As the latter does not serve to bar suit against the remaining tort feasors,[6] a number of states, including Illinois,[7] have held that the intention of the parties is controlling on the point.[8] Once it has been ascertained that the agreement made is actually a covenant not to sue, the problem of the instant case will arise, that is what should be the effect of such a covenant upon the covenanter's action against a third person whose tort liability grows out of the same circumstances?

2 Ill. Rev. Stat. 1947, Ch. 95½, § 58a.

3 See annotation in 104 A. L. R. 926 to the New Jersey case of Brandstein v. Ironbound Transportation Co., 112 N. J. L. 585, 172 A. 580 (1934), particularly pp. 932 and 941.

4 Mooney v. City of Chicago, 239 Ill. 414, 88 N. E. 194 (1909); Welty v. Laurent, 285 Ill. App. 13, 1. N. E. (2d) 577 (1936). In general, see 23 R. C. L. Release, §§ 35-6, and 66 A. L. R. 206.

5 See note in 79 U. of Pa. L. Rev. 503 (1930).

6 45 Am. Jur., Release, § 4.

7 Chicago & Alton Ry. Co. v. Averill, 224 Ill. 516, 79 N. E. 654 (1906); Reams v. Janoski, 268 Ill. App. 8 (1932).

8 45 Am. Jur., Release, § 37.

In the settlement of that problem, it may be noted that the great weight of authority in this country holds that evidence concerning the consideration received for the covenant not to sue may be introduced in evidence in a suit against the other joint tort feasor and the jury may be instructed to deduct, from any award made to plaintiff, the amount so received.[9] A fair number of the Illinois decisions fall in line with this majority view, commencing with the case of *City of Chicago* v. *Babcock*.[10] Actually, the court there decided that a jury finding to the effect that a purported release was really a covenant not to sue was binding, hence did not serve to exculpate the defendant. By way of comment, however, the court remarked that the moneys paid for such a covenant might well be used to reduce the amount of damages assessed against the other joint tort feasor. Whether the jury did or did not so consider the covenant was not questioned. Ten later Illinois decisions, more than a proportionate share of the cases on the subject, have picked up and applied the dictum so pronounced.[11]

Decisions which adhere to the opposite view base the refusal to allow evidence of the covenant to be offered in mitigation on a variety of grounds. The first view, really a reiteration of the prevailing viewpoint, becomes operative whenever the court finds that the party furnishing the con-

[9] McKenna v. Austin, 134 F. (2d) 659 (1934); Steenhuis v. Holland, 217 Ala. 105, 115 So. 2 (1927); Storey v. Breedman, 5 Alaska 468 (1916); Dwy v. The Connecticut Co., 89 Conn. 74, 92 A. 883 (1914); Ballick v. Philadelphia Products Co., Inc., 5 Harr. 74, 162 A. 776 (Del., 1932); Caplan v. Caplan, 62 Ga. App. 577, 9 S. E. (2d) 96 (1940); Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N. E. 756 (1913); Miller v. Beck, 108 Iowa 601, 79 N. W. 344 (1899); Louisville Gas & Electric Co. v. Beaucond, 188 Ky. 725, 224 S. W. 179 (1920); McCrillis v. Hawes, 38 Me. 566 (1854); Bogdahn v. Pascagoula St. Ry. & Power Co., 118 Miss. 668, 79 So. 844 (1918); Karcher v. Burbank, 303 Mass. 303, 21 N. E. (2d) 542 (1939); Knoles v. Clark, 236 Mo. App. 1162, 163 S. W. (2d) 369 (1942); Meinecke v. Intermountain Trans. Co., 101 Mont. 315, 55 P. (2d) 680 (1936); Mason v. Stephens, 168 N. C. 370, 84 S. E. 527 (1915); Colby v. Walker, 86 N. H. 568, 171 A. 774 (1934); Lombardo v. Creamer, 113 N. J. L. 117, 172 A. 584 (1934); Fidel v. Brooklyn & Queens Transit Corp., 242 App. Div. 791, 274 N. Y. S. 796 (1934); Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N. E. 300 (1919); City of Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923); McKay v. Pacific Bldg. Materials Co., 156 Ore. 578, 68 P. (2d) 127 (1937); Hunt v. Aufderheide, 330 Pa. 362, 199 A. 345 (1938); Finlay v. Plante, 52 R. I. 325, 160 A. 865 (1932); Bradshaw v. Baylor University, 126 Tex. 99, 84 S. W. (2d) 703 (1935); Chamberlin v. Murphy, 41 Vt. 110 (1868); Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 P. 331 (1923); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586 (1924); New River & Pocahontas Cons. Coal Co. v. Eary, 115 W. Va. 46, 174 S. E. 573 (1934); Abraham v. Clark, 202 Wis. 451, 232 N. W. 865 (1930).

[10] 143 Ill. 358, 32 N. E. 271 (1892).

[11] Garvey v. Chicago Railways Co., 339 Ill. 276, 171 N. E. 271 (1930); Bejnarowicz v. Bakos, 332 Ill. App. 151, 74 N. E. (2d) 614 (1947); Stoewsand v. Checker Taxi Co., 331 Ill. App. 192, 73 N. E. (2d) 4 (1947); Rather v. City of Chicago, 298 Ill. App. 625, 19 N. E. (2d) 451 (1939); Gore v. Henrotin, 161 Ill. App. 110 (1911); Chicago & Alton Ry. Co. v. Averill, 127 Ill. App. 275 (1906); Brennan v. Electric Installation Co., 120 Ill. App. 461 (1905); City of Chicago v. Smith, 95 Ill. App. 335 (1900); Chicago & E. I. Ry. Co. v. Hines, 82 Ill. App. 488 (1898), affirmed in 183 Ill. 482, 56 N. E. 177 (1899), without comment upon point in question.

sideration and the party being sued are not, in fact, joint tort feasors[12] but are independent actors.[13] As the general rule allowing mitigation is designed to apply only where joint liability is involved, that rule is clearly inappropriate for use in such cases. Three of the Illinois cases have been decided squarely on this proposition. In *Scharfenstein* v. *Trust City Knitting Company,*[14] for example, mitigation was disallowed when it appeared that the parties concerned were not joint tort feasors, albeit the court said that even joint tort feasors were not entitled to mitigation. In *Skillman* v. *McDowell,*[15] a proceeding under the Dram Shop Act,[16] the dram shop keeper was denied an opportunity to show that the plaintiff, his customer, had received money from another patron for a covenant not to sue because the defendant's liability was treated as being distinct and separate from that of the patron.[17] As recently as 1948, the Illinois Supreme Court, in the case of *McManaman* v. *Johns-Manville Products Corporation,*[18] also disallowed mitigation on much the same grounds, treating the parties concerned as not being joint tort feasors.

Other cases which refuse to allow mitigation do so on the ground that the granting of a covenant not to sue is purely a personal matter between the immediate parties with no portion of the transaction inuring to the benefit of another. As such parties are to be fully protected in their right to make any lawful contract they please, it has been conceived that their intention is to regard the sum paid for the covenant as not being designed to satisfy any part of the plaintiff's claim against the defendant. The intention so discovered has, as a necessary concomitant to the premise on which it is based, been enforced in cases such as *Nashland Interurban Railway Company* v. *Gregory.*[19] A Minnesota court, in an erroneous belief that such view had been applied "in a multitude of cases,"[20] wherein full recovery had been granted against the other person jointly liable, saw fit to follow the Tennessee view so expressed. In direct opposition to the

12 That the rule as to just what parties are joint tort feasors is not settled, see Prosser, "Joint Torts and Several Liability," 25 Cal. L. Rev. 413 (1937).

13 Payments made by employer to plaintiff-employee have been excluded in Town of West Hartford v. Willets, 125 Conn. 266, 5 A. (2d) 13 (1929); Gulf Refining Co. v. Jackson, 250 S. W. 1080 (Tex. Civ. App., 1923); Grimm v. Globe Printing Co., 232 S. W. 676 (Mo. App., 1921).

14 253 Ill. App. 190 (1929).

15 317 Ill. App. 85, 45 N. E. (2d) 574 (1942).

16 Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq.

17 But see Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N. E. (2d) 132 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 358, to the effect that such distinction does not hold true where a general release is given.

18 400 Ill. 423, 81 N. E. (2d) 137 (1948).

19 137 Tenn. 422, 193 S. W. 1053 (1917).

20 Musolf v. Duluth Edison Electric Co., 108 Minn. 369 at 378, 122 N. W. 499 at 503 (1909).

attitude that the covenant is a matter of concern solely to the contracting parties, is the viewpoint expressed in a few cases which hold that the defendant may not only take advantage, by way of mitigation, of the consideration given for the covenant when paid by a joint tort feasor but may also use proof of money paid by independent tort feasors and even by persons not, in fact, liable.[21] As a Utah court recently stated that concept, it would ill become "one who has forced another to pay him damages for injuries he has received to argue that he did so in bad faith,"[22] hence he must allow proof of such payments in favor of all others involved.

Relatively few cases have considered the impact such evidence might have upon the jury. In the Nebraska case of *Tankersley* v. *Lincoln Traction Company*,[23] it was the defendant who objected to the introduction of evidence concerning amounts received by the plaintiff for a covenant not to sue, despite the fact that such proof would seemingly redound to its benefit. The court agreed with the objection, holding that it was error to allow such proof in evidence because it would be apt to cause the jury to "assume that the non-settling defendant was liable for the same amount of damages."[24] The logic would seem unsound, but it is reflected in the Illinois case of *Devaney* v. *Otis Elevator Company*,[25] often cited as evidencing an adherence to the minority view, where the court said that, inasmuch as the covenantee was not a party to the suit, it was improper for the jury to consider the effect of any agreement it might have made with the plaintiff. It may be noted, however, that no reversal was granted therein for the instruction was not regarded as prejudicial to a defendant who would stand to benefit from that proof.[26] The point does not seem to have been pressed too strongly and the ultimate decision may be justified on the ground that the covenantee, who was the plaintiff's employer, was not really a joint tort feasor.

The decision in the instant case attempts to place the Illinois law on a sound basis, squaring it with the weight of authority. The only distracting feature lies in the fact that the whole discussion is beside the point for the jury found that the defendant had not acted in the

21 Husky Refining Co. v. Barnes, 119 F. (2d) 715 (1941); Young v. Anderson, 33 Ida. 522, 196 P. 193 (1921); Jacobsen v. Woerner, 149 Kan. 598, 89 P. (2d) 24 (1939); Bailey v. Delta Elec. Light, Power & Mfg. Co., 86 Miss. 634, 38 So. 354 (1905); El Paso & S. R. Co. v. Darr, 93 S. W. 166 (Tex. Civ. App., 1906).

22 Green v. Lang Co., Inc., — Utah — at —, 206 P. (2d) 626 at 627 (1949).

23 101 Neb. 578, 163 N. W. 850 (1917).

24 101 Neb. 578 at 584, 163 N. W. 850 at 852.

25 251 Ill. 28, 95 N. E. 990 (1911).

26 Much the same rationale appears to have been followed in Caruso v. City of Chicago, 305 Ill. App. 571, 27 N. E. (2d) 545 (1940), and in Onyschuk v. Sharkey, 277 Ill. App. 414 (1934), where the court felt that the defendant had the benefit of the proof even though no special instruction was given on the point.

wilful and malicious fashion necessary to support a recovery. As the court approved that finding, it follows that plaintiff could recover nothing from the defendant. Being without such right of recovery, there could never be damages assessed against the defendant from which to deduct the money plaintiff received for his covenant not to sue. The question of the effect of such covenant, then, was not before the court for purpose of comment.

E. A. WARMAN

DIVORCE—OPERATION AND EFFECT OF DIVORCE AND RIGHTS OF DIVORCED PERSONS—WHETHER A DIVORCE DECREE BY COURT HAVING PERSONAL JURISDICTION OF BOTH PARTIES ABROGATES A PRIOR SEPARATE MAINTENANCE DECREE OF ANOTHER STATE—That *Sherrer* v. *Sherrer*[1] and *Coe* v. *Coe*[2] have done little to clarify the question of the effect of an out of state divorce on a local separate maintenance decree is the disappointing conclusion to be drawn from two recent cases. One of these cases, that of *Buck* v. *Buck*,[3] came before the Illinois Appellate Court for the First District. It appeared therein that, for some twenty years prior to 1943, Lillian Buck and Gordon Buck had lawfully cohabited as husband and wife in Illinois. In that year, Lillian obtained a decree of separate maintenance from an Illinois court on the ground of her husband's willful desertion. The following year, he went to Nevada, remained the required six weeks, and filed a divorce action charging extreme cruelty. His wife followed him to Nevada and filed a sworn answer as well as a cross complaint for divorce alleging desertion. The Nevada court awarded the decree to Lillian, approving a property settlement which had been arranged by the parties and a support allowance. Both parties returned to Illinois. Lillian thereafter filed a petition seeking an increase in the monthly award under the prior Illinois decree. The ex-husband, as a defense to that action, raised the effect of the Nevada proceeding and of Lillian's participation therein. Lillian's reply questioned the jurisdiction of the Nevada court and alleged that fraud had been practiced upon that court and upon her by the defendant. Upon appeal from a decree adverse to Lillian, the Illinois Appellate Court affirmed, holding that the requirements of full faith and credit, as laid down in the Sherrer and Coe cases, precluded any collateral attack upon the Nevada decree inasmuch as the defendant therein had filed an appearance and had submitted to the jurisdiction of that court, thereby nullifying the operation of the earlier Illinois decree.

1 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, 1 A. L. R. (2d) 1355 (1948).
2 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451, 1 A. L. R. (2d) 1376 (1948).
3 338 Ill. App. 179, 86 N. E. (2d) 415 (1949).

In the other case, that of *Lynn* v. *Lynn*,[4] the Appellate Division of the New York Supreme Court, two justices dissenting, reached an opposite result on somewhat similar facts. Jay Lynn, having been an unsuccessful defendant in a New York bed and board suit, went to Nevada to establish residence and filed a divorce suit against his wife Lillian charging cruelty. Lillian followed, filed an answer denying the allegations of cruelty and questioning the genuineness of her husband's Nevada residence. By way of a separate defense, she set up the prior New York adjudication. The Nevada court found for the husband and entered a decree of divorce in his favor, omitting therefrom any reference to support. Both parties returned to New York. Payments under the bed and board separation were continued for some five years. At that time, Lillian applied to the New York court for an increase in the payments. As a defense to that action, Jay pleaded the Nevada divorce and Lillian's participation therein. This defense was sustained by the trial court but, on appeal, the Appellate Division reversed, holding that the ex-wife's appearance in the Nevada divorce proceeding did not destroy her right to support under the earlier New York decree.

The problem evidenced in these two cases is not a new one. During the comparatively tranquil reign of *Haddock* v. *Haddock*,[5] under which each state was left to determine for itself the effect an out of state divorce would have on its residents, it became generally recognized that, where both parties appeared in the out of state divorce proceeding before a court of competent jurisdiction, such decree was not subject to collateral attack.[6] Where a prior decree for separate maintenance was involved, however, the result was not so clear. If the wife had previously obtained a separate maintenance decree in one state and later personally appeared in her spouse's out of state divorce action, a question would arise as to whether she had thereby lost her right to separate maintenance under the earlier decree. Some states held that she did.[7] This result was reached, in some jurisdictions, even where the out of state divorce was of ex parte

[4] 275 App. Div. 269, 88 N. Y. S. (2d) 791 (1949). Cohn, J., wrote a dissenting opinion, concurred in by Van Voorhis, J.

[5] 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906).

[6] See collection of cases in the annotation to Chanblin v. Chanblin, 362 Ill. 588, 1 N. E. (2d) 73 (1936), in 104 A. L. R. 1183, and Guggenheim v. Wahl, 203 N. Y. 390, 96 N. E. 726 (1910); Strauss v. Strauss, 122 App. Div. 729, 107 N. Y. S. 842 (1907); French v. French, 74 Misc. 626, 131 N. Y. S. 1053 (1911).

[7] Bloedorn v. Bloedorn, 76 F. (2d) 812 (1935); Rosa v. Rosa, 296 Mass. 271, 5 N. E. (2d) 417 (1936); Scheinwald v. Scheinwald, 231 App. Div. 757, 246 N. Y. S. 33 (1930); Richards v. Richards, 87 Misc. 134, 149 N. Y. S. 1028 (1915); Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421 (1911), reversed on other grounds in 108 N. E. 1121 (1911); Comm. v. Parker, 59 Pa. Super. 74 (1915).

character,[8] although the general rule would seem to have been that an ex parte proceeding could have no such effect,[9] the existence or non-existence of personal jurisdiction being deemed the determining factor.[10] Other courts, by contrast, held that even a personal appearance by the wife and a plea to the merits would not waive her rights under the previous order.[11] The first federal clarification of the issue came with *Davis* v. *Davis*.[12] The Supreme Court, in that case, held that the wife's contest of her husband's Virginia divorce proceeding on the merits, even though termed a special appearance, he being properly domiciled in that state, had resulted in entitling the Virginia decree to full faith and credit in any action brought in another state.

Although the Davis case was a step in the right direction, conflicting state decisions thereafter evidenced that much remained to be done before uniformity could be attained. Nor did the two celebrated cases of *Williams* v. *North Carolina*[13] offer a solution. While the effect of these cases was to require each state to give full faith and credit to a foreign ex parte divorce, if rendered on proper jurisdictional bases, it failed to determine the effect that divorce would have on personal obligations arising from the marital status such as the husband's duty to support.

Those states which sought to retain whatever was possible from the Haddock rule held that, where the wife had sought no affirmative relief under her personal appearance, the foreign decree could have no effect upon a prior separate maintenance decree[14] although admitting that it would be conclusive if it incorporated a prior settlement,[15] particularly

8 Harrison & Saunders v. Harrison, 20 Ala. 629 (1852); Cardinale v. Cardinale, 8 Cal. (2d) 762, 68 P. (2d) 351 (1937); McCormick v. McCormick, 82 Kan. 31, 107 P. 546 (1910); McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929 (1918); Herrick v. Herrick, 55 Nev. 59, 25 P. (2d) 378 (1933).

9 Basset v. Basset, 141 F. (2d) 954 (1944); Simonton v. Simonton, 40 Ida. 751, 236 P. 863 (1925); Miller v. Miller, 200 Iowa 1193, 206 N. W. 262 (1925); Dory v. Dory, 248 Mass. 359, 142 N. E. 774 (1924); Metzger v. Metzger, 32 Ohio App. 202, 167 N. E. 690 (1929).

10 Bennett v. Tomlinson, 206 Iowa 1075, 221 N. W. 837 (1928); West v. West, 114 Okla. 279, 246 P. 599 (1926).

11 Harding v. Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066 (1905); Lednum v. Lednum, 85 Col. 374, 276 P. 674 (1929); Kelly v. Kelly, 118 Va. 376, 87 S. E. 567 (1916).

12 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518 (1938).

13 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273 (1942), and 325 U. S. 229, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

14 In Manney v. Manney, 42 Ohio L. Abs. 153, 59 N. E. (2d) 755 (1944), the court distinguished the case before it from the earlier case of Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421 (1911), on the basis that no affirmative relief had been sought.

15 Schacht v. Schacht, 295 N. Y. 439, 68 N. E. (2d) 433 (1946); Senor v. Senor, 187 Misc. 856, 65 N. Y. S. (2d) 603 (1946), affirmed in 297 N. Y. 800, 78 N. E. (2d) 20 (1946); In re Jarunek, 267 App. Div. 607, 47 N. Y. S. (2d) 625 (1944); Graham v. Hunter, 266 App. Div. 576, 42 N. Y. S. (2d) 717 (1943).

so as to all parties who personally appeared.[16] Closely associated with this line of cases are those which hold that, even after personal appearance, the jurisdictional question may be reopened if there is no positive finding of its existence by the out of state court.[17] Other states, reaching a different result, held that the personal appearance of the defendant made the decree effective not only for all that was litigated but for all that might have been litigated, providing the court had proper jurisdiction of the res.[18]

The matter eventually came to the United States Supreme Court through the case of *Estin* v. *Estin*.[19] The court there held, two justices dissenting, that an out of state ex parte divorce could have no effect on a prior separate maintenance decree of another state. That result was reached on the theory that no court, without personal jurisdiction, could determine personal rights and obligations. The principle of "divisible" divorce was thus laid down.[20] On the same day the court decided the Estin case, it handed down the decisions in the Sherrer and Coe cases.[21] The problem was again essentially that of the Estin case except that there had been personal appearance by both parties in the out of state proceeding. Because of that personal appearance, the court held that any failure by the party defendant to contest the jurisdiction of the court was no one's fault but his own and that failure could not serve to provide the basis for a subsequent attack on the decree before the courts of a sister state. The doctrine of the Davis case, which had been interpreted as requiring a contest of jurisdiction,[22] was thereby broadened and, insofar as it was in conflict with the holding in *Andrews* v. *Andrews*,[23] the latter case was expressly overruled.[24]

It is not possible, at this time, to draw any decisive conclusions as to how state courts will apply the doctrines of the Estin, Sherrer and Coe

[16] Matter of Lindgren's Estate, 293 N. Y. 18, 55 N. E. (2d) 849 (1944); DeMarigny v. DeMarigny, 193 Misc. 189, 81 N. Y. S. (2d) 228 (1948).

[17] Cohen v. Cohen, 319 Mass. 31, 64 N. E. (2d) 689, 163 A. L. R. 362 (1946); Giresi v. Giresi, 137 N. J. Eq. 336, 44 A. (2d) 345 (1946); Isserman v. Isserman, 23 N. J. Misc. 174, 42 A. (2d) 642 (1945), reversed on other grounds in 138 N. J. Eq. 140, 46 A. (2d) 799 (1946).

[18] Ex parte Jones, 249 Ala. 386, 31 So. (2d) 314 (1947); Taylor v. Burdick, 320 Mich. 25, 30 N. W. (2d) 418 (1948); Keller v. Keller, 352 Mo. 877, 179 S. W. (2d) 728 (1944).

[19] 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A. L. R. (2d) 1412 (1948).

[20] Mr. Justice Douglas noted that the "result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." See 334 U. S. 541 at 549, 68 S. Ct. 1213 at 1218, 92 L. Ed. 1561 at 1569.

[21] See notes 1 and 2, ante.

[22] Cohen v. Cohen, 319 Mass. 31, 64 N. E. (2d) 689, 163 A. L. R. 362 (1946).

[23] 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366 (1903).

[24] See Sherrer v. Sherrer, 334 U. S. 343 at 353, 68 S. Ct. 1087 at 1092, 92 L. Ed. 1429 at 1437, 1 A. L. R. (2d) 1355 at 1363 (1948).

cases. Collectively they seem to lay down a middle road of decision which, if followed by state tribunals, would result in a greater degree of uniformity than has heretofore been the case, a result eminently desirable. Thus a state, although required by the Williams doctrine to give full faith and credit to an out of state ex parte divorce insofar as it operates upon the res, might properly assert its interest in the financial welfare of its own domiciliaries by a refusal to recognize such a decree as operative upon personal rights or liabilities of the party not present; a result consistent both with the Williams case and the holding in *Pennoyer* v. *Neff*.[25] To require recognition of a personal decree based upon personal appearance would seem to be a mere corollary of the rule rather than an unwarranted extension.

The Illinois court, in deciding the Buck case, adhered to these principles. While it must be admitted that Lillian Buck sought affirmative relief in the Nevada proceeding, her action was not made the basis of the decision. Quoting extensively from the Sherrer case, the Illinois court affirmed the principle that, where a court has personal jurisdiction of the parties and of the res, the result of that hearing will be res judicata not only concerning what was in fact litigated but also as to what might have been so litigated.[26] The Illinois court, therefore, felt bound to accord full faith and credit to the Nevada decree, a holding which, it is to be hoped, will become the accepted interpretation of the Sherrer and Coe cases.

The New York court, reaching the opposite result in the Lynn case, recognized the compelling effect of the Williams doctrine as to the full faith and credit which had to be accorded to the Nevada decree insofar as it affected the marital status, but seized upon the "divisible" divorce doctrine of the Estin case in order to prevent it from having any effect on the New York separate maintenance decree. In an effort to buttress the logic of that decision, the court leaned upon the fact that, there being no provision for support of the wife in the Nevada decree, that decree was not entitled to full faith and credit in New York because it had failed to give full faith and credit to the earlier New York decree. The court also relied upon the paramount interest of New York in the maintenance of the validity of its judgments as to matrimonial matters as well as the public policy of that state regarding divorce. In effect, the New York court said that, as the Estin case had given birth to the principle of divisible divorce, while it was constrained by the Williams case to recognize

[25] 95 U. S. 714, 24 L. Ed. 565 (1878).

[26] Ex parte Jones, 249 Ala. 386, 31 So. (2d) 314 (1947); Godschalck v. Weber, 247 Ill. 269, 93 N. E. 241 (1910); Pratt v. Mridima, 311 Mich. 64, 18 N. W. (2d) 279 (1945), cert. den. 326 U. S. 739, 66 S. Ct. 49, 90 L. Ed. 441 (1945); Keller v. Keller, 352 Mo. 877, 179 S. W. (2d) 728 (1944); Morrisey v. Morrisey, — N. J. Eq. —, 64 A. (2d) 209 (1949).

the effect of the decree on the marital status, there was nothing to compel it to accept that part of the decree which purported to operate in personam.

A blind following of the New York view would provide the impetus to turn an already confused problem into one of even greater confusion. Under it, no out of state divorce, despite complete jurisdiction both in rem and in personam, would be completely effective in a restrictive state of domicile of one of the parties. The litigant in such a suit, while everywhere recognized as divorced, would have to be, for purpose of the support of his ex-wife, regarded as a married person. Whether the forward-looking attitude of the Illinois court or New York's attempt to salvage whatever is left from the doctrine of the Haddock case will become the generally accepted attitude is a problem now in need of solution. Perhaps the only solution will be in another case of the import of *Williams* v. *North Carolina*.[27] It is appropriate, at least, to recall the prophesy Professor Holt made in 1943. He wrote: "Yet the bones of *Haddock* v. *Haddock* remain—unbleached and unpulverized . . . so courts in states that do not favor free and easy termination of marriage may still find in the ossious remains of the Haddock case material to fashion some puzzles for the Supreme Court of the United States to solve—puzzles upon which law students and their teachers in the meantime may speculate."[28]

G. E. ELMORE

LANDLORD AND TENANT—TERMS FOR YEARS—WHETHER OPTION TO PURCHASE DEMISED PREMISES, CONTAINED IN LEASE FOR YEARS, IS EXTENDED BY VIRTUE OF EXERCISE OF OPTION TO RENEW SAME LEASE.—In the recent case of *Hindu Incense Manufacturing Company* v. *MacKenzie*,[1] the Illinois Supreme Court was called upon, for the first time, to determine whether an option to purchase, as contained in a lease, was continued into a renewal term by virtue of the exercise of an option to renew contained in the same lease.[2] The record showed that the lessee-plaintiff gave timely notice in writing to the lessor-defendant of its election to exercise the option to renew. During the renewal term the

27 See note 13, ante.

28 Holt, "The Bones of Haddock v. Haddock," 41 Mich. L. Rev. 1013 at 1036 (1943).

1 403 Ill. 390, 86 N. E. (2d) 214 (1949), affirming 335 Ill. App. 423, 82 N. E. (2d) 173 (1948).

2 The pertinent provisions of the lease were: "To have and to hold . . . with mutual option to renew for an additional term of two years under the same terms and conditions." A separate clause stated: "An option is hereby given to the lessee to purchase the said premises for the sum of twenty-four thousand ($24,000.00) dollars at any time during the term of this lease, free and clear of all encumbrances."

plaintiff, learning that the defendant was about to sell the property to a third person, notified the defendant that it had an option to purchase which would not expire until the end of the renewal term and that, if defendant sold, he would be depriving plaintiff of its right to purchase under the option. Plaintiff then filed a complaint in two counts, one for a declaratory judgment as to its rights, the other for an injunction. The proceedings were afterwards limited to count one upon which the trial court declared that the option to purchase had been renewed and continued when the plaintiff properly exercised its election to renew the tenancy. The Appellate Court for the First District affirmed that declaratory judgment and, on further appeal, the Supreme Court likewise affirmed. It reasoned that the language used in the lease was expressive of an intention by the parties that the exercise of the option to renew the lease "under the same terms and conditions" should also serve to carry the option to purchase over into the renewal term as an integral part of an indivisible contract.[3] Such being the case, the court was then able to say that "the option to purchase was one of the terms of the lease and the option to renew clearly grants to the lessee the power to renew the entire contract upon the same terms as granted in the original undertaking."[4]

Whether an option to purchase can be exercised during a renewal term must, of course, depend upon the intention of the parties, which intention must be gathered from the lease itself.[5] Where, however, the parties to the lease have not stipulated in precise terms on the point, courts are forced to formulate a rule of construction from which to achieve a decision. In arriving at such a rule, the first point to be considered is how the court is to regard the option to purchase in its relationship to the entire lease, that is whether to consider the option as an integral part of the lease or as an independent and collateral provision. The second consideration involves a determination as to whether the renewal term is to be considered part of one over-all leasing[6] or is to be treated as a new lease.[7]

[3] That an option is an integral part of an indivisible contract, see Garlick v. Imgruet, 340 Ill. 136, 172 N. E. 164 (1930).

[4] 403 Ill. 390 at 395, 86 N. E. (2d) 214 at 216.

[5] Thompson v. Coe, 96 Conn. 642, 115 A. 219 (1921); Volunteers of America v. Spring, 27 Ohio App. 229, 161 N. E. 215 (1927). See also 51 C. J. S., Landlord and Tenant, § 84.

[6] Underhill, Landlord and Tenant (T. H. Flood & Co., Chicago, 1909), Vol. 2, § 803.

[7] The court involved in Ardito v. Howell, — Del. — at —, 51 A. (2d) 859 at 861 (1947), however, felt that "it would be profitless and unrealistic to resolve this case by ascertaining whether the lease was 'extended' or 'renewed' or whether the option to purchase is part of a 'divisible' contract or is an 'independent' agreement." It believed that the "preferable practice would seem to be merely to consider the agreement as posing a problem of construction to ascertain intent to be resolved in the light of principles applicable to such a problem."

On the first of these points, a clear distinction appears to exist in the American decisions as to whether an option to purchase is an integral part of the contract or not. One view, treating the lease as being no different than any other contract, would give no greater significance to any one clause than to another or, to put the matter in converse fashion, would treat all clauses as possessing equal significance. Illustrating that view is the Maryland case of *Schaeffer* v. *Bilger*[8] where the court treated the clauses giving the right to obtain a renewal and also to acquire the title as being indivisible parts of the one contract.[9] It came to that conclusion through the aid of an earlier case, that of *Thomas* v. *G. B. S. Brewing Company,*[10] which had treated the option feature as a "continual obligation" running with the lease much as would be the case of a covenant running with the land.[11] Something of the sort is indicated by the instant case, for the court stressed the fact that the renewal was to be under "the same terms and conditions" as appeared in the original lease, considering that statement as evidence of an intention that all terms, and not just some of them, should be renewed. It may be said that this view reflects the majority opinion on the subject but it is not without a respectable opposition.

The contrary view, one which treats the option to purchase as being an incidental and collateral term of a demise of land, is best illustrated by the Pennsylvania case of *Pettit* v. *Tourison,*[12] a case involving parallel facts to the instant case but one which reached an opposite result. That view is based on the concept that a lease is not, per se, a contract but is primarily a grant of an interest in land so that all things not essential to such grant are necessarily incidental thereto. As the court there stated, a privilege to renew and an option to purchase "confer separate rights and powers upon the lessee. The first has reference to the continuance of the tenancy; the latter confers upon the lessee the power to terminate the tenancy and to become the absolute owner of the property. The option to purchase is not an essential covenant of the lease, nor is it a term and condition of the demise. There are many covenants which are often found in leases which are independent and not essential parts of the demise which without express agreement to that effect are not to be incorporated in renewals thereof, such as a covenant to renew or any covenant that has been fulfilled and is not continuous."[13]

8 186 Md. 1, 45 A. (2d) 775 (1946).

9 See also Moore v. Maes, — S. C. —, 52 S. E. (2d) 204 (1949).

10 102 Md. 417, 62 A. 633 (1905).

11 See Starr v. Holck, 318 Mich. 452, 28 N. W. (2d) 289 (1947), a case which adopts similar language.

12 283 Pa. 529, 129 A. 587, 39 A. L. R. 1106 (1925).

13 283 Pa. 529 at 531, 129 A. 587 at 587-8.

The adherence there shown to the English views on the subject[14] have not gone without notice in other parts of the country,[15] but it is clear that even an incidental provision may be carried over into the renewal period if suitable language is used to designate that intention. Such being the case, is there not a more practical basis for the general view since leases today have lost many of the common law characteristics and have become more nearly simple contracts? The court in the instant case did not say that an option to purchase could not be in the form of an independent condition, but rather that if such was the intention it would have to be clearly so worded.

Under the second point, which requires consideration of whether the transaction is to be taken to consist of parts of an over-all leasing or whether the renewal term is to be regarded as a new leasing arrangement, a similar split of authority may be noted. If the transaction is to be given over-all effect, any provision in the original agreement will necessarily have to be carried forward into the renewal period unless that action is specifically forbidden. Attempts to discriminate between the "renewal of a lease" and the "extension of a term" have been rejected as a play on words in the absence of clear evidence that execution of a new lease for the additional period is required. The terms "renew" and "renewal" not being words of art possessing some special legal or technical signification,[16] the general attitude has been to carry all covenants and conditions of the original lease forward to the extended period, if the option to extend is exercised.[17] Here, again, there is evidence that a lease is to be treated as if it were no different than any other contract.

The contrasting view may be illustrated by the Pennsylvania case of *Pettit* v. *Tourison*,[18] referred to above. The court there held that a provision for renewal could have reference only to the parts of the document which constituted the terms of the demise, terms that would, in case the option to renew was exercised, necessarily have to be carried forward into the continued tenancy. As the option to purchase the

[14] See, for example, the words of Warrington, L. J., in Sherwood v. Tucker, [1924] 2 Ch. 440 at 446. He stated: "It has frequently been held and may be treated as perfectly well settled that an option of purchase is not to be regarded as a provision incident to the relation of landlord and tenant, but is a matter collateral to and independent of it." The case is noted in 23 Mich. L. Rev. 75.

[15] Carter v. Frakes, 303 Ky. 244, 197 S. W. (2d) 436 (1946); Mauzy v. Elliot, 146 Neb. 865, 22 N. W. (2d) 142 (1946). Other Pennsylvania cases in point are Parker v. Lewis, 267 Pa. 382, 110 A. 79 (1920), and Signor v. Keystone Consistory, 227 Pa. 504, 121 A. 320 (1923).

[16] Flanagan v. Hambleton, 54 Md. 222 (1880).

[17] McKown v. Heery, 200 Ga. 819, 38 S. E. (2d) 204 (1946); Meadow Heights Country Club v. Hinchley, 229 Mich. 291, 201 N. W. 190 (1924); Johnson v. Bates, 128 N. J. Eq. 183, 15 A. (2d) 642 (1940); Harvey Holding Co. v. Satter, 297 N. Y. 113, 75 N. E. (2d) 619 (1947); Masset v. Ruh, 235 N. Y. 462, 139 N. E. 574 (1923).

[18] 283 Pa. 529, 129 A. 587, 39 A. L. R. 1106 (1925).

premises was not there regarded to be of that category, the court said it had to be made to reappear as a term of the renewal lease through the use of suitable words if it was to survive the original term.[19] The view would appear to be a logical extension of the original concept that a lease is primarily a grant and only incidentally a contract.

As long as courts start from different points of approach when dealing with the instant problem, there is little occasion for hope of effecting a reconciliation between these two views. Nor is the problem made simpler by reference to a hypothetical contractual intention which the parties themselves probably never possessed. At best, the subject can be said to reflect a more or less arbitrary treatment forced upon courts which are obliged to act in situations not competently covered by the parties. The present holding evidences a desire to side with the majority view, but it is a rather remarkable one in the light of earlier Illinois precedents which would indicate that an option to renew is not a present demise but is rather a covenant to grant an additional term[20] which, if exercised, results in a new lease.[21] When an option to purchase is limited, as the one in the instant case was, to the "term of *this* lease,"[22] it is a little illogical to treat the renewal of the tenancy as being a new leasing arrangement yet still somehow be able to carry over into it terms which were limited to the older one. If logic be cast aside in favor of uniformity, the decision has that much foundation to support it.

R. B. OGILVIE

NAMES—ASSUMED NAMES—WHETHER OR NOT CONTRACT MADE BY ONE WHO HAS FAILED TO COMPLY WITH STATUTE REGULATING USE OF AN ASSUMED NAME IS VALID AND ENFORCIBLE—The case of *Mickelson* v. *Kolb*[1] provides the first Illinois Appellate Court interpretation of the Illinois "assumed name" statute[2] so far as that statute may affect the enforcibility of a contract made by one who has failed to comply with its terms. The plaintiff there, a duly licensed real estate broker, who had done business as the American Business & Realty Sales, brought an action in his own name to recover a brokerage commission allegedly earned under a contract with the defendant. Defendant moved to strike plaintiff's

19 See also Sherwood v. Tucker, [1924] 2 Ch. 440 at 445. Pollack, M. R., there said: "It is another matter altogether to say that the option is to continue for an extended period unless clear words are used for that purpose."

20 Fuchs v. Peterson, 315 Ill. 370, 146 N. E. 556 (1925); Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560 (1884); Hunter v. Silvers, 15 Ill. 174 (1853).

21 Vincent v. Laurent, 165 Ill. App. 397 (1911).

22 403 Ill. 390 at 391, 86 N. E. (2d) 214 at 215. Italics added.

1 337 Ill. App. 493, 86 N. E. (2d) 152 (1949).

2 Ill. Rev. Stat. 1947, Ch. 96, § 4 et seq.

amended complaint and to dismiss the suit on the ground that plaintiff had violated the statute in question by failing to register his business name until after the action was begun. The trial court sustained defendant's motion and dismissed the action. On appeal, the Appellate Court for the First District affirmed such holding. It regarded the prohibition against a person doing business as a real estate broker without a license[3] and the substantially similar prohibition in the statute in question as possessing equivalent effect. Since, without a broker's license, a broker could not recover a commission,[4] the court said the same rule had to be applied to the instant case. The fact that the statute provided a penalty for its violation was said to make it one declaring the public policy of the state.

The view taken by the court announces a policy which is directly opposite to that heretofore followed in this state in the absence of a statute. At common law, it was the general rule that a person could adopt and use a business name other than his own and contracts entered into under that name were valid and enforcible.[5] That attitude was so well understood that it was possible for the court, in the Illinois case of *Graham* v. *Eiszner*,[6] to say: "It is well settled that any person may adopt any name, style or signature over which he may transact business and issue negotiable paper and execute contracts, wholly different from his own name, and may sue and be sued by such name, style or signature."[7]

But the common law right so enunciated has been subjected to statutory regulation in most of the states.[8] Where found, these statutes generally provide that a person[9] who wishes to do business under an

[3] Ibid., Ch. 114½, § 1. See also Municipal Code, Chicago, Ch. 113, § 23.

[4] Douthart v. Congdon, 197 Ill. 349, 64 N. E. 348 (1902); In re Estate of Katz, 329 Ill. App. 442, 69 N. E. (2d) 25 (1946); Hendricks v. Richardson, 233 Ill. App. 130 (1924).

[5] Beilin v. Krenn & Dato, Inc., 350 Ill. 284, 183 N. E. 330 (1932); The Union Brewing Co. v. The Interstate Bank & Trust Co., 240 Ill. 454, 88 N. E. 997 (1909).

[6] 28 Ill. App. 269 (1888).

[7] 28 Ill. App. 269 at 273.

[8] No general provisions were to be found upon search of the statutes of Delaware, Florida, Kansas, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, South Carolina, Tennessee, Wisconsin and Wyoming. Statutes from other states are referred to in notes 12 to 19, post.

[9] It is not deemed profitable to set out the application of the various statutes to different types of business units. The statutes usually designate whether they are to be applied to individuals, corporations, partnerships, or to the use of "& Company" following the names of individuals where that expression does not stand for actual partnerships. Section 7 of the Illinois act, Ill. Rev. Stat. 1947, Ch. 96, § 7, excludes domestic and foreign corporations, partnerships where the names of the partners are disclosed in the business name, and trusts.

assumed or fictitious business name[10] must register such name by filing a certificate or affidavit with some appropriate public official[11] and may even require the publication of a notice of intent to use such business name.[12] Most states either expressly or impliedly require that such registration be a condition precedent to doing business under the name,[13] or declare that "it shall be unlawful" to transact business in violation of the statute.[14] Provisions are also made for the time of filing the certificate, the clerk's duty to keep an index of the names, the cancellation of the registration, and fees for the clerk's services.

The principal significant differences in these statutes are to be found in the penalty provisions. Upon examination, they will be found to fall into three groups. The first group[15] declares a violation of the statute to be a misdemeanor, usually with some provision for a fine or for the imprisonment of the violator.[16] The second group directs that persons doing business contrary to the provisions of the act shall not be permitted to maintain any action upon any contract made under an assumed name

[10] For information concerning the types of names which have been classified as being fictitious or assumed, see annotation to Kusnetzky v. Security Insurance Company, 313 Mo. 143, 281 S. W. 47 (1926), in 45 A. L. R. 189 at 258, and to Hayes v. Providence Citizens' Bank & Trust Co., 218 Ky. 128, 290 S. W. 1028 (1927), in 59 A. L. R. 450 at 459. See also 38 Am. Jur., Name, § 24, and 45 C. J., Names, § 13.

[11] Ill. Rev. Stat. 1947, Ch. 96, § 4, is typical. It provides that: "No person or persons shall hereafter conduct or transact business in this State under an assumed name . . . unless such person or persons shall file in the office of the County Clerk of the County in which such person or persons conduct or intend to conduct . . . business, a certificate setting forth the name under which the said business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the post office address or addresses of said person or persons."

[12] Publication is required by Deering Cal. Civ. Code 1941, § 4468; Ga. Code 1933, Tit. 106, § 303, as amended by Ga. Laws 1937, p. 805; Mont. Rev. Code 1935, Ch. 158, § 8020; N. D. Rev. Code 1943, § 45-0229; Okla. Stat. Ann., Tit. 54, § 83; Purdon's Pa. Stat. Ann., Tit. 54, § 28.4 et seq.

[13] An exception thereto is to be found in Ala. Code 1940, Tit. 12, § 230, which calls for registration of the name within ten days after written demand therefor has been made by any creditor. Until then, the common law rule is in full effect: Jordan Undertaking Co. v. Asberry, 230 Ala. 97, 159 So. 681 (1935).

[14] See particularly Iowa Code 1946, Ch. 547.4; Mo. Rev. Stat. Ann., Art. 3, § 15469; S. D. Code 1939, Ch. 49, §§ 49.0802 and 49.9901.

[15] Illinois is included therein. Ill. Rev. Stat. 1947, Ch. 96, § 8, declares failure to comply shall be a misdemeanor punishable by fine or imprisonment for each day the violation continues.

[16] Ala. Code 1940, Tit. 14, § 230; Ark. Stat. 1947, Tit. 70, § 405; Conn. Gen. Stat. 1949, Vol. 3, § 6728; Ga. Code 1933, Tit. 106, § 303, as amended by Ga. Laws 1937, p. 805; Burns' Ind. Stat. Ann. 1933, § 50-203; Iowa Code 1946, Ch. 547.4; Ky. Rev. Stat. 1948, § 365.990; Dart La. Gen. Stat. 1939, § 6507; Me. Rev. Stat. 1944, Ch. 167, § 8; Mass. Ann. Laws, Ch. 110, § 5; Mo. Rev. Stat. Ann., Art. 3, § 15469; N. C. Gen. Stat. 1943, Ch. 59, § 88; N. J. Stat. Ann., Tit. 56:1—4; McKinney Cons. Laws N. Y. Ann., Penal Law, §§ 440(6) and 440-b(5); R. I. Gen. Laws 1938, Ch. 386, § 4; Vernon's Tex. Penal Code Ann., Ch. 7, Art. 1070; Utah Code Ann. 1943, Tit. 58, Ch. 2; W. Va. Code Ann. 1943, § 4658.

until the certificate is filed.[17] The third combines the provisions of the other two.[18] In three states there is a further provision to the effect that failure to file the required certificate shall be deemed prima facie evidence of fraud in the securing of credit.[19]

Courts bound by statutes falling within the first group, as was true of the one in the instant case, were soon faced with a question as to whether or not the penalty provided by the statute was, of itself, sufficient to accomplish the legislative design or whether the additional penalty of the loss of right to enforce any contract made in violation of the statute was to be implied.[20] These courts approached the problem as being primarily one of statutory interpretation calling for an ascertainment of legislative intent, to be gathered from the language of the statute as read in the light of the circumstances with which it deals.[21] The first consideration was the purpose of the statute. On this point, the courts generally agreed that the statutory object was to protect the public by giving information concerning the persons with whom they might deal as well as to afford protection against fraud and deceit in obtaining credit.[22] But this agreement did not extend to the question of whether this purpose required a strict enforcement of the statute. Here two conflicting views grew up, one allowing the violator the right to enforce his contract, the other denying that right.

New York was among the states which, at an early time, adopted the principle of recovery despite the violation. In the case of *Wood* v. *Erie Railway Company,*[23] the court declared that a wrongdoer was not to be protected in the invasion of the rights of another merely because that other happened to be transacting business in violation of a special statute.

17 Ariz. Code 1939 § 58-202; Deering Civ. Code Cal. 1941, § 4468; Mont. Rev. Code Ann. 1935, Ch. 158, § 8020; N. D. Rev. Code 1943, Tit. 45-0229; Page's Ohio Gen. Code, § 8104; Okla. Stat. Ann., Tit. 54, § 83; Remington's Wash. Rev. Stat. Ann., Ch. 2, § 9980.

18 Colo. Stat. Ann. 1935, Ch. 165, § 22; Ida. Code 1948, Tit. 53-506-7; Mich. Stat. Ann., § 19.827; Minn. Stat. Ann., § 333.13; Nev. Comp. Laws 1929, §§ 4456-7; Ore. Comp. Laws Ann., Ch. 5, §§ 43-506-7; Purdon's Pa. Stat. Ann., Tit. 54, §§ 28.4 and 28.12; S. D. Code 1939, Ch. 49, §§ 49.0802 and 49.9901; Vt. Stat. 1947, Ch. 270, §§ 6114-9; Va. Code 1942, Ch. 185, § 4722(3). The Vermont statute, § 6111, also provides that persons doing business contrary to the act may be enjoined therefrom by a court of chancery.

19 Ida. Code 1948, Tit. 53-506; Ore. Comp. Laws Ann., Ch. 5, § 43-506; Remington's Wash. Rev. Stat. Ann., Ch. 2, § 9980.

20 Court have generally agreed that the innocent party may enforce the contract against the person who has failed to comply with the statute; Kozy Theater Co. v. Love, 191 Ky. 595, 231 S. W. 249 (1921), and Springer v. Fuller, 196 Mich. 628, 162 N. W. 973 (1917). Validity and enforcibility, as used here, refers only to the violator's right.

21 See Sagal v. Fylar, 89 Conn. 293 at 298, 93 A. 1027 at 1028 (1915).

22 In general, see annotation in 45 A. L. R. 203, and 38 Am. Jur., Name, § 14.

23 72 N. Y. (27 Sickels) 196 (1878).

The case of *Gay* v. *Siebold*[24] held that an obligor could not plead the statute as a defense to an action on a bond brought by the violator of the statute, the court there saying that: "No one was deceived, and there was no possibility that any of the parties to the bond could be imposed on or harmed by the false designation. To indict and punish the plaintiffs for a crime in such a case would be most absurd and would shock the common sense, and the sense of justice of every right thinking person."[25] Connecticut agreed with this policy, saying that the purpose of the statute "obviously was not to provide a means by which persons having received a benefit from another should be enabled to retain it without compensation and to repudiate any agreement for compensation."[26] Other courts also believed that the defendant should not be allowed to use the statute as a means of escaping payment.[27]

Taking the lead in the view that such contracts are unlawful and unenforcible was the Michigan case of *Cashin* v. *Pliter*.[28] That was an action brought by a construction company to collect the balance due on a contract under which it had built a house for defendant. Verdict in the trial court was directed for the defendant, on the ground that the contract was void because of the statutory violation, and on appeal that ruling was affirmed. The court there said that the "general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void."[29] The Virginia case of *Colbert* v. *Ashland Construction Company*,[30] also a case in which the violator attempted to recover an unpaid balance on a construction contract, led to a denial of recovery because it was felt that courts were "established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law."[31]

The rule of the Cashin case has been adopted by other courts which likewise believed that the violator should be deprived of his remedy,[32] but

24 97 N. Y. (52 Sickels) 472 (1884).

25 97 N. Y. (52 Sickels) 472 at 477.

26 Sagal v. Fylar, 89 Conn. 293 at 298, 93 A. 1027 at 1028 (1915).

27 Wolf v. Youbert, 45 La. App. 1100, 13 So. 806 (1893); Lipman v. Thomas,— Me.—, 61 A. (2d) 130 (1948); Huey v. Passarelli, 267 Mass. 578, 166 N. E. 727 (1929); Viracola v. Comm'rs of City of Long Branch, 1 N. J. Misc. 200, 142 A. 252 (1923).

28 168 Mich. 386, 134 N. W. 482 (1912).

29 168 Mich. 386 at 389, 134 N. W. 482 at 483.

30 176 Va. 500, 11 S. E. (2d) 612 (1940).

31 176 Va. 500 at 509, 11 S. E. (2d) 612 at 616.

32 The following cases have particularly cited the rule of the Cashin case with approval: Hunter v. Big Four Auto Co., 162 Ky. 778, 173 S. W. 120 (1915); Courtney v. Packer, 173 N. C. 479, 92 S. E. 324 (1917); Beamish v. Noon, 76 Ore. 415, 149 P. 522 (1915); Bristol v. Noble Oil & Gas Co., 273 S. W. 946 (Tex. Civ. App., 1925).

some courts have taken a far-sighted view and have chosen to distinguish between the types of statutory violation to which such general rules should be applied. In this category is the case of *Kusnetzky* v. *Security Insurance Company*[33] wherein the court pointed out that the general rule referred to in the Cashin case, one which denied recovery on contracts made in violation of statute, had been adopted in cases where the contract called for the performance of an unlawful act, such as gambling, the sale of lottery tickets, the illegal leasing of premises for use as a bawdy house and the like, and should not be made to apply to the moral and harmless act of transacting an otherwise lawful business under an assumed name. The court there said that, if the defendant's contentions were correct, then one "could buy on credit a car from the Capital Motor Company; he could get his gasoline and have his car repaired at the Efficiency Garage; he could get his groceries at Delmonico, his ice cream at the Purity Ice Cream Company, his clothing at the Golden Eagle Clothiers, his milk from the Model Dairy, his bread at the Home Bakery; and, after having worn out and eaten all the stuff thus acquired without paying for it, he could defeat all suits brought to recover pay because those names had never been registered. And a person who would engage in that enterprise would be, by defendant's code, a righteous citizen, enforcing the law because he was guilty of the most nefarious frauds!"[34] The same statement might well be made concerning the defendant in the instant case if, in fact, the plaintiff had rendered the alleged service and defendant's refusal to pay rested on no other ground than the statutory violation.

When the harshness of decisions like those in the Cashin and Colbert cases was felt in states following the no-recovery rule, there was a demand for the development of a more equitable policy. Courts began to feel that the statute "was not intended to produce a confiscation of property, nor to relieve debtors from their honest obligations."[35] They began to distinguish the former rule, as has been done in the Kusnetzky case, by saying that it applied to acts which were *malum in se* and not *malum prohibitum,* hence would not apply it where the contract was not immoral or otherwise illegal.[36] To state the point differently, they felt that there was nothing inherently vicious about the act of doing business under an

[33] 313 Mo. 143, 281 S. W. 47 (1926). The defendant insurance companies there attempted to avoid payment to plaintiff under certain fire insurance policies because plaintiff had entered into the policies in an unregistered name. Recovery was permitted.

[34] 313 Mo. 143 at 155, 281 S. W. 47 at 50.

[35] Engle v. Capital Fire Ins. Co. of Concord, 75 Pa. Super. 390 at 397 (1921).

[36] Humphry v. City National Bank of Evansville, 190 Ind. 293, 130 N. E. 273 (1921).

assumed name[37] and would not blindly follow the earlier holdings. The cases which had been cited to support the rule were those involving persons who were required to procure a license before engaging in business, such as doctors, real estate brokers, and druggists. These cases were distinguished by pointing out that the statutory regulations there concerned served a purpose, that of insuring that only competent persons would so practice, a purpose which was entirely different from the one involved in statutes requiring the registration of an assumed name. These latter statutes did not attempt to prevent the transaction of business but merely required the performance of a statutory duty entirely collateral to the business transaction[38] so that, if this duty was neglected, the statute should be strictly construed and only the penalty provided therein be invoked. With the growth of this more equitable view, a number of the states in the first group, by reversal or amendment, aligned themselves with the majority view permitting recovery.

An outstanding example of that reversal can be seen in Kentucky. The court concerned in *Hunter* v. *Big Four Auto Company*[39] had followed the doctrine of the Cashin case, saying that while the act did not, in express terms, declare that it should be unlawful to transact business in violation of the statute, yet it was manifest that it was so intended. It was given an opportunity to examine into the wisdom of the Hunter case through the later case of *Hayes* v. *Providence Citizens' Bank & Trust Company*.[40] The plaintiff there brought an action against defendant bank to recover money he had deposited with it. Among other defenses, the defendant pleaded that the plaintiff, at the time covered in the complaint, had been doing business under the name of the "Dreamland Theatre" but had not registered that name. The trial court, after all proof was in, dismissed the jury and granted defendant's motion to dismiss the complaint. That holding was reversed on appeal. The court first noted that, in the Hunter case, it had said: "It is probable that a rule like this may, in some instances, work a hardship by permitting one person to get the benefit of another person's labor, services or property without compensation."[41] It now declared that experience had "demonstrated that this is about all the rule has done." Re-examining the question, the court expressed the belief that the object of the statute was "certainly not

[37] Hayes v. Providence Citizens' Bank & Trust Co., 218 Ky. 128, 290 S. W. 1028 (1927).

[38] Uhlman v. Kin Daw, 97 Ore. 681, 193 P. 435 (1920). In Sutton & Company v. Coast Trading Co., 49 Wash. 694, 96 P. 428 (1908), the court expressed the belief that any other result would militate against the common law privilege to contract.

[39] 162 Ky. 778, 173 S. W. 120 (1915).

[40] 218 Ky. 128, 290 S. W. 1028 (1927).

[41] 162 Ky. 778 at 783, 173 S. W. 120 at 122.

accomplished or even furthered by adding to the penalty expressedly imposed the additional one of the loss of goods, chattels, or services sold or performed by one doing business in violation of the statute. Such a cumulative penal result is scarcely commensurate with the evil sought to be remedied."[42] It accordingly repudiated the Hunter case and all Kentucky cases following it, saying that the reversal brought the state from an isolated position to one of accord with the overwhelming weight of authority.[43] Similar reversals have occurred in other states.[44]

Not all states have been so fortunate in the effort to obtain judicial re-appraisal of the subject. In Georgia, for example, the statute had provided that "it shall be unlawful" for any person to transact business under an unregistered assumed name and declared such violation to be a misdemeanor.[45] Both the trial and the intermediate reviewing courts, in *Dunn & McCarthy, Incorporated* v. *Pinkston*,[46] had been of the opinion that plaintiff's violation of the act did not prevent him from instituting and maintaining a suit. The Supreme Court reversed,[47] citing the case of a physician who had failed to register in compliance with another state statute and the case of a broker who had failed to obtain a license. The Georgia legislature, however, amended the statute in 1937 so as to provide that the violator should be guilty of a misdemeanor but should "suffer no other further penalty or forfeiture on account of any such failure to register, except costs as hereinafter provided."[48] By reason thereof, the

42 218 Ky. 128 at 133, 290 S. W. 1028 at 1030.

43 The doctrine of the Hayes case has since been applied in Bentley v. Regal Block Coal Co., 218 Ky. 258, 291 S. W. 28 (1927), and in Mammoth Garage v. Taylor, 220 Ky. 499, 295 S. W. 429 (1927).

44 The Indiana case of Horning v. McGill, 188 Ind. 332, 116 N. E. 303 (1917), had held that violation of the statute rendered the contract void but, in Humphry v. City National Bank of Evansville, 190 Ind. 293, 130 N. E. 273 (1921), the court took the position that the statute did not void the contract but merely provided an opportunity to set the matter up in abatement until compliance occurred. The case of Ayres v. McNeely, 75 Ind. App. 327, 130 N. E. 539 (1921), states that the Horning case was overruled by the Humphry case. Oregon, in 1915, had followed the lead of the Cashin case when it decided the appeal in Beamish v. Noon, 76 Ore. 415, 149 P. 522 (1915). In 1920, however, the court reviewed the subject, in Uhlman v. Kin Daw, 97 Ore. 681, 193 P. 435 (1920), and there held that the contract was not void but that action could not be maintained until the certificate was filed. The Texas case of Loving v. Place, 266 S. W. 231 (Tex. Civ. App., 1924), had followed the Hunter case and the views there expressed had been applied in Bristol v. Noble Oil & Gas Co., 273 S. W. 946 (Tex. Civ. App., 1925). But the highest Texas court, in Paragon Oil Syndicate v. Rhoades Drilling Co., 115 Tex. 149, 277 S. W. 1036 (1925), ruled that the violation of the statute did not render the contract unenforcible unless some injury could be shown from the failure to comply. See also Whitton Oil & Gas Co. v. Trapshooter Development Co., 291 S. W. 267 (Tex. Civ. App., 1927).

45 Ga. Code 1933, Tit. 106, §§ 301 and 303.

46 47 Ga. App. 514, 170 S. E. 922 (1933).

47 179 Ga. 31, 175 S. E. 4 (1934).

48 Ga. Laws 1937, p. 805, Section 303 of Ga. Code 1933, as so amended, now reads: "The effect hereof shall be that no contract or undertaking entered into by any person, firm or corporation, whether heretofore or hereafter entered into,

case of *Bullard* v. *Holman*[49] points out that all former decisions are now ineffective. It is also worthy of note that Michigan, which had sired the doctrine of the Cashin case, later amended the act there interpreted so as to declare that the fact that a penalty had been provided was not to be construed to avoid a contract but that the violator should be prohibited from bringing any suit until after full compliance.[50] Other states have followed suit.[51] It may be said, then, that the majority view presently held in states still within the first category, whether because of judicial decision or legislative action, now permits suit on the contracts or transactions of the statutory violator, albeit he still remains liable to punishment for his violation.

As would be expected, courts in states falling in the second group all agree that non-compliance with the statute is mere matter of abatement[52] requiring no more than suspension of the trial until the statute has been complied with,[53] so that the right of action is not destroyed but only the

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shall be invalidated or declared illegal on the ground that the same was entered into in a trade or partnership name not filed or registered in accordance with the laws in force at the time such contract was entered into; but all such contracts are expressly validated as against any such objection; and no suit or action heretofore or hereafter instituted by any such person, firm, partnership or corporation, whether sounding in contract or tort, shall be defeated because of any such failure to register. But the party who has failed to register his trade or partnership name at the time the suit is filed, as required by this Act, shall be cast with court costs."

[49] 184 Ga. 788, 193 S. E. 586 (1937).

[50] Mich. Stat. Ann., § 19.827, as amended by Pub. Acts 1919, No. 263.

[51] The North Carolina case of Courtney v. Packer, 173 N. C. 479, 92 S. E. 324 (1917), following the Cashin case, had denied recovery. The statute was amended in 1919 so that the violator could bring action: N. C. Gen. Stat. 1943, Ch. 59, § 88. Recovery has since been allowed in Farmers' Bank & Trust Co. v. Murphy, 189 N. C. 479, 127 S. E. 527 (1925). A discord which had existed in the lower courts of Pennsylvania was resolved in Lamb v. Condon, 276 Pa. 544, 120 A. 546 (1923), favoring recovery although admitting that violators were subject to the penalty. Because of that discord, the legislature amended the act several times in an effort to clearly establish the legislative purpose. In 1945, a new statute was substituted providing that failure to comply shall not impair the validity of any contract but, before action is instituted, the violator must comply and pay a fine: Purdon's Pa. Stat. Ann., Tit. 54, §§ 28.4 and 28.12. As late as 1940, the Virginia court, in Colbert v. Ashland Construction Co., Inc., 176 Va. 500 at 509, 11 S. E. (2d) 612 at 616 (1940), after a long review of cases, said there could be no recovery, pointing out that it would be "strange, indeed, were the commonwealth to say to a litigant, 'You have a valid contract and the entire machinery of the state may be invoked in its enforcement, but of course you must go to jail!'" The legislature, that year, amended the act so that the violator could maintain his action after complying therewith, but it still declares his conduct to be a misdemeanor punishable by a fine up to $1,000 and imprisonment up to one year. The "strange" result can apparently still happen in that state. The case of Phlegar v. Virginia Foods, Inc., 188 Va. 747, 51 S. E. (2d) 227 (1949), now indicates that the amendment removes the taint of illegality after compliance has occurred.

[52] See, for example, Wallace Plumbing Co. v. Dillon, 71 Colo. 224, 205 P. 950 (1922).

[53] Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App. (2d) 796, 167 P. (2d) 518 (1946).

remedy is, temporarily, affected.[54] A violator in these jurisdictions may acquire the unquestioned right and capacity to maintain the action by filing the certificate, either before or after the occurrence of the transaction or the making of the contract, or after the commencement of the action.[55] Courts of states in the third group have generally held that non-compliance does not void the contract[56] but only defers action until the certificate is filed,[57] leaving the person liable to the statutory penalty.[58]

On the score of the general problem, a North Carolina court once said: "It seems impossible to suppose for a moment that the legislature, sagacious as it is and endowed, in the highest degree, with practical wisdom and practical common sense, would enact a statute, which would do so much evil and so little good, as to a clearly innocent and harmless undertaking."[59] It seems equally unfortunate that the General Assembly of Illinois should have kept its sagacity so well hidden by writing into the law of this state an act which, having been the basis of so much controversy in other states, did not clearly express the effect it was intended to have on the validity of contracts made in violation thereof. Practically every case or amendment cited herein had occurred before the Illinois act was approved and was available for study. The unfortunate having happened, it can only be said that the situation has not been aided by the decision in the instant case or by the action of the court in choosing to follow a rule rejected elsewhere from experience. That decision puts this state in the secluded position of holding to a rule which has shown itself to be only a source of injustice and hardship.

Perhaps the General Assembly, now that its handiwork has been evaluated, will give the problem the serious consideration it should have received in 1941. If that body needs some parallel, it might consider what it had to say regarding transactions entered into by foreign corporations doing business within the state without first obtaining a certificate of authority.[60] If the unauthorized contracts of such concerns are to be enforced, there is little justification for denying the same privilege to local inhabitants who have done harmless, perhaps beneficial, acts under an assumed name without first attending to its registration.

J. F. WHITFIELD

54 Canonica v. St. George, 64 Mont. 200, 208 P. 607 (1922).

55 Peterson v. Morris, 119 Wash. 335, 205 P. 408 (1922).

56 Gallafant v. Tucker, 48 Ida. 240, 281 P. 375 (1929); Bovee v. DeJong, 22 S. D. 163, 116 N. W. 83 (1908).

57 Uhlman v. Kin Daw, 97 Ore. 681, 193 P. 435 (1920); Phlegar v. Virginia Foods, Inc., 188 Va. 747, 51 S. E. (2d) 227 (1949).

58 Lamb v. Condon, 276 Pa. 544, 120 A. 546 (1923).

59 Price v. Edwards, 178 N. C. 493 at 497, 101 S. E. 33 at 35 (1919).

60 Ill. Rev. Stat. 1947, Ch. 32, § 157.125.