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DISCUSSION OF RECENT DECISIONS

AMBASSADORS AND CONSULS — PRIVILEGES, IMMUNITIES AND DISABILITIES — WHETHER OR NOT ACCREDITED MINISTER PASSING THROUGH THE UNITED STATES ON WAY TO POST IS IMMUNE FROM SERVICE OF CIVIL PROCESS—The federal district court decision in *Bergman* v. *De Sieyes*[1] may possess an effect and an importance which may become the more greatly appreciated as innovations in international co-operation and advancements in trans-world transportation become accepted facts. The defendant therein was the duly accredited Minister of the Republic of France to the Republic of Bolivia. En route from France to his post in

[1] 71 F. Supp. 334 (S. D., N. Y., 1946).

Bolivia, he travelled by way of New York. While awaiting transportation there, he was served with civil process in an action instituted by plaintiff. Defendant answered by claiming immunity from service by reason of his status. Plaintiff moved to strike the defendant's answer and contended that, under the provisions of a federal statute regulating foreign relations,[2] defendant was not immune as he was not then an ambassador or foreign minister who had been received as such by the President of the United States. Plaintiff's motion was denied when the court held that not only is a foreign minister immune from the jurisdiction, both civil and criminal, of the courts in the country to which he is accredited but also that a foreign minister en route, either to or from his post in another country, is likewise entitled to immunity in the countries through which he passes. In setting down this principle, the court found it unnecessary to interpret the federal statute as the case did not fall within its terms. Instead, the court stated that the theory behind the rule of international law granting immunity to accredited diplomats at their posts of duty was equally applicable to situations as that presented by the facts of the case before it, for to hold otherwise might seriously hamper the travelling diplomat in the performance of his duty to fulfill his mission and might disrupt the friendly relations between his country and the country to which he had been assigned.

Cases squarely on point with the instant one are rare, relatively speaking, as compared to those which involve service of civil process upon a diplomat in the country to which he is accredited.[3] One of the earliest on record, that of *Holbrook, Nelson & Company* v. *Henderson*,[4] involved the person of the Minister of the Republic of Texas, duly accredited to France and England, who, while passing through New York en route to Texas with a treaty between the French government and his own, was arrested under civil process. His application to be discharged was granted by a court which cited freely from Vattel's treatise on international law and adopted the latter's theory that ambassadors passing through friendly

[2] 22 U. S. C. A. § 252 declares: "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."

[3] Cases of that character may be found in Re Republic of Bolivia Exploration Syndicate, Ltd., [1914] 1 Ch. 139; Musurus Bey v. Gadban, 2 Q. B. 352 (1894); Magdalena Steam Navigation Co. v. Martin, 28 L. J. Q. B. 310 (1859); In re Dillon, Fed. Cas. No. 3914 (1854); Ex parte Cabrera, Fed. Cas. No. 2278 (1805); State v. De La Foret, 2 Nott. & McCord (S. C.) 217 (1820). See also 1 Op. U. S. Atty. Gen. 71 (1797) and 5 Op. U. S. Atty. Gen. 69 (1849).

[4] 6 N. Y. S. 619 (1839).

territories on official business are not to be denied all the rights annexed to that position, the recognition of which all nations owe to each other.[5]

About one year later, in *Beyley* v. *Piedanna et Mauroy,*[6] a French court reached a similar result in a case involving an American consul en route to his post at Genoa who was served with civil process but was released by the court because of a statute similar to the federal one. The French statute, however, purported to make no distinction as to the rank of the foreign officer involved whereas the present American one applies only to ambassadors or public ministers. For that reason, immunity has been denied here to lesser officials accredited to or assigned to serve in the United States such as consuls,[7] "honorary" consulate officers,[8] chancellors of consulates,[9] chargés des affaires,[10] and to the families of any of these lesser diplomatic officers.[11] They must look for protection of their personal and property rights to the law of the states in which they are temporarily resident.[12] Attachés to foreign embassies, however, are immune[13] as are their families and the families of ambassadors and ministers,[14] including the members of their official domestic suites.[15]

The second American case on the point is that of *Wilson* v. *Blanco,*[16] decided in 1889. The defendant there, a duly accredited envoy extraordin-

[5] The court said, in part, that: "It is clear that this principle is founded not on any municipal law of this country but on the law of nations . . . I do not suppose that it [a federal statute similar to 22 U. S. C. A. § 252] was intended to abrogate any part of the generally received and acknowledged principles of international law on that subject." See 6 N. Y. S. 619 at 627.

[6] Trib. Civ. Seine Sirey 41, 2.148, cited in Bergman v. De Sieyes, 71 F. Supp. 334 at 339.

[7] Auer v. Costa, 23 F. Supp. 22 (1938); U. S. v. Tarcuanu, 10 F. Supp. 445 (1935); Gittings v. Crawford, Fed. Cas. No. 5,465 (1838); U. S. v. Ravara, Fed. Cas. No. 16,222 (1793). See also 1 Op. U. S. Atty. Gen. 77 (1797); 1 Op. U. S. Atty. Gen. 406 (1820); and 2 Op. U. S. Atty. Gen. 725 (1835).

[8] In Jay-Thorpe, Inc. v. Brown, 43 N. Y. S. (2d) 728 (1943), the defendant had been subpoenaed to appear as a witness. He moved to vacate the subpoena on the ground that he was the honorary Consulate-General of the Republic of Greece to New Orleans, although he was not a Greek national. His motion was denied.

[9] Moracchini v. Moracchini, 126 Misc. 443, 213 N. Y. S. 168 (1925); Tailored Woman, Inc. v. Bibily, 126 Misc. 354, 212 N. Y. S. 704 (1925).

[10] DuPont v. Pichon, 4 Dall. 321, 1 L. Ed. 851 (1805); Hollander v. Paiz, 41 F. 732 (1890).

[11] Herman v. Apetz, 130 Misc. 618, 221 N. Y. S. 389 (1927).

[12] 19 Op. U. S. Atty. Gen. 16 (1887).

[13] In re Anfrye, 3 Weekly Notes Cas. 188 (1876); U. S. v. Benner, Fed. Cas. No. 14,568 (1830); Girardon v. Angelone, 234 App. Div. 351, 254 N. Y. S. 657 (1932). But see contra: Carbone v. Carbone, 123 Misc. 656, 206 N. Y. S. 40 (1924).

[14] Herman v. Apetz, 130 Misc. 618, 224 N. Y. S. 389 (1927).

[15] Respublica v. De Longchamps, 1 Dall. 111, 1 L. Ed. 59 (1784); U. S. v. La Fontaine, Fed. Cas. No. 15,550 (1831).

[16] 4 N. Y. S. 714 (1889).

ary and minister plenipotentiary of Venezuela to France, was served with a civil process while in New York en route to France. His motion to vacate the service of summons upon him and also to vacate a judgment rendered on default was granted, the court citing the earlier American decision and stating that such a ruling was necessary to the free and unimpeded exercise of the defendant's diplomatic duties.

In only one case has a contrary ruling been reached and that was in the New York case of *Carbone* v. *Carbone*.[17] In that case, the defendant was a diplomatic attaché of the Republic of Panama assigned to its legation in Italy and he was served with a summons in an action for absolute divorce. An order for his arrest on a writ of *ne exeat* was also issued. He gave bond to secure his release and then moved to vacate the order of arrest, to set aside the service, and to discharge the bond because of his diplomatic status. The court granted the motion to vacate the order of arrest and to discharge the bond but it denied the motion to set aside the service of summons. It considered that the case was governed by the provisions of the federal statute above referred to and that such statute did not warrant granting immunity as it applied only to diplomats accredited to the United States, which was not the situation of the defendant. The court likewise refused to recognize the broad principle of international law laid down by Twiss to the effect that "it is in the common interests of nations that the peace of the world should be maintained, and the personal inviolability of the Ambassador, whose mission is essentially that of peace, is as necessary for that end where he is passing through on his way to his destination as when he has reached his post."[18] It also purported to find a distinction between the case before it and the earlier ones on the ground that the latter involved arrests while in the case at hand the question had been narrowed to one of service of civil summons. It granted the defendant his freedom because it was believed there was a duty, under the law of nations, not to prevent him from discharging his diplomatic functions by restraining his personal liberty. The fact that the defendant was only an attaché and not an ambassador or public minister was immaterial in view of the ruling that members of the staff of a diplomat are to be accorded the same privileges and immunities that are granted to the diplomat himself.[19] The case seems weak, how-

[17] 123 Misc. 656, 206 N. Y. S. 40 (1924).

[18] Twiss, The Law of Nations (Longmans, Green & Co., London, 1884), 2d Ed., Vol. 1, § 222. Others expressing the same idea are Grotius, *De Jure et Belli Pacis* (John W. Parker, London, 1853), Lib. 2, Ch. 8, § 9; Oppenheim, International Law (Longmans, Green & Co., London, 1920), 3d Ed., Vol. 1, § 398; Hall, International Law (LaSalle Extension University, Chicago, 1924), 8th Ed., p. 364; and Wheaton, Elements of International Law (Stevens & Sons, London, 1929), 6th Ed., p. 469.

[19] See cases cited in note 13, ante.

ever, for it fails to take into account the fact that the diplomat might be just as much restrained from the performance of his duties by the necessity of appearing and contesting a civil suit, attending the trial, testifying and the like, as if he were locked up in the local prison. It is, however, expressive of a minority view on the subject if there can be said to be either a majority or a minority view from so slender a stock of precedents.

Various theories designed to support the holding in the instant case have been expounded and debated over by the more eminent writers on international law. Although now outmoded and, logically, no longer applicable, it was once urged that an ambassador ought to be given extensive immunities and privileges because he travelled in an atmosphere of extra-territoriality so that, wherever he went, he theoretically remained in the territory of his sovereign. That explanation, based largely on a fiction, has almost completely disappeared as an explanation.[20] Another theory which has received some consideration has been designated as the "concession theory." It explains the juridical basis of diplomatic privileges and immunities by presuming that a state in receiving a diplomatic agent tacitly agrees that he shall be exempt from its jurisdiction.[21] Although this theory has been adopted, extended and modified by statutes in most countries it does not furnish a satisfactory explanation as to why diplomats must be accorded privileges. The most logically sound, and therefore the most widely accepted theory, adopts the principle of *ne impediatur legatio* whereby the free and unhindered fulfillment of the purpose of the ambassador's mission is of utmost importance not only to the nations immediately concerned but also to the entire family of nations in their endeavor to maintain peaceful relations with one another. It is readily discernible that this theory, sometimes referred to as the theory of "interest of function," provides equal justification for extending diplomatic privileges and immunities to ambassadors en route to their duties as it does for those accredited to the nation where the attempted restraint by civil process is practiced.

This last-mentioned theory, borne out by the decision in the instant case, is likely to possess increasing importance by reason of the significant advances made in aerial navigation so that now no spot on the globe is more than sixty hours distant by air. Important aerial centers in the United States will be internationally important as they are made into regular ports of call for airliners carrying diplomatic as well as other personages to their destinations in other parts of the world. It would

[20] Preuss, "Theoretical Basis of Diplomatic Immunities." 10 N. Y. U. L. Q. 170 (1932).

[21] Vattel, The Law of Nations (T. & J. W. Johnson & Co., Philadelphia, 1869), Ingraham's revision of Chitty's trans., pp. 466-7.

tend to create a serious breach of relations with other countries if their diplomatic personnel were subject to process even in civil actions while changing from one airliner to another. To expect them to answer on such service while they have more significant reasons for reaching their distant posts as soon as possible is obviously unwarranted.

With the advent of a United Nations, Congress has at least recognized the need for expanding the federal statutes in order to meet problems that will arise as to the immunities and privileges to be accorded to the personnel of the members of the United Nations. Its charter only loosely provides for those privileges and immunities that are necessary for the exercise of the functions of the organization.[22] Congress has added to the subject by passing the Immunities Act of 1945 which gives foreign representatives to international organizations of which the United States is a member a limited immunity from the service of civil process.[23] That statute does not reach the point here involved, but the courts should recognize, in the congressional treatment of the problem as it relates to the newer international organizations, a spirit equally applicable to older institutions. The court concerned with the instant case at least did so and thereby achieved a sound result.

J. C. GREGORY

BILLS AND NOTES — RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER—WHETHER OR NOT TRANSFERREE OF NEGOTIABLE INSTALLMENT NOTE AFTER DEFAULT ON FIRST INSTALLMENT IS A HOLDER IN DUE COURSE AS TO BALANCE OF PRINCIPAL DUE THEREON—The recent decision by the Supreme Court of California in the case of *Bliss* v. *California Cooperative Producers*[1] should attract the concern of all who are interested in

[22] United Nations Charter, Art. 105, states: "(1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes; (2) Representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

[23] 22 U. S. C. A. § 288D recites that: "Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relative to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned." Executive Order No. 9698, of Feb. 19, 1946, 22 U. S. C. A. § 288, names not only the United Nations but also the Pan-American Union, the International Labor Organization, and the Food and Agriculture Organization as international bodies entitled to enjoy the privileges and immunities set forth in the statute referred to.

[1] — Cal. —, 172 P. (2d) 62 (1946). Traynor, J., wrote a dissenting opinion concurred in by Edmonds, J., and Spence, J. See also — Cal. —, 181 P. (2d) 369 (1947).

commercial transactions involving the use of installment notes. In that case, three installment notes payable in equal amounts over a ten-year period were given by the defendant to a newly formed cooperative society. The first installment matured on January 2, 1928, but was never paid. At that time the cooperative society had on hand sufficient property belonging to the defendant to cover the first installment yet it waited until August 31, 1928, before crediting the maker with the first installment on its books. In the meantime, the notes had been pledged to the plaintiff and, when the cooperative society went into bankruptcy, plaintiff took title to the security and thereafter sued the maker. To the defense of failure of consideration offered by the defendant, plaintiff asserted that he was a holder in due course and, as such, was a person against whom such a personal defense was of no avail. The lower court found that the plaintiff was not a bona fide purchaser as to the installment which was past due on the face of the notes at the time of the pledge but was a holder in due course as to the balance of the notes. Upon appeal, such decision was reversed, the California Supreme Court reasoning that, as one installment was in default on the date of the transfer, the plaintiff took the rest as an "overdue" instrument.[2] It was also of the opinion that it made no difference whether the past due installment was or was not eventually paid.

The only question involved being whether or not the plaintiff was a holder in due course, the absence or presence of the necessary elements requisite to determine this question are of chief concern but the problem may be examined in the light of analogous situations. The problem may be present in any one of three types of cases, to-wit: (1) where there is a transfer of a note payable in installments and one or more of these installments are overdue at the time of negotiation; (2) where a series of notes based upon the same consideration but of different maturity dates are transferred subsequently to the non-payment of one of the notes; and (3) where a note with interest installments is negotiated after a default in the payment of one of the interest installments. While the legal effect of these different factual situations is for the greater part identical some slight differences do exist and will be noted hereafter.

To constitute plaintiff as a holder in due course, the first element of concern requires that the taking be before maturity. The majority of the court in the instant case expressly stated that default in the payment of the first installment due upon the notes constituted the remainder "overdue." On the face of things, this statement is erroneous for only one installment had become due, in the absence of acceleration, and it

[2] Deering Cal. Civ. Code 1937, § 3133(2). That section is identical with Section 52(2) of the Uniform Negotiable Instruments Act.

could not logically be contended that the remainder had matured contrary to the very terms of the notes. It is true that there are decisions in which courts have unfortunately used the words "matured" and "overdue" when attacking similar problems,[3] but in each of these decisions the main question was one of good faith or notice of dishonor and the terms were used loosely. In the instant case, on the other hand, the fact of maturity was the only ground upon which the court could have reached its decision.

An installment note, or series of notes, may mature in entirety upon default in one installment or in the payment of one note only in the event that the note or notes contain an acceleration clause. Even then, a distinction must be made between a clause which is optional in character and has not been exercised prior to negotiation and one which matures the note or notes automatically. In the case of the former, it is apparent that until the option is exercised the note has not matured,[4] although instances may exist where the prior holder has taken advantage of the option before transferring the notes.[5] On the other hand, where, upon default, the balance of the note or notes becomes due automatically, the transferree subsequent to default could never be regarded as a holder before maturity,[6] unless in the rare instance where, because a note cannot mature before delivery, the purchaser takes after the note has matured because of some automatic acceleration clause while it still remained in the maker's possession.[7] There was no acceleration clause in the notes involved in the instant case, so it is ridiculous to argue that the plaintiff was not a holder in due course because the remainder was overdue by virtue of the default in one installment.

The dissenting opinion therein strikes at the heart of the real issue, not one regarding maturity but rather whether or not the default in payment of the first installment constitutes a dishonor or, conversely, whether a taking under such circumstances shows a lack of good faith. Courts seem to be in almost complete agreement that a failure to pay a

[3] Huselby v. Allison, 25 S. W. (2d) 1108 (Tex. Civ. App., 1930); National State Bank v. Richetts, 152 S. W. 646 (Tex. Civ. App., 1912); Norwood v. Leeves, 115 S. W. 53 (Tex. Civ. App., 1909); Lybrand v. Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005 (1902).

[4] Gillette v. Hodge, 170 F. 313 (1909); Lowenstein v. Phelan, 17 Neb. 429, 22 N. W. 561 (1885); Hobart M. Cable Co. v. Bruce, 135 Okla. 170, 274 P. 665 (1929); Holt v. Guaranty & Loan Co., 136 Ore. 272, 296 P. 852 (1931).

[5] See, for example, Christian Community of Universal Brotherhood v. Graf, 137 Ore. 638, 1 P. (2d) 596 (1931).

[6] Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907 (1903); Yeomans v. Nachman, 198 Mo. App. 195, 198 S. W. 180 (1917); Rowe v. Scott, 28 S. D. 145, 132 N. W. 695 (1911); Marion Nat. Bank v. Harden, 83 W. Va. 119, 97 S. E. 600 (1918).

[7] Beach v. Bennett, 16 Colo. App. 459, 66 P. 567 (1901).

principal installment on a note is notice of dishonor.[8] These decisions are based on the fact that default in the payment of even an installment of principal raises a presumption that there is a valid reason for such failure or refusal to pay, thereby putting the transferree upon notice that a defense might exist. The majority hold that where the series of notes is based upon the same consideration, and one of them is in default at the time when the transfer takes place, the transferree is not to be regarded as a holder in due course but takes subject to all existing defenses,[9] although there is a slender minority to the contrary.[10]

In the case of overdue interest installments, one line of cases, regarding the promise to pay interest as an integral part of the contract of equal importance as the promise to repay the principal, treats a default thereon as notice of dishonor just as if it had been a default on an installment of principal.[11] Other jurisdictions regard interest as a mere incident to the debt, so that default is not evidence of dishonor and notice of such fact does not show a lack of good faith in the purchase of such an instrument.[12] In between these views are other cases which treat the fact of default in interest as having some, but not necessarily conclusive evidentiary value, in determining whether or not the necessary element of good faith is present.[13] This view would seem to be the more logical one for

[8] Hall v. E. W. Wells & Sons, 24 Cal. App. 238, 141 P. 53 (1941); Archibald Hardware Co. v. Gifford, 44 Ga. App. 837, 163 S. E. 254 (1932); General Motors Acceptance Corp. v. Talbott, 39 Ida. 707, 230 P. 30 (1924); Vinton v. King, 86 Mass. (4 Allen) 562 (1862); Sorenson v. Greysolon, 170 Minn. 259, 212 N. W. 457 (1927); National State Bank v. Richetts, 152 S. W. 646 (Tex. Civ. App., 1912); Norwood v. Leaves, 115 S. W. 53 (Tex. Civ. App., 1909).

[9] Railway Postal Clerks Inv. Ass'n v. Wells, 147 Ga. 377, 94 S. E. 228 (1917); Beasley Hardware Co. v. Stevens, 42 Ga. App. 114, 155 S. E. 67 (1930); Harrington v. Claflin, 91 Tex. 294, 42 S. W. 1055 (1897); Ferguson v. Wiede, 46 S. W. 392 (Tex. Civ. App., 1898); Huselby v. Allison, 25 S. W. (2d) 1108 (Tex. Civ. App., 1930); Iowa City State Bank v. Friar, 167 S. W. 261 (Tex. Civ. App., 1914); Lybrand v. Fuller, 30 Tex. Civ. App. 1166, 69 S. W. 1005 (1902); Masterson v. Turnley, 220 S. W. 428 (Tex. Civ. App., 1920).

[10] Hobart M. Cable Co. v. Bruce, 135 Okla. 170, 274 P. 665 (1929); Morgan v. Farmington Coal & Coke Co., 97 W. Va. 83, 124 S. E. 591 (1924).

[11] Mills v. Charlson, 201 Minn. 167, 275 N. W. 609 (1937); First Nat. Bank v. Forsyth, 67 Minn. 257, 69 N. W. 909 (1897); Citizens Savings Bank v. Couse, 68 Misc. 153, 124 N. Y. S. 79 (1910); Hart v. Stickney, 41 Wis. 630, 22 Am. Rep. 728 (1877).

[12] Winter v. Nobs, 19 Ida. 18, 112 P. 525 (1910); Cooper v. Hocking Val. Nat. Bank, 21 Ind. App. 358, 50 N. E. 775 (1898); Higby v. Bahrenfuss, 180 Iowa 316, 163 N. W. 247 (1917); Kreitz v. Savings Deposit Bank & Trust Co., 21 Ohio App. 354, 153 N. E. 236 (1926); Taylor v. Buckner, 100 Ore. 75, 196 P. 839 (1921); United States Nat. Bank v. Floss, 38 Ore. 68, 62 P. 751 (1900); Merchants Nat. Bank v. Smith, 110 S. C. 458, 96 S. E. 690 (1918); Barbour v. Finke, 41 S. D. 644, 201 N. W. 711 (1924); Tuke v. Feagin, 181 S. W. 805 (Tex. Civ. App., 1915).

[13] City of New Port Richey v. Fidelity & Deposit Co., 105 F. (2d) 348 (1939); Lumpkin v. Lutgens, 143 Minn. 139, 172 N. W. 893 (1919); Batson v. Peters, 89 S. W. (2d) 46 (Mo., 1935); Fidelity Trust Co. v. Whitehead, 165 N. C. 74, 80 S. E. 1065 (1914); McPherrin v. Tittle, 36 Okla. 510, 129 P. 721 (1913); Shultz v. Crewdson, 95 Wash. 266, 163 P. 266 (1918).

the presence of an overdue interest payment should put the purchaser on guard but should not be conclusive of bad faith.

It must be remembered, however, that a party must have notice of dishonor before he can be bound thereby.[14] There was no finding in the instant case that the plaintiff had been told that there had been a prior default when he took the notes. All he knew was that he obtained the notes after one of the installments became due. The mere fact that there was no endorsement of credit or payment on the notes created no presumption that the installment had not been paid,[15] and as he took all but the first installment before maturity the only effect that the prior default might have had was to create a notice of dishonor. Absent such notice, the upper court should have affirmed rather than reversed the holding of the trial court.

I. D. FASMAN

DEATH—ACTIONS FOR CAUSING DEATH—WHETHER PLACE WHERE FATAL INJURIES WERE INFLICTED OR PLACE WHERE DEATH OCCURS CONTROLS RIGHT TO BRING WRONGFUL DEATH ACTION IN ILLINOIS—At first glance, the term "death" would appear to be capable of only one definition, but the courts of Illinois have found it necessary to expand the ordinary connotation of the word when construing Section 2 of the Injuries Act. An example of another such definition is found in the recent case of *Carroll* v. *Rogers*[1] where the deceased, a minor and resident of Illinois, was fatally injured in Missouri by defendant's negligent act. He died thirteen months later in Illinois and suit was instituted in this state based on the Missouri wrongful death statute. The action was dismissed in the trial court on motion predicated on the ground that the court lacked jurisdiction since the act causing death occurred outside of Illinois.[2] That court, following an interpretation of the word "death" which had been laid down in several earlier decisions, concluded that it was confined to mean the wrongful act which caused the demise rather that the fact of expiration of life. The Appellate Court for the Second District, however, reversed that holding, thereby indicating that the word included its ordinary meaning and was not

[14] U. S. v. Capen, 55 F. Supp. 81 (1944); Archibald Hardware Co. v. Gifford, 44 Ga. App. 837, 163 S. E. 254 (1932); Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P. 509 (1909).

[15] McCorckle v. Miller, 64 Mo. App. 153 (1895).

[1] 330 Ill. 114, 70 N. E. (2d) 218 (1946).

[2] Ill. Rev. Stat. 1945, Ch. 70, § 2, provides, among other things, that ". . . no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of the state. . . ."

limited in the fashion supposed. As the death did occur in Illinois, the courts of this state had jurisdiction of the case.

Prior to 1903, there was no limitation upon the jurisdiction of the Illinois courts with respect to wrongful death actions for, even if the case arose outside of the state, the remedy was treated as being transitory in nature and the local courts were free to apply the statutes of other states so long as they were not contrary to any public policy of Illinois.[3] In that year, the legislature added a proviso limiting the jurisdiction of the courts in such cases by forbidding suit in this state for a "death occurring outside of this state."[4]

In the first few controversies arising under the section as so amended, it was contended that the change merely served to prevent the court from applying the Illinois statute when the action accrued outside of the state but did not serve to bar the court from taking jurisdiction. That contention was uniformly answered with the statement that, since a state statute never has extra-territorial application, there would have been no need for the new provision so any such interpretation would render it utterly useless.[5] It was also argued that the amended section was unconstitutional for it would operate to prevent the Illinois courts from recognizing and giving full faith and credit to the statutes of the other states. Here again, the Illinois Supreme Court answered in the negative, pointing out that the legislature, when determining the public policy of the state, was fully empowered to limit the jurisdiction of its courts.[6]

At this point, the meaning of the term "death" became important. Did it mean the actual process of dying, or could it denote the wrongful act causing death? It is quite apparent that where both the act and the death occurred outside the state there was no necessity for making any distinctions so the courts had no difficulty.[7] The same thing was true

[3] C. & E. I. R. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951 (1899); Hannah v. C. T. Ry. Co, 41 Ill. App. 116 (1891); Shedd v. Moran, 10 Ill. App. 618 (1882).

[4] Laws 1903, p. 217. In Brennan v. Electrical Installation Co., 120 Ill. App. 461 (1905), however, it was held that the amendment had no effect upon an action instituted before its enactment even though the same had not yet been decided.

[5] Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227, 125 N. E. 20 (1919); Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619 (1912); Stephen v. I. C. R. R. Co., 128 Ill. App. 99 (1906).

[6] Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619 (1912). The United States Supreme Court, however, in Kenney v. Loyal Order of Moose, 252 U. S. 411, 40 S. Ct. 71, 64 L. Ed. 638 (1920), reversing 285 Ill. 188, 120 N. E. 631 (1918), held that Illinois had to give full faith and credit to an Alabama judgment based on a claim for wrongful death, despite the fact that the action accrued outside of Illinois, forbidding the state court from going behind the judgment to ascertain its basis.

[7] See cases cited in note 5, ante.

where both events happened within the state. Where, however, one occurred outside the state and the other within, problems such as the instant one or the converse thereof would arise.

In *Crane* v. *Chicago & Western Railroad Company,*[8] for example, a negligent act in Illinois resulted in the death of the deceased in Indiana. The action was instituted in Illinois. It was urged that the court did not have jurisdiction as the death had occurred outside of the state. The court, however, emphasized the fact that the underlying basis for every wrongful death action is the wrongful act itself rather than the fact of death, thereby holding that the term "death" as used in the amended statute could be read as if it was stated that no action should be brought in this state where "the wrongful act causing the death" occurred outside of the state.[9] If the act occurred in Illinois, the place of the resultant death was unimportant.

Just the opposite situation was presented in *Fitzgerald* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company,*[10] for there the wrongful act took place in Indiana and the death followed in Illinois. Again the Illinois court took jurisdiction, despite the claim that the Crane case prevented the maintenance of the suit, on the obviously correct conclusion that the Crane case had merely defined the term "death" as being broad enough to include the wrongful act but that the court there had had no occasion to determine that the term did not also embrace its ordinary connotation. As the decedent in fact died in Illinois, it could not be said that the "death" occurred outside of the state. The instant case has exactly the same standing, so it may be said that until a court declines to take jurisdiction where either the act or death, taken alone, occurs in Illinois it must be recognized that the word "death" as used in the statute has a double meaning.

The court in the instant case used language tending to minimize the effect of the Crane case, indicating that the interpretation promulgated there was a strained one, not likely to be reached again, due to the fact that Indiana would not allow a recovery and the court was anxious to see that justice was done. There is nothing in that decision which would justify any such conclusion and it is reasonable to suppose that, as the plaintiff was a resident of Illinois, he had never attempted to bring suit in the other state. The decision in the Crane case should not

[8] 233 Ill. 259, 89 N. E. 222 (1908).

[9] The decision became something of a leading case, being cited and followed in Campe v. Chicago City Ry. Co., 148 Ill. App. 224 (1909), and Fortner v. Wabash R. Co., 162 Ill. App. 1 (1911).

[10] 151 Ill. App. 32 (1909). See also the more recent case of Rost v. Noble & Co., 316 Ill. 357, 147 N. E. 258 (1925).

be passed over lightly for its basis is founded in logic and good public policy. The accident occurred in Illinois. The court was sitting in the state whose law would govern the plaintiff's right, even had the controversy been taken into another jurisdiction.[11] It would have been absurd for the court to deny redress to a party, especially a resident, by refusing to apply its own laws which it could be considered far more capable of administering than any other court. As the apparent purpose of the prohibition was to prevent the courts of this state from being cluttered with litigation lacking any connection whatsoever with Illinois, not even that purpose would have been served by a contrary holding. Since it is the situs of the injury which determines the existence of the cause of action, it is no more than reasonable to contend that there is a stronger link where the injury occurs within the state than where the death does. It may be unfortunate that the statutory language was not broad enough, without interpretation, to cover both situations but the holding of the Crane case should not be lightly cast aside.

Legislative revision of the statute in question, occurring in 1935, did not change the phraseology interpreted in the cases mentioned but purported to put certain limitations on the operation of that proviso. While actions to recover damages for deaths occurring outside of the state are still generally prohibited, they may be maintained "where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit" cannot be had upon the defendant in such place.[12] The present case, decided after these additions were made, properly draws no support therefrom for the death clearly took place in Illinois. It may, however, be of value to determine the effect of this amendment on the jurisdictional question. In its present form, the statute limits the operation of the prohibition against suit here to cases where (1) the place of death does not provide the plaintiff with a right of action, and (2) the defendant is not amenable to service of process in that jurisdiction. Read literally, if either (1) or (2) is lacking, the Illinois courts are to take jurisdiction, even though the death occurred outside of this state, if the parties can be found here. Given such literal interpretation, an Illinois court might be persuaded to take jurisdiction, especially on behalf of one of its citizens, even though this state had no factual connection whatsoever with the controversy, if the courts of the place of death, whether measured by the infliction of harm or fatal result, were not open to entertain such an action. Whether or not this section will be given so broad an interpretation with respect to the first element remains for

[11] For list of authorities, see 25 C. J. S., Death, § 28.

[12] Laws 1935, p. 916; Ill. Rev. Stat. 1945, Ch. 70, § 2.

the future to determine. Lacking a common law remedy and absent any statute creating one, it would seem that principles of the conflict of laws concerning the *lex loci delicti* would dictate that no remedy should be provided.[13]

It is more likely that the amendment was prompted by and was intended to cure certain defects noted by a federal court sitting in this jurisdiction.[14] That court pointed out that if both the act and the death occurred outside of Illinois but were the product of the fault of an Illinois resident, all the latter would have to do would be to remain within the state, and he would be safe from litigation therein in the state courts.[15] Any policy granting such an asylum to a resident ought to be severely condemned. Now, under the new provision, and particularly by reason of the second element, if the defendant cannot be served in the place where death occurs, then, presumably a suit may be maintained in Illinois. This state might not have any real connection with the suit but so long as the defendant was not amenable to service of process at the situs of the death our courts could take jurisdiction. There is no decision on that point at present but in the light of the evident public policy, no other result could be expected.

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[13] In general, see Goodrich, Handbook of the Conflict of Laws (West Pub. Co., St. Paul, Minn., 1938), 2d Ed., pp. 250-6. As to workmen's compensation, compare Friedman Mfg. Co. v. Industrial Commission, 284 Ill. 554, 120 N. E. 460 (1918), with Biddy v. Blue Bird Air Service, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

[14] See Swett v. Givner, 5 F. Supp. 739 (1934). The federal courts sitting in Illinois have always treated this provision as procedural in nature and have, therefore, repeatedly refused to be bound by it: Missouri Pac. Ry. Co. v. Larussi, 161 F. 66 (1908); Martineau v. Eastern Air Lines, 64 F. Supp. 235 (1946).

[15] This is under the supposition that the defendant removed himself from the state where the action accrued before he was served with process and was not amenable under a statute such as Ill. Rev. Stat. 1945, Ch. 95½, § 23, providing for substituted service where the defendant is a non-resident and the cause of action against him arose out of his use of the highways of the state. Even then, the problem would be a real one if the local statute, as applied to a principal sought to be held for the acts of his agent, were given the interpretation placed on the Illinois statute in Jones v. Pebler, 296 Ill. App. 460, 16 N. E. (2d) 438 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 69, reversed in 371 Ill. 309, 20 N. E. (2d) 592 (1939). Another angle is revealed by the decision in Smalley v. Hutcheson, 296 N. Y. 68, 70 N. E. (2d) 161 (1946). The plaintiffs there were injured as a result of a collision in Illinois between their automobile and the car driven by the defendant's intestate, who was killed in the accident. The deceased was a resident of New York and administration of the estate occurred there. Suit in apt time was instituted in Illinois, service being had under the statute aforesaid. That suit was dismissed on defendant's special appearance, the Illinois court holding that the statute did not authorize substituted service upon the personal representative of the non-resident driver. A subsequent suit brought in New York was held barred by the statute of limitations and the pendency of the Illinois action was regarded as insufficient to prevent the running of the statute.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OR NOT SELF-EMPLOYER MAY ENJOIN PICKETING BY LABOR UNION WHERE SUCH CONDUCT IS NOT JUSTIFIED BECAUSE OF ABSENCE OF LABOR DISPUTE OR GRIEVANCE—The case of *Dinoffria* v. *International Brotherhood of Teamsters and Chauffeurs Local Union No. 179*[1] presents a problem in labor law which, while not novel in Illinois, is of interest because the result reached appears to be contradictory to that attained in two other Appellate Court decisions to be found in this state.[2] The plaintiffs, self-employed operators of retail gasoline service stations, instituted an action against the defendant labor union requesting relief in the form of an injunction and money damages. The union was in the process of picketing and boycotting the plaintiffs' businesses because of plaintiffs' refusal to join the union. Such conduct resulted in substantial injuries to the plaintiffs as they were not able to obtain the necessary supplies for the carrying on of their trade. The trial court refused both injunctive relief and the claim for damages, but, on appeal, the Appellate Court reversed and remanded. It agreed with the operators' contention that since they employed no one but themselves they were in no way jeopardizing the union or its members and, therefore, interference by it was wholly unjustified.

The approach utilized by the court in solving the instant problem is a simple one. It merely found that the union had no legitimate objective in seeking the plaintiffs' membership. The basis of this conclusion rests upon two grounds: (1) there were no employees whose working conditions and the like could be improved, and (2) there were no allegations that the plaintiffs were employing methods injurious to the union or its members. The defendant rested its case upon the constitutional guaranty of free speech. The court, in passing over this argument, said: "Such conduct cannot be deemed lawful and protected by the constitutional guaranty of free speech."[3] This language is vastly different from that used in the two previously mentioned Illinois decisions where the court, in both cases, stressed the right of free speech as permitting the union to picket the self-employer.

This conflict in the application of legal principles and reasoning seems to run throughout the cases. Condemnation of the conduct of a union in picketing a one-man business has been justified on the ground

[1] 331 Ill. App. 129, 72 N. E. (2d) 635 (1947). Writ of error has been granted.

[2] Baker v. Retail Clerks' I. Protective Ass'n, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); Naprawa v. Chicago Flat Janitors' Union Local No. 1, 315 Ill. App. 328, 43 N. E. (2d) 198 (1942), leave to appeal denied 382 Ill. 124, 46 N. E. (2d) 27 (1943).

[3] 331 Ill. App. 129 at 137, 72 N. E. (2d) 635 at 638.

that it is unlawful,[4] an invasion of rights guaranteed by the Fourteenth Amendment,[5] or that no labor dispute, as defined by anti-injunction statutes, can exist between the union and this type of business.[6] The opposite view has been upheld on the contention that there can be a labor dispute between a one-man business and a union,[7] or that freedom of speech guarantees the right to picket,[8] and, therefore, makes it unnecessary to determine whether or not there is a dispute present.[9] One court, in commenting upon this, has stated: "The more recent cases justify conduct, such as that charged against the defendant, on the broader grounds of their constitutional guaranty of the right to free speech."[10]

It is apparent by now that if the stated reasoning of the courts is accepted at face value it throws the whole picture into utter confusion. The difficulty results from the fact that the courts have recognized the existence of two separate rights as guaranteed by the Constitution which are in opposition to one another in any labor conflict. The union has a right to picket under the constitutional guarantee of free speech, and a businessman has the right to engage in his business without interference

[4] Lyle v. Local No. 452 Amalgamated Meat Cutters, etc., 174 Tenn. 222, 124 S. W. (2d) 701 (1939).

[5] Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N. W. 766 (1918), rehearing denied 141 Minn. 140, 169 N. W. 529 (1918). See also the concurring opinion of North, J., in Harper v. Brennan, 311 Mich. 489 at 501, 18 N. W. (2d) 905 at 909.

[6] Luft v. Flove, 270 N. Y. 640, 1 N. E. (2d) 369 (1936), affirming 246 App. Div. 523, 283 N. Y. S. 441 (1935); Feinberg v. Pappas, 30 N. Y. S. (2d) 5 (1941); Fertel v. Rosenzweig, 28 N. Y. S. (2d) 6 (1941); Comen v. Osman, 27 N. Y. S. (2d) 353 (1941); Rubin v. Choina, 26 N. Y. S. (2d) 10 (1941); Anastasiou v. Supran, 21 N. Y. S. (2d) 541 (1940); Lyons v. Meyerson, 18 N. Y. S. (2d) 363 (1940), affirmed in 260 App. Div. 911, 23 N. Y. S. (2d) 557 (1940); Kershnar v. Heller, 14 N. Y. S. (2d) 595 (1939), modified in 258 App. Div. 751, 15 N. Y. S. (2d) 451 (1939); Gips v. Osman, 170 Misc. 53, 9 N. Y. S. (2d) 828 (1939); Botnick v. Winokur, 7 N. Y. S. (2d) 6 (1938). The foregoing New York cases take it for granted without discussion that unless there is a labor dispute within the terms of the Anti-injunction Act, there can be no union interference. Those opinions which do go into the question reach the same conclusion: Zueidon v. Goldberg, 20 N. Y. S. (2d) 272 (1940); Leach v. Himmelfarb, 18 N. Y. S. (2d) 642 (1940); Pitter v. Kaminsky, 7 N. Y. S. (2d) 10 (1938). But see contra: Bierber v. Bininbaum, 168 Misc. 943, 6 N. Y. S. (2d) 63 (1938).

[7] Reiner v. Sullivan, 33 N. Y. S. (2d) 77 (1942); Schwartz v. Fish Workers' Union etc., 170 Misc. 566, 11 N. Y. S. (2d) 283 (1939); Abeles v. Friedman, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939); Rohde v. Dighton, 27 F. Supp. 149 (1939).

[8] Glover v. Retail Clerk's Union, 10 Alaska 274 (1942); Naprawa v. Chicago Flat Janitors' Union Local No. 1, 315 Ill. App. 328, 43 N. E. (2d) 198 (1942), leave to appeal denied 382 Ill. 124, 46 N. E. (2d) 27 (1943); Baker v. Retail Clerks' I. Protective Ass'n, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942).

[9] Bakery & Pastry Drivers, etc. v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); Cafeteria Employees Union v. Anjelos, 320 U. S. 293, 64 S. Ct. 95, 88 L. Ed. 58 (1943).

[10] Glover v. Retail Clerk's Union, 10 Alaska 274 at 284.

under the Fourteenth Amendment. The dilemma the courts find themselves in can only be resolved by balancing these two rights, one against the other, although it is seldom that a court takes the time to mention this.[11]

From a careful analysis of the decisions, it may be gathered that the test used to determine whether picketing should be allowed is whether or not in the opinion of the court the union is attempting to attain a legitimate labor objective. Will the conduct of the union help improve the economic and working conditions of labor, or will it cause the business man to desist from some practice which is detrimental to the laboring man? If so, the picketing will be allowed. Of course, if there is no apparent legitimate objective and the union is merely trying to obtain more power or to increase its income, then such interference should not and will not be tolerated. Naturally, the courts do not expressly state these considerations. Thus, in *Bakery & Pastry Drivers and Helpers Local 802* v. *Wohl*,[12] a United States Supreme Court decision which has been cited many times to the effect that a union has a right to picket under the guaranty of free speech, the court said: ". . . one need not be in a 'labor dispute' as defined by state law to have a right under the 14th Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."[13] The court stated that a labor dispute need not be involved but it did use the word "grievance" and, when deciding the case, it went into great detail in pointing out the harmful effect of the plaintiff's conduct upon the union and its members. It was necessary to determine that the union was seeking a lawful objective by its picketing before it was possible to consider the other issues. This same thread of reasoning can be found in some of the New York decisions, for while it has repeatedly and dogmatically been held in that state that a one-man business can never be involved in a labor dispute as there are no "employees,"[14] still where the court has expressly found that the union had legitimate cause to protest it has been willing to decide against

[11] See the concurring opinion of North, J., in Harper v. Brennan, 311 Mich. 489 at 501, 18 N. W. (2d) 905 at 909.

[12] 315 U. S. 769, 662 S. Ct. 816, 86 L. Ed. 1178 (1942).

[13] 315 U. S. 769 at 774, 62 St. Ct. 816, 86 L. Ed. 1178 at 1183.

[14] Luft v. Flove, 270 N. Y. 640, 1 N. E. (2d) 369 (1936), affirming 283 N. Y. S. 441, 246 App. Div. 523 (1935); Feinberg v. Pappas, 30 N. Y. S. (2d) 5 (1941); Fertel v. Rosenzweig, 28 N. Y. S. (2d) 6 (1941); Comen v. Osman, 27 N. Y. S. (2d) 353 (1940); Rubin v. Choina, 26 N. Y. S. (2d) 10 (1941); Lyons v. Meyerson, 18 N. Y. S. (2d) 363 (1940), affirmed in 260 App. Div. 911, 23 N. Y. S. (2d) 557 (1940); Kershnar v. Heller, 14 N. Y. S. (2d) 595 (1939), modified in 258 App. Div. 751, 15 N. Y. S. (2d) 451 (1939); Gips v. Osman, 170 Misc. 53, 9 N. Y. S. (2d) 828 (1939); Botnick v. Winokur, 7 N. Y. S. (2d) 6 (1938).

the majority view.[15] This type of solution for the problem can be found in other opinions, if they are carefully analyzed; but unfortunately sufficient facts to permit such close analysis are not always given.[16] It is reasonable to conclude, therefore, that in spite of the apparent conflict in legal reasoning, the only difference that exists among the courts lies in their determination of what constitutes a legitimate labor objective. It is impossible to draft a strict definition thereof as this concept has changed and, no doubt, will change again with the social and economic outlook.

The query then is what legitimate labor objectives can be attained by the picketing of a one-man business? As was aptly pointed out in the instant case, the union cannot justify its conduct on the usual basis of trying to improve the working conditions of labor employed by the party picketing.[17] Is it not possible, however, that a union, by picketing this type of businessman, can improve the working conditions of those employed by someone else? In that respect, interference has been condoned where the one-man business handled non-union goods manufactured by a producer whose workmen the union was trying to organize for the court reasoned that the only way to bring the union's grievance before the public and to obtain action was to picket the ultimate distributor.[18]

Not only have courts upheld the union's right to picket for the improvement of labor conditions but they have also refused to enjoin where the union is attempting to protect gains already made. Thus, picketing has been allowed where the union objected to the number of hours a self-employed party kept his place of business open.[19] It was argued by the union that such conduct jeopardized the position of the union worker as the tendency was for these individuals to draw off the business from the union shops. The court agreed and recognized the fact that a

[15] See, for example, Reiner v. Sullivan, 33 N. Y. S. (2d) 77 (1942); Abeles v. Friedman, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939).

[16] The objective in some cases is readily discernible: Glover v. Retail Clerk's Union, 10 Alaska 274 (1942); Baker v. Retail Clerks' I. Protective Ass'n, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); Evans v. Retail Clerks' Union, 66 Ohio App. 158, 32 N. E. (2d) 51 (1940). In others, the facts are not adequate enough to make any determination as to whether or not the basis of the court's decision was a finding of a legitimate labor objective: Ex parte Lyons, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938); O'Neil v. Building Service Employees I. Union No. 6, 9 Wash. (2d) 507, 115 P. (2d) 662 (1941).

[17] See also Yablonowitz v. Korn, 205 App. Div. 440, 199 N. Y. S. 769 (1923).

[18] Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937). See also Jacobs v. Eison, 188 Misc. 577, 68 N. Y. S. (2d) 921 (1947).

[19] Glover v. Retail Clerk's Union, 10 Alaska 274 (1942); Baker v. Retail Clerks' I. Protective Ass'n, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); Evans v. Retail Clerks' Union, 66 Ohio App. 158, 32 N. E. (2d) 51 (1940).

union might have a vital interest in the number of hours and days a one-man shop remained open. It is of interest to note, however, that in all of these cases the union merely wanted the individual proprietor to conform to union hours but did not insist that he join the union.

Along the same line, other aspects of one-man businesses have been held inimical to unions and their members so as to justify picketing. For instance, in two cases,[20] independent jobbers were engaged in purchasing from wholesalers and selling to retailers. They refused to join the union or to conform to union rules and regulations. As these individuals did not have to contend with such obligations as social security taxes or unemployment insurance payments, could work as many hours as they wished and did not have to draw the union scale wage, they could operate on a small margin of profit. It was, therefore, advantageous to the wholesalers to sell to these jobbers instead of maintaining their own delivery system. A trend was started whereby regularly employed union drivers would be replaced or forced to become independent jobbers, resulting in keen competition and disastrous effects upon working conditions which had originally been fought by the union. Picketing was, therefore, regarded as a proper device.

Because a man is self-employed and hires no one else, it does not always mean that he thereby rid himself of worker responsibility and, with it, union pressure. Certain New York garment manufacturers, for example, who had always employed workers to do the cutting and finishing of clothing, revised their methods of operating by doing the cutting themselves and farmed out the finishing work to other less responsible individuals who, in turn, hired the labor. The court held that these self-employed parties, by contracting for the finishing of garments with whomsoever they wished, just as effectively controlled labor as if they actually employed the workers so were subject to picketing.[21]

While the courts have gone a long way to protect the legitimate interests of labor, they have been prone to oppose picketing where the result of compliance with the union demand would, almost of necessity, force the individual out of business. Such an illustration is provided by the cases where the self-employed party offers to join the union when approached but is not allowed to do so because of a union rule against the employer doing the work. The union might or might not have a legitimate grievance, but as the result of compliance with union demands would force the self-employer out of business, since he would

[20] Bakery & Pastry Drivers, etc. v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); Reiner v. Sullivan, 33 N. Y. S. (2d) 77 (1942).

[21] Abeles v. Friedman, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939).

have to hire a union worker to do the work he had himself performed, picketing was restrained.[22] In one of the more recent cases of this type, that of *Bautista* v. *Jones*,[23] the court said: "Thus the question before us does not relate to the right of the union to take measures reasonably necessary to protect its members from unequal and unfair competition but, instead, to the asserted right to make the possible evils of a system the basis for complete deprivation of the opportunity of particular individuals to work."[24] But even this situation must be contrasted with cases where others are employed,[25] for then the apparent difference between the two lines of cases seems to lie in the fact that in the latter the tendency of the union rule is not to drive the individual out of business because he has shown himself able to employ others.

The preceding discussion merely illustrates what some courts have deemed to be justifiable circumstances permitting union interference with businesses conducted by self-employed parties. The cases must, of necessity, be read with one eye on the period when they were rendered, for the trend of the times is of the utmost importance. The earliest cases held that such interference should not be tolerated without discussion of other consequences. Cases permitting such picketing fall within a period when public sympathy was concerned with the problems of the laboring man and his union. At the present, the field of labor relations is in a state of upheaval with accent on placing curbs on labor and unions. It is, therefore, at least for the present, likely that courts will scrutinize closely the conduct of unions in their relation to business and might again return to earlier trends, at least with respect to self-employed individuals. The Taft-Hartley Act may have made its contribution in this direction for it designates as unlawful the "forcing or requiring [of] any employer or self-employed person to join any labor or employer organization . . ."[26] But whether the policy reflected thereby is temporary or permanent is, to say the least, problematical.

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[22] Bautista v. Jones, 25 Cal. (2d) 746, 155 P. (2d) 343 (1945), affirming 55 Cal. App. (2d) 694, 131 P. (2d) 579 (1943); Roraback v. Motion Picture Machine Operator's Union, 140 Minn. 481, 168 N. W. 766 (1918), rehearing denied 141 Minn. 140, 169 N. W. 529 (1918). See also Campbell v. Motion Picture Mach. Operators' Union, 151 Minn. 220, 186 N. W. 781 (1922); Jensen v. St. Paul Moving Picture M. O. L. Union, 194 Minn. 58, 259 N. W. 811 (1935).

[23] 25 Cal. (2d) 746, 155 P. (2d) 343 (1945), affirming 55 Cal. App. (2d) 694, 131 P. (2d) 579 (1943).

[24] 25 Cal. (2d) 746 at 751, 155 P. (2d) 343 at 346.

[25] Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1227 (1939); Glover v. Minneapolis Building Trades Council, 215 Minn. 533, 10 N. W. (2d) 481 (1943); Zaat v. Building Trades Council, 172 Wash. 445, 20 P. (2d) 589 (1933).

[26] Labor-Management Relations Act, 1947, § 303(a)(1).

LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—WHETHER OR NOT ABSENCE FROM JURISDICTION AFTER ACCRUAL OF CAUSE OF ACTION TOLLS RUNNING OF STATUTE OF LIMITATIONS WHERE PLAINTIFF HAS OTHER MEANS OF SECURING JURISDICTION OVER DEFENDANT—In the recent Ohio case of *Commonwealth Loan Company* v. *Firestine*,[1] the plaintiff received from the defendants a note dated in 1926. Default was made in payment of the note in 1930 when the maker left a balance still due and owing. In 1945, the plaintiff exercised the power conferred by a cognovit clause contained in the note and had judgment entered against the defendants. The defendants then filed a motion to vacate that judgment on the ground that the fifteen-year statute of limitations had run against the claim. The trial court found that, between 1930 and the date of the judgment, the defendants had resided in Illinois for a period of approximately four years. Plaintiff therefore contended that, as required by the local statute, this period of absence should be excluded in computing the period of limitation. If it was, the action was clearly not barred. Defendants nevertheless argued that the statutory exception was only applicable where the plaintiff's relief depended upon the personal presence of the defendant within the state whereas under this particular note, because of the warrant of attorney, the plaintiff might have obtained judgment at any time. The trial court refused to vacate the judgment and its decision was affirmed in the intermediate appellate court.[2] The Supreme Court of Ohio also agreed with that result, stating that the statute involved was clear and explicit and, as the defendants came within the letter of the exception, the presence of a warrant of attorney in the note made no difference.

The court pointed out the dearth of direct authority on this precise question, citing only one case, an Illinois Supreme Court decision in the case of *Hibernian Banking Association* v. *Commercial National Bank*,[3] from which they quoted with approval. Research has turned up another Illinois case which is in harmony.[4] The reasoning of both these Illinois cases is founded on the same basis as that used in the instant decision; namely, that the statute does not provide for a different conclusion if there happens to be a cognovit clause. In fact, it was suggested that to hold that the presence of such a clause would change matters would be, in effect, to repeal the statute. The absence of authority is easily explained. A creditor holding a note with a confession clause has a

1 — Ohio —, 73 N. E. (2d) 501 (1947).

2 — Ohio App. —, 72 N. E. (2d) 912 (1946).

3 157 Ill. 524, 41 N. E. 919 (1895).

4 Mitchell v. Comstock, 305 Ill. App. 360, 27 N. E. (2d) 620 (1940).

convenient and inexpensive method of obtaining judgment against the makers. He is, therefore, not likely to wait very long after default has occurred before proceeding to a remedy.

The problem in the present case is, of course, narrow. It is, however, part and parcel of a larger one, to-wit: should the statute of limitations be tolled by the absence or non-residence of the defendant where, in spite of such circumstance, the plaintiff by diligent effort could have obtained relief before the local tribunals? In this discussion, interest in the application of this problem is confined to actions *in personam,* but it is also of importance to *in rem* proceedings.[5]

Under the former category fall two types of situations other than the one involved in the instant case. In each of these the defendant, although absent from the state, is amenable to process either by some form of substituted service which may be authorized by statute[6] or by service upon some person, such as the Secretary of State, acting as the non-resident defendant's duly appointed agent.[7] The courts are in disagreement as to whether or not either of these circumstances should affect the operation of the exception. The main crux of the argument is whether the courts should look into the spirit of the statute or whether they should be confined to its express language. If the former, then as long as the plaintiff can obtain relief, the statute is not tolled. If the latter, then the statute will only be tolled where the facts fall into the exact language, and, therefore, the presence of any other method of obtaining relief is of no consequence.

Where substituted service is possible, the present problem must be further analyzed in the light of the language of the appropriate limitation statute. Some statutes, like the one in Illinois, require that in order for the exception to operate the defendant must "reside out of" the state,[8] hence mere absence alone is not sufficient.[9] In the majority

[5] See annotation in 119 A. L. R. 331 to the case of Herthel v. Barth, 148 Kas. 308, 81 P. (2d) 19 (1938).

[6] See, for example, Ill. Rev. Stat. 1945, Ch. 110, § 137.

[7] Ibid., Ch. 95½, § 23.

[8] Ibid., Ch. 83, § 19, for example, specifies that the limitation period is tolled ". . . if, after the cause of action accrues, he departs from *and resides out of the state.* . . ." Italics added.

[9] Gray v. Fifield, 59 N. H. 131 (1879); Ward v. Cole, 32 N. H. 452 (1855); Gilman v. Cutts, 27 N. H. 348 (1853); Malakoff v. Frye, 158 Misc. 171, 284 N. Y. S. 22 (1935), construing a Washington statute; State v. Furlong, 60 Miss. 839 (1883); Dent v. Jones, 50 Miss. 265 (1874); Miller v. Tyler, 61 Mo. 401 (1875); Venuci v. Cademartory, 59 Mo. 352 (1875); Garth v. Robards, 20 Mo. 523, 64 Am. Dec. 203 (1855); State v. Allen, 132 Mo. App. 98, 111 S. W. 622 (1908); Bensley v. Haeberle, 20 Mo. App. 648 (1886); Rhodes v. Parish, 16 Mo. App. 430 (1885); Rutland Marble Co. v. Bliss, 57 Vt. 23 (1885); Hall v. Nasmith, 28 Vt. 791 (1856); Crowder v. Murphy, 61 Wash. 626, 112 P. 742 (1911).

of cases, that result is just and equitable to all parties involved for where an individual is merely temporarily absent from the state and has not taken up residence elsewhere he will have a residence within the state where substituted service may be had. The plaintiff thus having a remedy, there is no need for the tolling of the statute. One can, of course, envision a situation where the defendant abandons his residence intending to establish a new one when he returns from a temporary sojourn outside the state. Such a problem, apparently, would not be covered by the express language of statutes in this category, but might be settled by recourse to the idea that a residence is not abandoned merely by an intention so to do but continues until a new one is established.

The prime conflict, however, arises where the statute involved merely mentions "absence" as the controlling factor in determining whether or not the statute of limitations is tolled. Some courts have said that language of that type is so clear that any absence would serve even though substituted service might be had.[10] As one court put it, whether the "full or partial remedies of the law are or are not suspended by a resident of the state being temporarily out of the state, cannot be considered in giving effect to the plain and unambiguous language."[11] Another court preferred to base its decision upon the fact that the exception to the statute of limitations was in existence long before any statutory provision with regard to substituted service had been enacted.[12] It logically pointed out that it could not have been within the contemplation of the legislature, at the time of enacting the earlier of the two statutes, that the exception should not operate where substituted service could be had. Courts which take the opposite view under the same set of circumstances look rather to the spirit of the statute and disregard the precise language.[13] They point out that the exception was enacted to prevent injustice and that where such injustice can be forestalled by the plaintiff's own action he needs no special protection.

The same conflict is present where the non-resident defendant is amenable to process by the service thereof on his duly appointed agent.

[10] Bauserman v. Blunt, 147 U. S. 647, 13 St. Ct. 466, 37 L. Ed. 316 (1890); Connor v. Timothy, 42 Ariz. 517, 33 P. (2d) 293 (1934); Roth v. Holman, 105 Kas. 175, 182 P. 416 (1919); Conlon v. Lanphear, 37 Kas. 431, 15 P. 600 (1887); Fisher v. Phelps, Dodge & Co., 21 Tex. 551 (1858); Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917), followed in Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123 (1924).

[11] Parker v. Kelly, 61 Wis. 552 at 557, 21 N. W. 539 at 540 (1884).

[12] Anthes v. Anthes, 21 Ida. 305, 121 P. 553 (1912).

[13] Dorus v. Lyon, 92 Conn. 55, 101 A. 490 (1917); Sage v. Hawley, 16 Conn. 106, 41 Am. Dec. 128 (1844); Penley v. Waterhouse, 1 Iowa 498 (1855); Mune v. Taylor, 91 Ky. 461, 16 S. W. 128 (1891); Blodgett v. Utley, 4 Neb. 25 (1875).

Typical provisions of that character exist to cover situations where the non-resident automobile operator uses the highways of the state and thereby appoints some public official as his agent for service of process. One line of authority holds, in such cases, that as the plaintiff has a method of obtaining relief the mere fact that the defendant remains out of the state does not toll the statute.[14] It has been said, in that regard, that the "absence or non-residence of the defendants in no way obstructed or prevented suit against them or service upon them,"[15] and a pertinent Illinois decision, that in the case of *Nelson* v. *Richardson,*[16] follows much the same line of reasoning. The basis of the decision there was that, even though the facts did not fall within the express language of the exception, it must have been the intention of the legislature to take this particular situation out of the exception. As the very purpose for a non-resident driver provision is to give the plaintiff a speedy method of obtaining relief not otherwise available, granting recognition to the operation of this exception would be inconsistent therewith and unnecessary.[17] Other jurisdiction, however, still feel bound by the express language of the limitation statute and allow it to be tolled even though the Secretary of State could be served as the agent of the non-resident defendant.[18] Decisions of that character seem to rest upon the fact that it is the duty of the debtor to seek out his creditor and to pay him at his residence so that it is not unreaonable to say that one violating his duty by staying outside of the state should not have the benefit of a statute of repose.

Courts which look to the spirit of the statute rather than to its precise language would seem to have more reason back of their decisions. If the original object of the statute of limitations and the purpose of

[14] Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Nelson v. Richardson, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938); Arrowood v. McMinn County, 173 Tenn. 562, 121 S. W. (2d) 566 (1938). The same result is reached where an agent is expressly appointed: Green v. Sunder, 114 Tenn. 100, 84 S. W. 808 (1904). For a discussion as to foreign corporations doing business within the state see annotation in 59 A. L. R. 1336 to the case of Clawson v. Boston Acme Mines Develop. Co., 72 Utah 137, 269 P. 147 (1928).

[15] Arrowood v. McMinn County, 173 Tenn. 562 at 565, 121 S. W. (2d) 566 at 567.

[16] 295 Ill. App. 504, 15 N. E. (2d) 17 (1938).

[17] Any difference between the decision in Nelson v. Richardson, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938), and the two Illinois cases referred to in notes 3 and 4, ante, would seem to depend on the existence of such a statute. In the earlier decisions, cases which concerned the effect of a warrant of attorney, nothing tangible could be shown which would indicate a legislative intent to take the case out of the statutory exception. The converse was the case when the matter involved a non-resident automobile driver.

[18] Maguire v. Yellow Taxi Corporation, 253 App. Div. 249, 1 N. Y. S. (2d) 749 (1938), affirmed in 278 N. Y. 576, 16 N. E. (2d) 110 (1938); Bode v. Flynn, 213 Wis. 509, 252 N. W. 284 (1934). The Ohio Court of Appeals has recently decided to the contrary: see Canaday v. Hayden, — Ohio App. —, 74 N. E. (2d) 635 (1947).

the exception is kept in mind, it hardly seems possible that a legislature would intend to have the statute suspended where that was unnecessary as is the case where the rights of the parties can be protected by the exercise of diligence.

W. A. HEINDL

WILLS—PROBATE, ESTABLISHMENT, AND ANNULMENT—EFFECT OF ADMISSION OF FOREIGN WILL TO PROBATE ON RIGHT TO CONTEST WILL BY DIRECT ATTACK—The case of *Sternberg* v. *St. Louis Union Trust Company*[1] provides the first Illinois Supreme Court interpretation of the provisions of Section 90 of the Illinois Probate Act[2] so far as they affect the right to contest a foreign will which has been admitted to probate in this state. The testator's will there concerned was made in Missouri in 1937. He married in 1943 and died in that state in 1944 leaving no issue. Under the Missouri statutes,[3] his will was not revoked by his subsequent marriage since he left no issue of that marriage surviving him, hence the will was admitted to probate in that state. An authenticated copy of the will was subsequently admitted to probate[4] in Illinois where testator had owned and left considerable real estate. The widow thereafter renounced the will but the other heirs filed suit to contest the same on the ground that the validity of the will, insofar as it affected real estate located in Illinois, was determinable by Illinois law and that the marriage of the testator subsequent to the execution of the will had worked a revocation of it.[5] The executor, on the other hand, contended that the present Illinois Probate Act had modified the common-law rule to the point where a foreign will, valid where the testator was domiciled, was likewise valid in Illinois and, when admitted to probate in this state, was sufficient to pass title to real estate located there, any local provision to the contrary notwithstanding. The circuit court held that the will was valid insofar as it affected personal property located in Illinois but was invalid to devise the real estate. On appeal, the Illinois Supreme Court affirmed, holding that the common-law rule had been modified by the Probate Act only to the extent that a foreign will might be admitted to probate when executed in accordance with the law of the testator's domicile, or in accordance with the law of the place where executed, or where it had been admitted to probate in a foreign state, but that

[1] 394 Ill. 452, 68 N. E. (2d) 892 (1946).
[2] Ill. Rev. Stat. 1945, Ch. 3, § 242.
[3] Mo. Rev. Stat. 1929, Ch. 1, §§ 521-2.
[4] Ill. Rev. Stat. 1945, Ch. 3, § 237 et seq.
[5] Ibid., § 197.

its operation and effect, after admission to probate, was to be determined by local law.

While the problem settled by the court in the instant case is a new one under the present Probate Act,[6] it has arisen many times before in the history of the probating of foreign wills. That which has caused difficulty from time to time has been the erroneous belief that statutory provisions, making a foreign will which was valid where executed admissible to probate or good and available in law on recordation in a stated manner, were to be treated as having the effect of making such foreign will valid for all purposes, freeing it from attack either directly or collaterally. This has, however, not been the case even under the earliest provisions for the probate of foreign wills in the states whose laws ultimately were adopted and became the law of Illinois.

Under English law, wills might be proved either in common form or in solemn form. Under the first method, the will was brought before the judge of the proper court and proved by its witnesses without notice to interested parties. At any time within thirty years thereafter, however, any interested person, by petition, could force the executor of the will to again prove the will in solemn form, at which time notice was given to all interested parties and all issues with reference to the validity of the will were tried *de novo*. Probate established the validity for purpose of transfer of personalty only; as to lands, probate had no significance. Each time a devisee found it necessary to prove his claim to land, he was obliged to prove the will anew, so the validity of the will could be contested on every such occasion.

The early statutes of this country extended the validity of a probated will to realty as well as to personalty by providing for a will contest proceeding which was comparable to the reprobating of a will in England in solemn form. The validity of a will might also be questioned in chancery by direct attack.[7] In 1789, at a time when Illinois was but a county of Virginia, a law was passed in that state providing for the proof of foreign wills, there having been no prior statute covering the subject matter.[8] It declared that such wills could be "contested and controverted in the same manner as the original might have been." This statute is the earliest direct antecedent of the present Illinois provisions, and indicated an intent that the right to contest a foreign will should be as broad as that concerned when a domestic will was

[6] Ibid., § 151 et seq.

[7] Dibble v. Winter, 247 Ill. 243, 93 N. E. 145 (1910); Luther v. Luther, 122 Ill. 558, 13 N. E. 166 (1887); Rigg v. Wilton, 13 Ill. 15, 5 Am. Dec. 419 (1851). See also Horner, Probate Practice, 2d Ed., Ch. IV, § 58.

[8] Abridgment Pub. Laws Va. (1796), p. 335, § 14. See also 4 Littel's Laws of Ky., Append. 2, p. 447, § 7.

involved. It was followed by an enactment of the Governor and Judges of the Northwest Territory, dated 1795, making allowance for the proving of wills as well as the recording of foreign wills, which provided for the contesting of wills "whereof copies or probates shall be as aforesaid produced and given in evidence."[9] Again there was evident intention that some method should exist by which every will could be contested. That statute was re-enacted for the Territory of Indiana, in 1807, when the land now comprising the state of Illinois was a part thereof.[10] Subsequently, upon the organization of the Territory of Illinois in 1809, these sections were re-enacted into Illinois law in 1812.[11]

After the admission of Illinois as a state, provision was made for the probate of both domestic and foreign will by language which seems to have been borrowed substantially from the then Ohio statute.[12] Shortly thereafter, a probate court was established under a statute wherein it was also provided that ". . . any person or persons interested may contest any wills . . . ."[13] When the Illinois statutes were revised in 1829, the provisions of the then Kentucky statute concerning the contest of wills,[14] which in turn had been based upon the earlier Virginia statute, were included in the revision[15] and the other provisions already noted were re-enacted.[16] At that time, therefore, foreign wills could be contested in precisely the same way as domestic wills not only in Kentucky,[17] Ohio,[18] and Virginia[19] but apparently also in Illinois. In 1855, the Illinois legislature adopted the Pennsylvania proof of foreign will statute[20] at a time when it had been held in that state that foreign wills were contestible.[21] All these provisions remained intact, with the exception of some inconsequential omissions or renumbering of the sections,[22] down to the passage of the present Probate Act.

[9] See Maxwell, Laws of Northwest Territory, p. 148.

[10] Terr. Laws Indiana, Aug. 1807 to Nov. 1811, pp. 84-8.

[11] Pope's Laws of Illinois Territory, pp. 215-6.

[12] Laws 1819, p. 231, §§ 22-3.

[13] Laws 1821, p. 119, § 5.

[14] Ky. Laws 1797, § 11 and § 15. See also Rigg v. Wilton, 13 Ill. 15, 5 Am. Dec. 419 (1851).

[15] Rev. Laws 1828-29, p. 193, § 5.

[16] Ibid., p. 192, § 2 and § 7.

[17] See 2 Morehead and Brown, Ky. Dig. 1834, p. 1544, § 13, and p. 1548, § 1.

[18] Ohio Stats. 1824, p. 121, § 12.

[19] 1 Rev. Code Va. 1819, p. 379.

[20] Laws 1855, p. 44.

[21] See Opp v. Chess, 204 Pa. 401, 54 A. 354 (1903).

[22] Section 22 of the Act of 1819 became Section 2 of the Act of 1829, and remained such; Section 23 of the Act of 1819 became Section 7 of the Act of 1829, but was afterwards changed to Section 9 of the Wills Act: Section 5 of the Act of 1821 remained Section 5 in the Act of 1829 but later became Section 7 of the Wills Act. All these provisions were repealed but became incorporated into the present Probate Act.

One technical question did arise over the legislative intention because the provision for the admission of foreign wills[23] appeared in sequence after the provision for will contests[24] while that concerning the admission of domestic wills[25] preceded it. That question was resolved in the case of *Dibble* v. *Winter*,[26] wherein it was said that it would be unreasonable to read a radical departure into the Illinois act and give foreign wills greater force than domestic ones, for the court there held that foreign wills were contestible in Illinois in like manner as domestic wills. It can thus be seen that, from the earliest day until the passage of the present Probate Act, foreign wills were open to contest here.

The language of the present Probate Act is clear on the question for it states that "within nine months after the admission to probate of a domestic or foreign will in the probate court of any county of this state, any interested person may file a complaint in the circuit court of the county in which the will was admitted to probate to contest the validity of the will."[27] One of the framers thereof has stated that the application of this section, both to foreign wills as well as to domestic ones, is nothing more than a restatement and codification of the rule of *Dibble* v. *Winter* and that while a successful constest here will have no effect on the original probate it will serve to prevent the will from operating on real estate located in this state.[28] It has, therefore, been held that the grounds upon which a will may be contested are not in any way restricted,[29] so that if, for example, the writing offered as the will of the decedent has been revoked, such fact will serve as a proper ground for contest.[30]

It now having been established, contrary to the contentions of the executor in the instant case, that foreign wills admitted to probate in Illinois are subject to contest, it still remains to be determined what effect the marriage of the non-resident testator, subsequent to the execution of the will offered in probate, has upon the will for purpose of transferring title to the testator's lands located in this state. An established principle of law, recognized everywhere and arising from the necessities of the case, declares that the disposition of immovable property, whether by deed, descent, or otherwise, is exclusively subject to the laws of the

[23] Laws 1829, p. 193, § 7; Ill. Rev. Stats. 1937, Ch. 148, § 9.
[24] Laws 1829, p. 193, § 5; Ill. Rev. Stats. 1937, Ch. 148, § 7.
[25] Laws 1829, p. 192, § 2; Ill. Rev. Stats. 1947, Ch. 148, § 2.
[26] 247 Ill. 243, 93 N. E. 145 (1910).
[27] Ill. Rev. Stats. 1945, Ch. 3, § 242.
[28] See Ill. Probate Act Ann., 1940, p. 95, § 90.
[29] Shelby Loan & Trust Co. v. Milligan, 372 Ill. 397, 24 N. E. (2d) 157 (1939).
[30] Dowling v. Gilliland, 275 Ill. 76, 113 N. E. 989 (1916).

government within whose jurisdiction such property is situated.[31] This principle extends to wills and governs not only the form and mode of execution but also the power of the testator to make the devise or other disposition of property.[32] It applies to descent and heirship, so that none can take except those who are recognized as legitimate heirs by the *lex rei sitae,* and they take in the proportions and order which those laws prescribe.[33] In accordance with these principles, the validity of the will offered for probate in the instant case was governed by the laws of Illinois as to the real estate located there and, by that law, the marriage of the testator produced a revocation of any will made by him prior to the date of that marriage.[34] The only recognized exception to such rule, established by statute, permits the will to survive if a contrary intention is expressed by the testator therein,[35] but such was not the fact in the instant case. The decision, therefore, both on historic principles and on clear legislative intent, is well founded.

R. C. MONTGOMERY

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER OR NOT WIDOW MAY CLAIM STATUTORY SHARE IN CORPUS OF REVOCABLE TRUST CREATED BY DECEASED HUSBAND—A remarkable doctrine on the subject of trusts was announced by the Supreme Court of Ohio in the recent case of *Harris* v. *Harris,*[1] a suit brought by a widow to have certain instruments executed by her deceased husband declared not to be trusts or, if otherwise valid as trusts, to have the instruments set aside to the extent necessary to permit her to receive her statutory share in his estate. The settlor died testate without issue. Prior to his death, he had purported to create a trust *inter vivos* over certain shares of stock in a corporation of which he was president under which he received the income for life and provided for an eventual disposition of the trust res to the children of his brother. The widow was not named

[31] United States v. Fox, 94 U. S. 315, 24 L. Ed. 192 (1877); Furhop v. Austin, 385 Ill. 149, 52 N. E. (2d) 267 (1943); Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806 (1904).

[32] Harrison v. Weatherby, 180 Ill. 418, 54 N. E. 237 (1899); Dibble v. Winter, 247 Ill. 243, 93 N. E. 145 (1910).

[33] Stoltz v. Doering, 112 Ill. 234 (1885). See also Story, Conflict of Laws, Ch. XII, p. 823, § 483.

[34] Ill. Rev. Stats. 1945, Ch. 3, § 197.

[35] See Kuhn v. Bartels, 374 Ill. 231, 29 N. E. (2d) 284 (1940); Lawman v. Murphy, 321 Ill. 421, 152 N. E. 220 (1926); Wood v. Corbin, 296 Ill. 129, 129 N. E. 553 (1920); Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172 (1900); McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397 (1887).

[1] 147 Ohio St. 437, 72 N. E. (2d) 378 (1947). Mathias, Hart and Zimmerman, JJ., dissented. Mathias, J., and Zimmerman, J., each wrote dissenting opinions.

as a beneficiary. Under the terms of the trust instrument, the settlor expressly reserved the unrestricted right to modify and revoke, but such rights were never exercised. In addition, he reserved the right to deliver additional securities or to take delivery of trust property which might be the subject of revocation. The trustee was denied the power to sell, had no right to invest or re-invest the trust assets, and was particularly refused the right to vote the stock in question. The trial court held the trust to be valid in all respects and denied plaintiff's petition. The Ohio Court of Appeals held that the trust was valid except that, because the settlor had retained dominion and control over the corpus, the trust was ineffective to deprive the widow of her interest in the assets thereof as the surviving spouse. The Supreme Court of Ohio, by a divided court, affirmed the decision for the plaintiff.

In support of its holding, the majority of the court stressed the fact that, in spite of the trust agreement, the settlor had continued to serve as president and director of the corporation in question and, until his death, had made the same use of his property as he had done prior to the execution of the trust agreement. It also pointed out that the trustee had not attended meetings of the stockholders or board of directors and at no time had he examined the books of the company. In short, the majority felt that the trustee performed only a minor function. While admitting that a husband could dispose of his personal property during his lifetime without the consent of his wife and while recognizing that the transfer of property to a trustee under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke is a perfectly proper and valid transaction, the majority nevertheless concluded that if, by such an agreement, the settlor does not part absolutely with dominion over the property, his widow may elect to take a statutory share therein as if the same constituted a part of the settlor's estate.

It is difficult to reconcile the opinion of the majority with existing decisions. If a valid trust *inter vivos* had been created, title passed immediately to the trustee and nothing remained in the settlor except the right to revoke, alter, and amend the trust agreement. Thereafter, in the event of the settlor's death, since title to the trust property was already in the trustee, it would appear that no part of such trust res would pass to the settlor's executor or administrator if the right of revocation had not been exercised. On the other hand, if the transfer was illusory only, then the purported trust would be invalid as to the wife and others and the corpus thereof would be administered as part of the settlor's estate for title had not passed. It is significant that no fraud as to the wife was alleged or proven. The court merely based its

decision on the fact that the settlor had not parted with absolute dominion over the trust res.

In this connection, the court purportedly followed the decision in the Ohio case of *Bolles* v. *Toledo Trust Company*,[2] but as the trusts involved in that case were testamentary in character that decision would not have material application. It is significant, too, that the court reached its decision despite an Ohio statute, mentioned in the opinion, which reads: ". . . the creator of a trust may reserve to himself any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust and such trust shall be valid as to all persons, except . . . creditors of such creator."[3] It should be pointed out, however, that the Ohio bar should have been amply prepared for the present decision for a review of the Ohio cases had already indicated that the upper court of that state has consistently followed a vacillating and erratic course on the subject of trusts and one which is generally opposed to the weight of authority.[4]

The generally accepted rule in cases of this character was once stated by a Pennsylvania court, in the case of *Windolph* v. *Girard Trust Company*,[5] where the court said: "It is the settled law in this state, as was the common law, that during his life a man may dispose of his personal estate by voluntary gift or otherwise, as he pleases, and it is not a fraud upon the rights of his widow and children. . . . The power arises from the fact that he is the absolute owner and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life, his wife and children have no vested interest in his personal estate and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death."[6] And this is true even though the gift was made with the intention and purpose of depriving the wife of her distributive share of the husband's personalty at his death.[7] It has, therefore, been held that the reservation of a life interest to the husband and some

[2] 144 Ohio St. 195, 58 N. E. (2d) 381 (1944).

[3] Page Ohio Gen. Code Ann., Vol. 6, Ch. 4, § 8617.

[4] See Goldman and DeCamp, "When is a Trust not a Trust?", 16 U. of Cin. L. Rev. 191 (1942).

[5] 245 Pa. 349, 91 A. 634 (1914).

[6] 245 Pa. 349 at 363, 91 A. 634 at 638.

[7] Sturges v. Citizens' Nat. Bank, 152 Md. 654, 137 A. 378 (1927); Kerwin v. Donaghy, 317 Mass. 559, 59 N. E. (2d) 299 (1945); Brashears v. State ex rel. Oklahoma Pub. Welfare Comm'n, 194 Okla. 663, 154 P. (2d) 101 (1944); Potter Title & Trust Co. v. Braum, 294 Pa. 482, 144 A. 401 (1928).

degree of control over the property would not defeat the transfer in trust if it was otherwise absolute in nature,[8] and a federal court has held that where the husband created an irrevocable trust reserving the income to himself for life his widow would have no interest in the trust estate.[9]

But the general rule is otherwise when it appears that the gift is merely a colorable device by means of which the husband makes an apparent gift of his property but in reality continues to use and enjoy the trust property during his lifetime and at the same time attempts to deprive his wife of her property rights after his death. Such a transfer is deemed to be a legal fraud on the rights of the wife and hence is voidable at her election.[10] Illinois adopted this view in the case of *Smith* v. *Northern Trust Company*,[11] but that case is readily distinguishable from the instant one for there fraud as to the wife was alleged. In addition, the Ohio court acknowledged the trust to be valid, while the Illinois court declared it invalid because of the fraud on the wife. It should be mentioned, however, that there is a minority group of cases which achieve a result directly opposed to this general rule and uphold trusts even when created in fraud of the wife's rights.[12]

The concept that retention by the settlor of control over the trust and the trust res may have an adverse effect on the purported transfer was developed by the United States Supreme Court in the income tax case of *Helvering* v. *Clifford*.[13] In that case, the taxpayer had declared himself trustee over certain securities owned by him, retaining for himself wide powers of control over the corpus. The court held that the trust was invalid for federal income tax purposes and stated: "In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. . . . So far as his dominion and control were concerned, it seems clear that the trust did not effect any substantial change. In substance his control over the

[8] Jones v. Somerville, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627 (1900); Gentry v. Bailey, 6 Gratt. (Va.) 594 (1850).

[9] West v. Miller, 78 F. (2d) 479 (1935).

[10] Burton v. Burton, 100 Colo. 567, 69 P. (2d) 307 (1937); Trader v. Trader, 48 Ida. 722, 285 P. 678 (1930); Kratli v. Booth, 99 Ind. App. 178, 191 N. E. 180 (1934); Martin v. Martin, 282 Ky. 411, 138 S. W. (2d) 509 (1940); Merz v. Tower Grove Bank & T. Co., 344 Mo. 1150, 130 S. W. (2d) 611 (1939); In re Side's Estate, 119 Neb. 314, 228 N. W. 619 (1930); Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937). See also 26 Am. Jur., Husband and Wife, § 198; 41 C. J. S., Husband and Wife, p. 417.

[11] 322 Ill. App. 168, 54 N. E. (2d) 75 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 87.

[12] Brown v. Fidelity Trust Co., 126 Md. 175, 94 A. 523 (1915); Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N. W. (2d) 458 (1942); Beirne v. Continental Equitable Title & Trust Co., 307 Pa. 570, 161 A. 721 (1932).

[13] 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1939).

corpus was in all essential respects the same after the trust was created as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have.''[14] Its views, however, did not purport to establish that the trust was invalid for other purposes under state law,[15] and it has often happened that wide divergencies exist between taxation principles and those which control in other legal problems based on the same facts. While the Ohio court in the instant case made no reference to the Clifford decision, one is led to wonder if the court might not have been unconsciously influenced thereby as the reasoning parallels that underlying the income tax decision. If so, and if the views there promulgated should spread to other jurisdictions, income tax law may change state law instead of vice versa.

It might well be that in the instant case the Ohio court has achieved a commendable result from the standpoint of public policy in that it protects the surviving wife from becoming a possible charge upon the state; but the rationale of the court permits the conclusion that the court does not have a complete grasp of the fundamental legal principles involved in a trust. Other courts, when setting trusts aside, have declared them to be invalid. The Ohio court held the subject trust to be valid, thereby indicating that title had passed and yet, at the same time, held that the trust res should be administered as part of the settlor's estate, thereby indicating that title had not passed. To say the least, the decision introduces novel features into the law of trusts.

E. B. STROH

[14] 309 U. S. 331 at 335, 60 S. Ct. 554, 84 L. Ed. 788 at 791.

[15] In that regard, see Barlett, "The Impact of State Law on Federal Income Taxation," 25 CHICAGO-KENT LAW REVIEW 103 (1947), particularly p. 115.