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DISCUSSION OF RECENT DECISIONS

ADOPTION — CONSTITUTIONALITY OF STATUTES — EXTENT TO WHICH STATUTE MAY OBVIATE NECESSITY FOR PARENTAL CONSENT TO ADOPTION — Two recent cases, one arising in Illinois and the other in the District of Columbia, provide illustrations of the length to which statutes regulating adoption may go, yet remain constitutional, while eliminating the need for consent by the natural parents to an adoption decree. In the first, that entitled *People ex rel. Nabstedt* v. *Barger*,[1] an attack on Section 15 of the

[1] 3 Ill. (2d) 511, 121 N. E. (2d) 781 (1954).

statute relating to dependent, neglected and delinquent children[2] was refuted on the ground the state had a right, in the interest of the welfare of the minor child, to provide for the adoption thereof whenever the parent was mentally ill, had so remained for a period of three years, and it was made to appear that there was no likelihood of the parent's recovery from the mental illness in the foreseeable future.[3] In the other, that entitled *In re Adoption of a Minor,*[4] it was held that a divorced father who had entered into a property settlement, under which he had relinquished all visitation privileges, was to be regarded as a person who had permanently been deprived of custody pursuant to an appropriate decree, for which reason his consent to the adoption of his child was not required.[5]

Judicial adoption, while well-known to the Roman law,[6] appears to be a comparatively recent innovation in the United States[7] and of even more recent origin in England,[8] although it was possible, before then, to produce an adoption by private deed and without court participation.[9] As consent was an essential element to every such deed, it was natural, at the outset, for the legislatures to provide for parental consent before a court could exercise its jurisdiction or attempt to construct a new home for the child[10] and it has been said that such a consent would lie at the foundation of every adoption.[11] But social necessity and the interests of

2 Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 209. See also ibid., Ch. 4, § 3—4½.

3 The problem arose under a question certified pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 208 and § 259.48, in a case where the father was dead and the mother had been adjudged to be mentally ill, when a guardian appointed by a county court for the dependent child sought instructions as to whether he might participate in an adoption proceeding and give consent, on behalf of the child, to a legal adoption. Over protest by a guardian *ad litem* appointed to represent the mother, whose mental condition was certified to be one which would become progressively worse and from which there was no possibility of recovery, the court held the statute to be constitutional and also retroactive in its operation.

4 214 F. (2d) 844 (1954). Miller, C. J., wrote a dissenting opinion.

5 D. C. Code 1951, Tit. 16, § 202.

6 Radin, Handbook of Roman Law (West Publishing Co., St. Paul, 1927), pp. 95 and 113. See also Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900).

7 Massachusetts, in 1851, appears to have been the first state to legislate on the subject: Ross v. Ross, 129 Mass. 243 (1878). The statement in Keegan v. Geraghty, 101 Ill. 26 at 33 (1891), to the effect that this was true except for Louisiana and Texas should be read in the light of the civil law origins of these two states.

8 16 & 17 Geo. V, c. 29 (1926).

9 See Oler, "Construction of Private Instruments Where Adoption of Children is Concerned," 43 Mich. L. Rev. 705 (1945).

10 See In re Petition of Stern, 2 Ill. App. (2d) 311, 120 N. E. (2d) 62 (1954). For a general discussion as to the necessity for notice to the natural parents as a jurisdictional requirement, see 1 Am. Jur., Adoption of Children, §§ 39, 40, 44, and 45.

11 Jackson v. Spellman, 55 Nev. 174, 28 P. (2d) 125 (1934). See also the recent Indiana case of Rhodes v. Shirley, — Ind. App. —, 124 N. E. (2d) 865 (1955),

the child have, with the passage of time, come to override any rights enjoyed by the natural parents so that, fairly recently, it was possible to say that in all but four jurisdictions[12] the circumstances of the case might be such that, for one reason or another, the need for parental consent could be obviated.

Naturally, with so many statutes on the subject, some diversity in language is to be expected which it would be unprofitable to analyze in a paper of this character but it is possible to note a degree of uniformity in the statutory provisions on the subject. In thirty-seven American jurisdictions, a judicial declaration that the parent is insane or, in connection with the finding of insanity, has lost all civil rights, is enough to make parental consent unnecessary.[13] Next in line, for this purpose, is a court order depriving the parent of custody, frequently one which includes a termination of parental rights, which order is regarded as being enough, in thirty-six jurisdictions, to put the interest of the child ahead of that of the parent.[14] Parental abandonment of the child is the third most common reason assigned for denial of a parent's right to protest the adoption.[15] This, in turn, is followed by such scattered bases for abrogation of the requirement that consent be obtained as a voluntary relinquishment of parental rights,[16] a failure to support,[17] a wilful desertion for

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wherein it was held that the consent of natural parents, given to the state Department of Public Welfare because of the economic distress of the parents, was subject to revocation prior to the entry of a decree of adoption and, when revoked, removed the jurisdictional basis for the proceeding.

[12] Vernier, American Family Laws, Vol. 4, p. 340. But see a later statement in a note in 24 Rocky Mt. L. Rev. 360. Even without a statute, Florida dispensed with parental consent in the event the child had been abandoned: In re Whetson, 137 Fla. 712, 188 So. 576 (1939).

[13] All jurisdictions except Colo., D. C., Ind., Md., N. M., Tex., Utah, and Va. Wash. Rev. Code 1952, Ch. 26, § 32.040, and N. Y., Domestic Relations Law, § 111, combine provisions for loss of civil rights and insanity. One year of insanity is required in Alaska and Kentucky; two years in Nevada; and three in Illinois. The parent must be "hopelessly" insane in Iowa, Maine and Massachusetts, while Illinois, Nevada and Pennsylvania require medical testimony from two qualified physicians to the effect that the insanity is incurable.

[14] All jurisdictions except Ariz., Ark., Me., Mass., Miss., Mo., Pa., R. I., Tenn., and Wyo. Jurisdictions like Idaho, Montana, New York, Oklahoma and Utah specifically provide that the parent must have been deprived of custody because of cruelty or neglect. In California, North Dakota, Oregon, and Virginia the order must be included in a divorce decree. Washington, by contrast, provides that a divorce decree which "grants any right of custody, control, or visitation of a minor child, shall not constitute such deprivation of custody." See Wash. Rev. Code 1952, Ch. 26, § 32.040.

[15] All jurisdictions except Ariz., Cal., Conn., Iowa, Kans., Mass., Mich., Nev., N. J., N. M., Ohio, Okla., R. I., S. C., Utah, and Va.

[16] Cal. Civ. Code 1949, § 224; Colo. Rev. Stat. 1953, Vol. 2, Ch. 4, § 1—6; Ga. Code Ann. 1951, § 74-404; Ill. Rev. Stat. 1953, Vol. 2, Ch. 4, § 2—1; Me. Rev. Stat. 1953, Ch. 145, § 36; Md. Code Gen., Cum. Supp. 1954, Art. 16, § 82; Mich. Stat. Ann. 1953, Ch. 27, § 3178; Neb. Rev. Stat. 1952, Ch. 43, § 104; Nev. Stat. 1953, Ch. 332;

a specified period of time,[18] a divorce against the parent concerned,[19] a period of imprisonment for crime, with the length thereof varying in the several statutes concerned,[20] or a determination that the parent is an habitual drunkard.[21] A finding that the parents are unknown and cannot be found,[22] or are unfit to have the care and custody of the child,[23] completes the list except for three isolated instances which are of unique character.[24]

Returning to the case illustrations cited above, it is quite readily apparent that the welfare of a child of an insane parent could be seriously prejudiced if it was not possible to provide for its adoption but, until the change made in the statute by the addition of the ground there considered

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N. J. Rev. Stat. 1953, Ch. 9-3-24; N. Y., Domestic Relations Law, § 111; N. C. Gen. Stat. Ann. 1950, § 48-7; Pa. Stat. Ann. 1953, Tit. 1, § 2.1; Tenn. Code 1950 Supp., Vol. 2, § 9572; Tex. Rev. Civil Stats. 1954, Art. 46a, § 6; Utah Code Ann. 1953, Vol. 9, Tit. 78, § 30-4.

17 In addition to the statutes in Georgia, Nevada, New Jersey, and Texas cited in the preceding note, see Ida. Code Ann. 1953, Tit. 16, § 1504; Ind. Stat. Ann. 1953, Vol. 2, Part 2, § 3-120; Mass. Ann. Laws 1953, Ch. 210, § 1—5; Mo., V. A. M. S., 1949, § 453.040; Mont. Rev. Code Ann. 1947, Tit. 61, § 130; N. M. Stat. Ann. 1953, Ch. 22-2-6; N. D. Rev. Code 1953, Ch. 14-1104; and Ohio Rev. Code Ann. 1953, § 3107-06. Ariz. Code Ann. 1939, Cum. Supp. 1952, Ch. 27, § 203; D. C. Code 1951, Tit. 16-2021; and Ore. Rev. Stat. 1951, Ch. 109, § 320, each require that the failure to support be in conjunction with a wilful desertion or an abandonment.

18 To the statutes in Ariz., Cal., Ill., Ind., Mass., Ore., and Utah cited in the two preceding notes, add Miss. Code Ann. 1942, § 1269; R. I. Gen. Laws 1938, Ch. 420, § 3; and Wash. Rev. Code 1952, Ch. 26, § 32.040, but note that the period may vary from six months to one year.

19 Ky. Rev. Stat. 1953, § 199.500; Me. Rev. Stat. 1953, Ch. 145, § 36; Minn. Stat. Ann. 1954, Ch. 259, § 24; N. J. Rev. Stat. 1953, Ch. 9-3-24; N. Y., Domestic Relations Law, § 111. The divorce must have been granted for specified causes under Ida. Code Ann. 1953, Tit. 16, § 1504; Mont. Rev. Code Ann. 1947, Tit. 61, § 130; N. J. Rev. Stat. 1953, Ch. 9-3-24; and Okla. Stat. Ann. 1951, Tit. 10, § 44.

20 A term of three years is required by Mass. Ann. Laws 1953, Ch. 210, § 1—5; Ore. Rev. Stat. 1953, Ch. 109, § 320; R. I. Gen. Laws 1938, Ch. 420, § 3. One year is enough, according to S. D. Code 1939, § 14.0403. See also Ariz. Code Ann. 1939, Cum. Supp. 1952, Ch. 27, § 203, and Iowa Code Ann. 1951, Tit. 28, § 600.3, as amended by Laws 1954, Ch. 204, § 1.

21 The statutes of Ida., Me., Mont., N. Y., Okla., Pa., and S. D. have previously been cited. In Illinois, the condition must have existed for at least one year: Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 2—1.

22 Ala. Code Ann. 1940, Tit. 27, § 3; Ark. Stat. Ann. 1947, Tit. 56, § 106; D. C. Code 1951, Tit. 16-2021; Ga. Code Ann. 1951, § 74-404; N. M. Stat. Ann. 1953, Ch. 22-2-6; N. D. Rev. Code 1953, Ch. 14-1104; Ohio Rev. Code Ann. 1953, § 3107-06; and W. Va. Code Ann. 1949, § 4755.

23 Illinois lists the conduct considered as amounting to unfitness in Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 4—2. See also Me. Rev. Stat. 1953, Ch. 145, § 6, and Miss. Code Ann. 1942, § 1269.

24 Under Ind. Stat. Ann. 1953, Vol. 2, Part 2, § 3—120, consent may be dispensed with if the parents are non-residents. Iowa Code Ann. 1951, Tit. 28, § 600.3, as amended by Laws 1954, Ch. 204, § 1, states that the consent of an inmate or keeper of a house of ill fame is not necessary. Consent is obviated if the child has lived for ten continuous years with the adopting parents under Pa. Stat. Ann. 1953, Tit. 1, § 2.1.

to be constitutional by the Illinois court,[25] the law of this state effectively prevented any such adoption since the mentally-ill parent could not enter into a binding consent.[26] Now that such an adoption is possible, the court may some day face the question as to what should be done in the event the unfortunate natural parent, upon restoration to reason,[27] should seek custody of the child so adopted. While that possibility would probably be remote in view of the Illinois requirement that the parent must be certified as being one who will not recover from the mental illness in the foreseeable future, it has happened, in other states, that the natural parent has been restored to sanity and has begun proceedings to regain the child.

The Oregon case of *Johnson* v. *Johnson*[28] may be dismissed from consideration because the parent there was able to show, by a preponderance of evidence, that she was sane at the time the petition for adoption was filed. More to the point, however, is the New York case of *People ex rel. Strohsahl* v. *Strohsahl.*[29] The natural parent there concerned had been placed in a mental institution in New Jersey but had been released some three years later. Following this release, his child was adopted by another in New York without notice or consent because of the prior adjudication of insanity.[30] Two years after the adoption, the natural parent secured a judicial declaration of sanity in New Jersey and then instituted habeas corpus proceedings, seeking custody of the child. Relief was denied when the New York court concluded that, at the time of the adoption, the natural parent was still legally insane, hence his consent to the adoption was not needed and his rights had been terminated by the decree. In the light of that holding, provided all other statutory requirements have been observed, it would seem that an adoption decreed in the interest of a child at a time when the parent was mentally ill would have to be regarded as a permanent bar to the assertion of parental rights.

The other holding, of interest in those states where a parent who has been deprived of custody under a divorce decree is not required to give

[25] The particular provision was adopted in 1953. See Laws 1953, p. 1108.

[26] See Keal v. Rhydderck, 317 Ill. 231, 148 N. E. 53 (1925). According to the case of Burstein v. Milliken Trust Co., 350 Ill. App. 462, 113 N. E. (2d) 339 (1953), reversed on other grounds in 2 Ill. (2d) 243, 118 N. E. (2d) 293 (1954), the issue with respect to capacity to consent may not be raised until long after the adoption proceeding. The court there went back over fifty years to strike down an adoption decree when it was made to appear that the natural mother of the child had given no consent because of her insanity. Accord: State ex rel. Monroe v. Ford, 164 La. 149, 113 So. 798 (1927).

[27] Ill. Rev. Stat. 1953, Vol. 2, Ch. 91½, § 7—1, provides for the filing of a petition for restoration of civil rights.

[28] 124 Ore. 480, 264 P. 842 (1928). See also Welch v. Welch, 208 Miss. 726, 45 So. (2d) 353 (1950).

[29] 221 App. Div. 86, 222 N. Y. S. 319 (1927).

[30] N. Y., Domestic Relations Law, § 111.

consent to an adoption proceeding, is not so easy to accept. While the property settlement agreement involved in that case had become incorporated in the decree so as to give judicial sanction thereto, it was the act of the parent, not that of the court, which put an end to all visitational privileges. The parent was not, by the decree, found to be an improper person who ought to be denied any interest in the welfare of his child but rather it was found that he had, in fact, provided for the child's care by means of a trust established for the purpose. True, the case was not like the one involved in the New Mexico holding in *Onsrud* v. *Lehman*[31] where, because the divorce decree gave the father visitational privileges, it was held improper to grant adoption without his consent.[32] But two recent Kentucky cases add emphasis to the fact that it should be the court which judicially deprives the parent of custody, or at least finds those facts to exist which would justify that relief, before it should be possible to proceed with an adoption without parental consent.[33] Certainly, the mere fact that the parents are divorced and that custody has been reposed in one of the parties should not be enough[34] for statutes of this character ought to be strictly construed.[35]

It could be said, however, that holdings of the type noted above add further illustration to the fact that while, at one time, parental consent lay at the foundation of every adoption, the modern concern has been with the welfare and best interest of the child. The conflict of interest which thereby may be generated between persons involved in a close human relationship is not one which it would be easy to resolve but, where choice cannot be avoided, the attempt to attain a just result should not be pushed to absurd lengths.

W. J. WYLIE

[31] 56 N. M. 298, 243 P. (2d) 600 (1952).

[32] The Nevada case of In re Jackson, 55 Nev. 174, 28 P. (2d) 125 (1934), also indicates that the decree must be absolute, reserving no right whatever in the divorced parent. See also In re Adoption of Perkins, 248 Iowa 1374, 49 N. W. (2d) 248 (1951), where a divided court held that a father who had visitation rights had to consent, following the holding in the case of Rubendall v. Bisterfelt, 227 Iowa 1388, 291 N. W. 401 (1940). But see contra: In re China's Adoption, 238 Iowa 4, 25 N. W. (2d) 735 (1947), where a father with a right of visitation was not contributing to the support of the child.

[33] See the cases of Smith v. Wilson, — Ky. —, 269 S. W. (2d) 270 (1954), and Stanfield v. Willoughby, — Ky. —, 269 S. W. (2d) 255 (1954), which provide construction for Ky. Rev. Stat. 1953, § 199.500 et seq.

[34] Willis v. Bell, 86 Ark. 473, 111 S. W. 808 (1908); State ex rel. Buch v. Baker, 147 La. 319, 84 So. 796 (1919); In re Brand, 153 La. 195, 95 So. 603 (1922).

[35] Smith v. Smith, 67 Ida. 349, 180 P. (2d) 853 (1947).

BILLS AND NOTES — ACTIONS — WHETHER DISCOUNT PURCHASER OF PROMISSORY NOTE, IN ACTION FOR BREACH OF WARRANTY, IS LIMITED TO RECOVERY OF ACTUAL DAMAGES — An unusual issue of damage law appears to have been brought to light in the recent Ohio case of *First Discount Corporation* v. *Sutton*.[1] The defendant therein, an automobile dealer, took a negotiable promissory note[2] as part payment on the purchase price of an automobile. This note, before maturity, was endorsed without recourse[3] by the defendant and discounted by the plaintiff for less than the face value. Shortly thereafter, the maker of the note defaulted and suit was instituted against him but that action was dismissed for the reason that he was shown to be incompetent to contract. Plaintiff then sued the defendant, as endorser, to recover the full amount due on the note and, on a stipulation as to the facts, secured such a judgment in the trial court. On defendant's appeal on a question of law as to the proper measure of damages, the Court of Appeals of Ohio reversed when it held that, while a qualified endorser warrants that all prior parties had capacity to contract[4] and would be liable for the breach of warranty, the proper measure of damage was the amount of consideration given by the purchaser of the note plus interest, less any payments received on the note, and not the face value of the note.

By the act of endorsing an instrument without recourse, the limited endorser divests himself of ownership of the instrument[5] but disclaims any assumption of liability for its ultimate payment[6] so is not to be held to the same degree as would be the case with respect to an unqualified endorser.[7] While he exempts himself from liability as a general endorser, however, he is not free from all obligations with respect to the instrument[8] for he is still liable as a vendor and is regarded as making certain war-

1 96 Ohio App. 256, 121 N. E. (2d) 657 (1954).

2 Although the case does not indicate precisely that the note was negotiable, the liability would be the same as in the case of a sale: Ohio Rev. Code 1953, § 1315.37. The text thereof is the same as Section 36 of the Uniform Sales Act and Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 36.

3 Ohio Rev. Code 1953, § 1301.40. The text thereof is the same as Section 38 of the Uniform Negotiable Instruments Act and Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 58.

4 Ohio Rev. Code 1953, § 1301.67; Section 65(3) of the Uniform Negotiable Instruments Act and Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 85(3).

5 Hudson v. Shepard and Andrews, 90 Ill. App. 626 (1900); M. Rumley Co. v. Dollarhide, 86 Ill. App. 476 (1899).

6 Stover Bank v. Welpman, 323 Mo. 234, 19 S. W. (2d) 740 (1929). An endorsement without recourse does not release the endorser from the warranty that the note is valid and legal: Lutz v. Matheny, 208 Ill. App. 40 (1917).

7 Scarbrough v. City National Bank, 157 Ala. 577, 48 So. 62 (1908); M. V. Monarch Co. v. Farmers Trust Bank, 105 Ky. 430, 49 S. W. 317 (1899); Evans v. Stuhrberg, 78 Mich. 145, 43 N. W. 1045, 6 L. R. A. 501 (1889).

8 Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666 (1923).

ranties, particularly those enumerated in Section 65 of the Uniform Negotiable Instruments Act.[9] Although the warranties there described do not extend to the solvency of the maker and are restricted to matters affecting the legal enforcibility of the paper,[10] they do extend to the point that all prior signatures are represented as genuine,[11] that no payments have been made except such as appear to have been endorsed on the instrument, and that such as do appear are genuine.[12] He also warrants that he has title to the property,[13] that it is what it purports to be, and that it is that for which it was sold, as understood by the parties at the time.[14]

The particular warranty concerned in the case at bar was one to the effect that all prior parties had capacity to contract,[15] so it is important to notice in whose favor this warranty extends. At common law, the warranties of a transferor by delivery and of a qualified endorser were identical and would run only to the immediate transferees who paid value and the action for breach of warranty could not be assigned.[16] As the law stands today, however, the uniform statute limits suit for breach of warranty to an immediate transferee when transfer is by delivery only,[17] so an implication could arise that the warranties of a qualified endorser are to run for the benefit of remote holders as well.[18] Inasmuch as this pro-

9 5 U. L. A., Part 2, § 65. See also Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 85.

10 Leekley v. Short, 216 Iowa 376, 249 N. W. 363, 91 A. L. R. 394 (1933).

11 Federal Fidelity Co. v. Royal Mortgage Co., 252 Ky. 716, 68 S. W. (2d) 25 (1934). In Parlange v. Faures, 14 La. Ann. 448 (1859), a bearer note was sold by a broker at a discount. Suit was brought to recover the amount of the note, with costs of protest and interest, and judgment was so awarded. On appeal, however, the judgment was reversed when the court said that the recovery should have been only for the amount paid, plus interest.

12 Watson v. Cheshire, 18 Iowa 202, 87 Am. Dec. 382 (1865); Carroll v. Nodine, 41 Ore. 412, 69 P. 51 (1902).

13 The implied warranties which are present in the sale of chattels necessarily have to do with the title, with the description, and with the quality, for general and for particular purposes. Those relating to a negotiable instrument likewise concern the title and, in a sense, the kind and quality of the instrument. With respect to negotiable paper, however, it is more appropriate to think of defects of quality in terms of defenses or equities, that is, the vendor is a warrantor against defenses of prior parties and against the existence of outstanding legal or equitable titles to the instrument.

14 Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152 (1875).

15 5 U. L. A., Part 2, § 65(3); Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 85(3).

16 Watson v. Cheshire, 18 Iowa 202 (1865); Brown v. Summers, 91 Ind. 151 (1883); Elliot v. Threlkeld, 55 Ky. 341 (1855); Mardis v. Tyler, 49 Ky. 376 (1850). Contra: Broaddus Institute v. Siers, 68 W. Va. 125, 69 S. E. 468 (1910), but note that a specific statute was involved which allowed the assignee to sue a remote assignor on his implied warranty. It has been suggested that, under special circumstances, a remote assignor may be reached in equity: Weaver v. Beard, 21 Mo. 155 (1855).

17 5 U. L. A., Part 2, § 65(4); Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 85(4).

18 Express mention of both qualified endorsers and transferors by delivery is made in the first part of Section 65 but, in the last part thereof, reference to

vision of the statute seems to pertain not so much to endorsers of, or even to, commercial paper at all but relates more nearly to vendors of chattels and their liability, the warranty of the endorser, like the warranty of the vendor, should be considered personal to the vendee. As the plaintiff in the instant case was the immediate vendee, no objection could be made to the suit on this score.

It is important, next, to notice that a qualified endorsee has an election among several available remedies when payment of the instrument cannot be secured. He may sue for the breach of warranty, thereby seeking to enforce the contract of the endorser, or he may rescind and sue for money had and received.[19] A suit for breach of warranty sounds in special assumpsit and liability arises simply from the fact that a breach exists in that the thing delivered was not as promised, for which purpose the quality of the breach, whether tainted with fraud or otherwise, is unimportant.[20] The liability, then, is clearly contract liability and not tort liability,[21] nevertheless the qualified endorsee might maintain an independent tort action for deceit if the facts should be sufficient to support an action of that character.[22] No suit against the maker to collect on the instrument is required before bringing a suit for breach of warranty,[23] but the return of the instrument would be a condition precedent to a suit based on recision[24] although in *Summers* v. *Richie*,[25] the court said that the plaintiff might retain the note and recover for breach of warranty or return the note and recover in an action for money had and received.

The remedy most frequently utilized, against both qualified and unqualified endorsers, is the one which proceeds on the theory of recision of the contract of sale, thereby necessarily operating to limit recovery to the

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qualified endorsers is omitted. It has been suggested that the warranties contained in Section 65 should run only to holders in due course: Moody v. Morris-Roberts Co., 38 Ida. 414, 226 P. 278 (1923). The suggestion does not seem to fall in line with the general thought on the subject.

[19] See Broaddus Institute v. Siers, 68 W. Va. 125, 69 S. E. 468 (1910). In Webb v. Odell, 49 N. Y. 583 (1872), a recovery of the purchase price was upheld where the notes were sold for less than their face value upon a representation that they were business paper when, in fact, they were accommodation notes, were usurious, and were void in the hands of the vendee. The case was based on the idea that the thing sold differed in substance from what the vendee was led to believe he was buying, so a failure of consideration was involved.

[20] Rucker v. Harger, 117 Kans. 76, 230 P. 70 (1924).

[21] Evans v. First Nat. Bank of Fairbury, 138 Neb. 727, 297 N. W. 1054 (1941).

[22] Larue v. Barbee, 184 Ky. 354, 212 S. W. 142 (1919); Jamison v. Copper, 35 Mo. 483 (1865); Wallace & Co. v. First Nat. Bank of Superior, 102 Neb. 358, 167 N. W. 416 (1918).

[23] Terry v. Bissell, 26 Conn. 23 (1857); Whitney v. The Nat. Bank of Potsdam, 45 N. Y. 303 (1871).

[24] Lunt v. Wrenn, 113 Ill. 168 (1885).

[25] 3 Yeates 531 (Pa., 1803). Accord: Delaware Bank v. Jarvis, 20 N. Y. 226 (1859).

amount paid, plus legal interest.[26] Thus, in the early case of *Cook* v. *Cockrill,*[27] a suit against an unqualified endorser, the court said it was a well-settled principle that, where the consideration passing between the endorsee and his endorser was not equal to the amount of the note, the endorsee could recover no more than the consideration which he had paid. In suits of this character, the defense of want of consideration would be ineffectual except as to an attempt to recover an amount in excess of the sale price.[28]

The liability of a qualified endorser would be exactly the same for, in each instance, the endorser would be sued as a vendor[29] rather than upon the terms of the endorsement.[30] Thus, in *Yates* v. *Bain,*[31] an action brought to recover on a note which had been endorsed without recourse, the trial court gave judgment for the face amount of the note but the upper court reversed, saying that, as the cause of action was based upon the breach of a warranty to the effect that the note was unpaid at the time of its transfer, the measure of damages was "the amount of money which the transferee paid for the note, plus legal interest thereon from the date of payment," in the absence of a showing of circumstances which would give rise to special damage.[32] This view is also supported by the case of *Commercial Credit Company* v. *Ward & Son Auto Company,*[33] a suit brought against a qualified endorser because the maker, an infant, refused to pay the note at maturity. A defense premised on the ground that the suit was premature since, until action had been had against the

26 Bethune v. McCrary, 8 Ga. 114 (1850); Shaeffer v. Hodges, 54 Ill. 337 (1870); Raplee v. Morgan, 3 Ill. (2 Scam.) 561 (1840); Braman v. Hess, 13 Johns. 52 (N. Y., 1816); May v. Campbell, 26 Tenn. 450 (1846).

27 1 Ala. 205, 1 Stew. 475 (1828). Accord: Coye v. Palmer, 16 Cal. 158 (1860); Short v. Coffeen, 76 Ill. 245 (1875); Metcalf v. Pilcher, 45 Ky. 529 (1846); Brown v. Mott, 7 Johns. 361 (N. Y., 1811).

28 In Roark v. Turner, 29 Ga. 455 (1859), an endorsee who had paid $1750 for a note in the amount of $1950 was allowed to recover the face amount of the instrument, but it should be noted that the suit was on the note, not for breach of warranty or recision. Accord: Felton v. Smith, 88 Ind. 149 (1882); National Bank of Michigan v. Green, 33 Iowa 140 (1871).

29 Both in England and in the United States, whenever commercial paper is sold without endorsement, or without express assumption of liability on the paper itself, the contract of sale, and the obligations of vendor and vendee thereunder, are governed by the common law relating to the sale of goods and chattels: Meyer v. Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199 (1896).

30 The double aspect of the liability of the unqualified endorser is illustrated by the fact that a release to him as endorser does not release him as a vendor: Bevan v. Fitzsimmons, 40 Ill. App. 108 (1890). In much the same way, an endorsement of a note without recourse does not operate to divest the endorser of his character as a vendor of the note: Dumont v. Williamson, 18 Ohio 515, 98 Am. Dec. 186 (1869).

31 162 S. W. (2d) 143 (Tex. Civ. App., 1942).

32 162 S. W. (2d) 143 at 144.

33 215 Ala. 34, 109 So. 574 (1926).

maker, no damage had been sustained was rejected when the court said that proof of the making of the note, of the endorsement, and of the infancy of the maker, was all that was needed to support the plaintiff's right to a recovery.[34]

It sometimes happens, as it did in the instant case, that the endorsee does not know that the warranty has been breached until after a suit against the maker has been prosecuted to completion. In the event the first suit is only partly successful, the endorsee might seriously consider suing on the warranty to recover the deficiency. The case of *Challis* v. *McCrum*[35] is noteworthy in that connection. A negotiable note was there transferred without recourse and, in a suit by endorsee against maker, the defense of usury was set up and sustained with the result that interest was forfeited and the recovery was limited to the unpaid principal of the loan. When the endorsee sued the endorser to recover a deficiency, relying on an implied warranty that the note was valid and for the amount purportedly expressed to be due upon its face, the court awarded a judgment for the deficiency. It might be added that the cost of conducting the litigation against the maker, with a reasonable attorney's fee, would be proper elements of damage in suits of this character.[36]

In the event the endorsee should proceed at once against the endorser for breach of warranty, the general principles of contract law would become applicable.[37] Under these principles, it would be improper to deny to the vendee such damages as would put him in as good a position as he would have occupied had the contract been kept, so he would be entitled to those damages which "directly and naturally" result from the breach of warranty[38] together with any costs incurred in an unsuccessful suit against

[34] See also Frieman v. Schneider, 238 Mo. App. 778, 186 S. W. (2d) 204 (1945), where the action rested on a bearer bond issued by a corporation, which bond proved to be without value because of a corporate reorganization. But see Gramatan Nat. Bank & Trust Co. v. Lavine, 99 N. Y. S. (2d) 868 (1950), where the qualified endorsee sued because the maker had previously been declared insane and was given a summary judgment for the full amount due on the note.

[35] 22 Kans. 157 (1879). See also Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100 (1888), where a vendor without recourse was held liable for a deficiency between the amount apparently due on the note and the amount legally collectible on it. Accord: Commercial Credit Co. v. Blanks Motor Car Co., 174 Ark. 274, 294 S. W. 999 (1927).

[36] Edwards v. Beard, 211 Ala. 251, 100 So. 101 (1924).

[37] The law of the place where the transfer occurred would control: Meyer v. Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199 (1896); Stacy v. Baker, 2 Ill. (1 Scam.) 417 (1837); Humphreys v. Collier, 1 Ill. (Breese) 297 (1829); Briggs v. Latham, 36 Kans. 255, 13 P. 393 (1887).

[38] Uniform Sales Act, § 69(6); Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 69(6).

the primary obligor [39] and with interest at the legal rate.[40] Except as he might recover more if he had been able to sue in tort, the endorsee ought not to expect more than this for no man is entitled, at law, to have more than the benefit of his bargain. The instant case, therefore, ends with a logical result at the same time that it does justice between the parties.

L. E. BALOUN

CORPORATIONS—CAPITAL, STOCK AND DIVIDENDS—WHETHER CORPORATION MAY CANCEL NEW STOCK ISSUE BECAUSE OF DENIAL OF PRE-EMPTIVE RIGHT TO CERTAIN OF ITS STOCKHOLDERS—The scope of the stockholder's pre-emptive right has been subjected to curtailment by the decision in the recent Ohio case of *Barsan* v. *Pioneer Savings & Loan Company*.[1] It appeared therein that, at a meeting of the board of directors of the defendant corporation, a motion was made and passed to issue new stock[2] provided the sale thereof was concluded within three months. Certain of the shareholders entered into subscriptions for the new shares and certificates were issued when the subscriptions became fully paid. At the next stockholders' meeting following the issuance of these certificates, another stockholder inquired as to the increase in the stock and the failure to give all stockholders an opportunity to exercise the pre-emptive right. The inquiry prompted the directors, at their next meeting, to adopt a resolution purporting to cancel the shares of stock so issued for an alleged violation of the statutorily recognized pre-emptive right.[3] A special stockholders' meeting was then called for the purpose of giving all stockholders an opportunity to purchase additional stock in proportion to the number of shares held. Thereupon, the present action was brought by some of the prior subscribers to remove the cloud alleged to exist on the title to the new stock purchased by them and to permanently enjoin the holding of the proposed special stockholders' meeting. The trial court gave judgment for these plaintiffs and the Ohio Court of Appeals affirmed when it held that, as the existing stockholders had been given notice that new stock was

[39] Hurst v. Chambers, 75 Ky. 155 (1876); Delaware Bank v. Jarvis, 20 N. Y. 226 (1859); Kingsley v. Fitts & Avery, 55 Vt. 293 (1883); Lawton v. Howe, 14 Wis. 241 (1861). A vendee would also be entitled to recover all costs paid in a successful action brought against him by his vendee: Edwards v. Beard, 211 Ala. 251, 100 So. 101 (1924); Frank v. Lanier, 91 N. Y. 112 (1883).

[40] Yates v. Bain, 162 S. W. (2d) 143 (Tex. Civ. App., 1942).

[1] — Ohio App. —, 121 N. E. (2d) 76 (1954).

[2] Under the corporation's by-laws, three classifications of stock existed, namely: permanent, "running," and paid-up stock. All shares, other than the permanent stock, could be repurchased and cancelled by the corporation. The new issue took the form of permanent stock but the non-subscribing shareholders appear to have been led to believe that the proposal covered only "running" stock.

[3] See Ohio Gen. Code, § 8623-35, which has been carried over into Ohio Rev. Code Ann. 1953, § 1701.40.

to be issued and had raised no objection thereto, the corporation had no right to cancel the shares even though certain of the stockholders had not been afforded an opportunity to participate in the distribution.

In the analysis of the problem presented in the aforementioned case, three integrated questions immediately come to mind, to-wit: (1) what is the pre-emptive right, and to what type of stock does it apply; (2) may the pre-emptive right be waived or relinquished and, if so, what constitutes a waiver or relinquishment; and (3) what, if any, are the remedies available in the event there has been a breach of the pre-emptive right? As to the first, it can be said that, unless the corporate charter or an appropriate by-law provides otherwise,[4] a stockholder has an inherent right to acquire a proportionate share in any new stock issued for money,[5] which right may neither be taken away nor lessened without the stockholder's consent[6] to the end that he may maintain his proportionate influence within the corporation.[7] For this reason, the shareholder must be given an opportunity to purchase a proportionate amount of the new shares about to be issued before such stock may be offered to outsiders. It is to be noted, however, that the mere authority to issue new or additional stock does not automatically entitle a stockholder to purchase for the right does not become operative until additional shares are in the process of being issued.[8] When the board of directors decides to issue additional shares,[9] the board usually issues warrants to the stockholders of record indicating the nature of the right to subscribe for these additional shares, the terms of the offering,[10]

[4] The pre-emptive right may be restricted: Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.24.

[5] Ibid., Ch. 32, § 157.18, permits the payment for shares to be made in property. See also ibid., Ch. 32, § 157.61 et seq., as to changes which may be made in the process of merger or consolidation.

[6] Albrecht, Maguire Co., Inc. v. General Plastics, Inc., 256 App. Div. 134, 9 N. Y. S. (2d) 415 (1939), affirmed without opinion in 280 N. Y. 840, 21 N. E. (2d) 887 (1939).

[7] Southern Pacific Co. v. Bogert, 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099 (1919); Hammer v. Cash, 172 Wis. 185, 178 N. W. 465 (1920).

[8] The general rule is that the pre-emptive right does not come into being until after the initial offering has been distributed: Yasik v. Wachtel, 25 Del. Ch. 257, 17 A. (2d) 309 (1941). In the case of Dunlay v. Avenue M Garage & Repair Co., 254 N. Y. 274, 170 N. E. 917 (1930), however, the court did say that, if any of the unissued original stock was retained for future expansion, the pre-emptive right could not be denied at the time the expansion occurred. The treatment to be accorded to treasury stock is explained in Hammer v. Werner, 239 App. Div. 38, 265 N. Y. S. 172 (1933). See also Stevens, Handbook on the Law of Private Corporations (West Publishing Co., St. Paul, 1949), 2d Ed., pp. 509-16.

[9] The power is usually vested in the board of directors, but action by the stockholders may be required: Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.52 et seq.

[10] The price may not be less than par for shares having a par value: Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.17. It may be higher, if the board should so decide: Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969 (1906).

and the time within which the right must be exercised,[11] in recognition of that right of the old stockholders which was inherent in their original shares.[12] Except to the extent that the pre-emptive right may be regulated by statute or by-law, the privilege to subscribe proportionately to any additional issue extends not only to new common stock and to new issues of voting preferred, particularly if convertible into common stock,[13] but to convertible debentures and convertible bonds,[14] since the exercise of the convertible features contained therein could operate to lessen the proportionate voting strength of the existing shareholders.

There is unanimity of opinion on the point that the pre-emptive right may be waived for there is absolutely no compulsion in law which can be asserted to force the stockholder to exercise his pre-emptive right or to purchase additional stock. In addition to an express waiver,[15] it has been held, as in the case of *Seaman* v. *Ironwood Amusement Corporation*,[16] that a stockholder would relinquish his right in the event he had constructive notice of the action taken by his corporation in increasing its stock, yet did nothing to avail himself of the right to subscribe within a reasonable time. In much the same way, the action of a proxy for a shareholder, enjoying voting control, who voted for a resolution giving the directors discretionary power to issue additional shares, has been said to bind the shareholder, particularly since the latter knew of the plan to issue the shares publicly and raised no question at the time.[17] Before waiver or estoppel could set in, however, it has been said that there must be a sufficient disclosure of the facts as would afford the shareholder information pertaining to the proposed issue in order to prevent the taking of advantage by a non-disclosure.[18]

[11] See Hyman v. Velsicol Corp., 342 Ill. App. 489, 97 N. E. (2d) 122 (1951), to the effect that the shareholder is not entitled to restrain the proposed issue merely because, for reasons personal to himself, he is financially unable to exercise the privilege within the time fixed. In the event no time is set, the right must be exercised within a reasonable time: Oppenheimer v. Wm. F. Chiniquy Co., 335 Ill. App. 190, 81 N. E. (2d) 260 (1948).

[12] Shaw v. Dreyfus, 172 F. (2d) 140 (1949), cert. den. 337 U. S. 907, 69 S. Ct. 1048, 93 L. Ed. 1719 (1949).

[13] As to non-voting preferred, see Frey, "Shareholders' Pre-emptive Rights," 38 Yale L. J. 563 (1929), particularly p. 569, et seq., but note that, in Illinois, all stock must possess voting rights: Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.14.

[14] Wall v. Utah Copper Co., 70 N. J. Eq. 17, 62 A. 533 (1905). In the last-mentioned instance, the pre-emptive right may be abrogated by statute: Deering Cal. Civ. Code 1941, § 297; Ohio Rev. Code Ann. 1953, § 1701.40.

[15] The pre-emptive right, if present, may be deleted by modification of the articles of incorporation, pursuant to Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.24 and § 157.52(o).

[16] 283 Mich. 220, 278 N. W. 51 (1938).

[17] Canada Southern Oils, Ltd. v. Manabi Exploration Co., Inc., — Del. Ch. —, 96 A. (2d) 810 (1953).

[18] Gord v. Iowana Farms Milk Co., — Iowa —, 60 N. W. (2d) 820 (1953).

In the event a stockholder has been deprived of his pre-emptive right without cause, he may seek remedy either at law or in equity. Where the new stock has not yet been issued, the shareholder may be entitled to an injunction to prevent the board of directors from issuing new shares in disregard of the shareholder's right[19] or equitable jurisdiction may be invoked to set aside the additional issue in the hands of the directors who voted for it.[20] In these circumstances, it could not be claimed that the stockholder's remedy, if any, was by way of damages for, in the event control of the corporation was at stake, any remedy by way of damages would be entirely inadequate. It is also possible that an action in the nature of specific performance would lie to compel issuance to the stockholder of a stock certificate sufficient to evidence his proportionate interest in the enlarged corporation, especially so if an action for damages would afford inadequate relief because the stock then possessed no market value and the actual value of the shares would depend on the outcome of the enterprise.[21] It is clear that, in addition to or independent of these equitable remedies, the injured stockholder may sue to recover damages,[22] but it should be noted that it is the injured stockholder who must be the plaintiff for the corporation is without authority either to cancel the stock which it has issued or to bring suit for its cancellation.[23]

The instant case is, therefore, somewhat remarkable in that first, the non-subscribing original stockholders were not supplied with an adequate disclosure of all the pertinent facts so as to bar their rights, and second, the corporation itself undertook to undo the wrong by cancelling the new issue because of the failure to recognize the pre-emptive right. As the corporation was entirely without authority to do this, the result attained was the correct one, but it might have been an entirely different one had the aggrieved shareholders been the moving parties to the suit.

P. J. SHANNON

COURTS—COURTS OF LIMITED OR INFERIOR JURISDICTION—WHETHER COURTS CREATED PURSUANT TO GENERAL STATUTE AUTHORIZING FORMATION OF MUNICIPAL COURTS POSSESS UNLIMITED JURISDICTION OVER TRANSITORY TORT ACTIONS—A recent holding of the Illinois Supreme Court in the case

[19] Petre v. Bruce, 157 Tenn. 131, 7 S. W. (2d) 43 (1928).

[20] Glenn v. Kitanning Brewing Co., 259 Pa. 510, 103 A. 340 (1918).

[21] Falk v. Dirigold Corp., 174 Minn. 219, 219 N. W. 82 (1928).

[22] Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969 (1906); Hammer v. Werner, 239 App. Div. 38, 265 N. Y. S. 172 (1933).

[23] In addition to the instant case, see the holding in Waters v. Horace Waters Co., 130 App. Div. 678, 115 N. Y. S. 432 (1909), affirmed in 201 N. Y. 184, 94 N. E. 602 (1911).

of *Starck* v. *Chicago & North Western Railway Company*[1] should afford ample basis for the belief that there is urgent need to revise the judicial department of the state government in order to eliminate the present confusing welter of courts possessed of restricted, concurrent and, at times, competing jurisdiction.[2] The suit in question arose out of an alleged wrongful death occurring in Kane County but was instituted by the legal representative of the deceased person's estate, both residents of DuPage County, before the Municipal Court of Evanston, located in Cook County, against a Wisconsin railroad corporation which operated one of its lines through Evanston, so as to be subject to service of process there.[3] Following trial, verdict, and judgment for plaintiff for $54,300, the defendant appealed directly to the Supreme Court on the ground that the issues concerned a construction of the state constitution and the validity of a statute.[4] That court affirmed the judgment when it found that no limitation existed in law on the right of the litigant in question to conduct the suit before the chosen tribunal although the resort thereto was probably dictated by no more than a desire to obtain a speedy hearing.[5]

At one time, in the history of the state, matters of the character mentioned would have been heard solely by the state circuit court of the county, which court, from inception, had enjoyed unlimited original jurisdiction in all cases in law and equity.[6] Because of difficulty experienced in travelling to the county seat, the people, in 1848, authorized the legislature to establish inferior local courts, of civil and criminal jurisdiction, within the cities of the state, provided such courts possessed a uniform organization and jurisdiction.[7] Pursuant thereto, a number of such courts were estab-

[1] 4 Ill. (2d) 616, 123 N. E. (2d) 826 (1955).

[2] In general, see Edmunds, "Jurisdiction of Courts," 1952 Ill. L. Forum 480-525.

[3] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, §§ 132 and 141. See also ibid., Vol. 1, Ch. 32, § 157.111.

[4] Ibid., Vol. 2, Ch. 110, § 199. The defendant directed attention to Ill. Const. 1870, Art. VI, § 1, which vests the judicial power of the state in certain courts there enumerated, and to Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 495, having to do with the selection of petit jurors for service in municipal courts, said to be invalid because improperly enacted and lacking in definiteness. The statute was held not to be open to question.

[5] The Chicago Daily News, March 5, 1955, p. 7, carries a news article which indicates that a trial may be had, before the court in question, within a month after the pleadings have been made up; a sharp contrast to the delays experienced in state courts located in Cook County. It is there indicated that as many as fifty suits, with claims ranging from $30,000 to $175,000, have been filed in the Evanston court in the past year. It is anticipated that the Municipal Court for the Village of Oak Park, organized late in 1954, will probably experience a similar trend.

[6] See Ill. Const. 1818, Art. IV, §§ 1, 2 and 4; Ill. Const. 1848, Art. V, § 8; Ill. Const. 1870, Art. VI, § 12.

[7] Ill. Const. 1848, Art. V, § 1.

lished.[8] These city courts, being substantially the equivalent of the circuit court,[9] were one time thought to be limited by the requirement that the cause of action had to arise within, and concern litigants residing in, the city where the court was established, hence were not entitled to take jurisdiction over matters arising elsewhere.[10] But the power of such courts was definitely increased when the Supreme Court held that they were entitled to hear transitory causes of action, without limit and no matter where arising, provided other jurisdictional features were observed.[11]

The desperate situation existing in Chicago at and prior to 1905, induced the legislature, with the concurrence of the people of the city,[12] to create a special tribunal, unlike anything then existing, designated as the Municipal Court of Chicago and designed to take over the functions theretofore performed within the city by justices of the peace but which tribunal was given larger powers than those exercised by the justices.[13] The court so created, however, was not the same as the other city courts found within the state and did not enjoy general jurisdiction but was confined to the handling of enumerated types of cases. With particular reference to personal injury actions, the jurisdiction of the court was definitely limited, at least at one time,[14] to cases where the amount claimed did not exceed $1000. This amount was increased in 1951 to $5000, the figure presently controlling in cases of that type.[15] Again, it was one time thought that the court was restricted to handling matters which arose within municipal limits but its power of transitory tort causes was sustained on much the same ground as had been adopted with reference to the city courts.[16]

8 The controlling statute is Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 333 et seq. City courts presently exist in the following Illinois cities: Alton, Aurora, Beardstown, Benton, Calumet City, Canton, Carbondale, Charleston, Chicago Heights, DeKalb, DuQuoin, East St. Louis, Eldorado, Elgin, Granite City, Harrisburg, Herrin, Johnston City, Kewanee, Litchfield, Marion, Mattoon, Moline, Pana, Spring Valley, Sterling, West Frankfort, and Zion.

9 Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 333, declares such courts to be "courts of general jurisdiction" in and for the cities where created "in all criminal cases and in all cases both in law and chancery and also in statutory proceedings," with one minor exception there noted.

10 Werner v. Illinois Central Railroad Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942).

11 Turnbaugh v. Dunlop, 406 Ill. 573, 94 N. E. (2d) 438 (1950).

12 This concurrence was necessary because the 1870 Constitution had been amended, in 1904, to provide for a degree of home rule for Chicago: Ill. Const. 1870, Art. IV, § 34.

13 Compare Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 356 et seq., particularly § 357, with ibid., Ch. 79, § 16.

14 See Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, § 357.

15 Laws 1951, p. 1726; Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 357. See also Secco v. Chicago Transit Authority, 2 Ill. App. (2d) 239, 119 N. E. (2d) 471 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 338.

16 United Biscuit Co. v. Voss Truck Lines, Inc., 407 Ill. 488, 95 N. E. (2d) 439 (1950).

The experiment with the Municipal Court of Chicago apparently proved sufficiently satisfactory to cause the legislature to make further use of the power to create additional courts for the state[17] and, in 1929, it enacted a general statute[18] providing for the formation of other municipal courts in cities or villages within the state having a population in excess of 15,000 but not more than 500,000. It was under this statute that the court concerned with the instant case was established.[19] Under this statute, the original intent seems to have been one to provide courts which, unlike the true city courts, were to exercise a limited and petty jurisdiction, subject to a monetary ceiling of $2000, about on a plane with the work done by the county courts of the state,[20] and, except for a slight difference in the monetary amount, were to be the substantial and practical equivalent of the Municipal Court of Chicago.

An important, but little noticed, change occurred in the organizational set-up of the last described courts when, in 1935, the legislature amended the general municipal court statute so as to delete the monetary limitation previously imposed,[21] thereby making it possible for municipal courts, other than the one organized in Chicago, to entertain actions in tort growing out of personal injury, as well as other types of enumerated cases, without regard to the amount involved. Naturally, until the Supreme Court indicated otherwise, the belief prevailed that municipal courts organized under the general statute as amended were subject to the further limitation that the cause of action had to arise within municipal limits, so very little recourse was had to the expanded jurisdiction. It is now apparent, both from the holding in the instant case and the prior decisions concerning the courts of other cities,[22] that no such limitation exists, at least with respect to transitory causes of action if jurisdiction over the persons involved can properly be obtained.

The net result is not only that the parent organization now appears to have become inferior to its offspring[23] but that one more potentially

17 Ill. Const. 1870, Art. VI, § 1.

18 Laws 1929, p. 315, as amended; Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 442 et seq. Careful attention should be given to the fact that the Municipal Court of Chicago is regulated by a separate statute devoted exclusively to it: Laws 1905, p. 157; Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 356 et seq.

19 The Evanston court, founded in 1933, was for a long time the only such court. The Village of Oak Park, late in 1954, established the second such tribunal.

20 County courts were first given constitutional status in 1848: Ill. Const. 1848, Art. V, § 1. Art. V, § 16, of that constitution directed the establishment of a county court in each county within the state.

21 Laws 1935, p. 697 et seq.

22 United Biscuit Co. v. Voss Truck Lines, Inc., 407 Ill. 488, 95 N. E. (2d) 439 (1950); Turnbaugh v. Dunlop, 406 Ill. 573, 94 N. E. (2d) 438 (1950).

23 The state is now presented with the ridiculous spectacle of having the court of its largest city possessed of a jurisdiction considerably inferior to that exercised by its nominal counterpart, even though the latter is located in an adjacent suburb with a population scarcely one-fiftieth the size.

available tribunal has been added to an already extended and confusing list of courts declared capable of handling a particular piece of litigation. Leaving aside questions as to venue[24] and the manner of acquiring jurisdiction over the parties, a person who has suffered a personal injury may sue (1) in the circuit court of a given county;[25] (2) in the county court thereof if the amount sought does not exceed $2000;[26] (3) in an appropriate city court, if one exists, without limit on the measure of recovery;[27] (4) in the Municipal Court of Chicago, subject to the limitations imposed by its fundamental statute on fourth-class cases;[28] (5) in any other municipal court within the state which may be able to secure jurisdiction; or (6) before a justice of the peace, if the litigant would be content with a recovery not exceeding $500. The mere statement of this fact should, itself, be argument enough for the abolition of these multiple competing tribunals and for the establishment of one universal court at the trial level.

W. F. ZACHARIAS

ELECTIONS—VIOLATIONS OF ELECTION LAWS—APPLICABILITY AND CONSTITUTIONALITY OF PAY-WHILE-VOTING STATUTES—Three state court decisions achieved within the past year have focussed attention on problems concerning the applicability and the constitutionality of statutes which purport to require an employer to allow his eligible voting employees to take time off, on election day, without being subject to penalty or suffering a deduction from wages. The Minnesota case of *State* v. *International Harvester Company*[1] arose from a criminal complaint which charged that the employer, in violation of law,[2] had deducted wages when an employee had absented himself from work, during his regular shift, in order to vote although it would have been possible for the employee to visit the polls without difficulty after normal working hours were over. A judgment imposing a fine was affirmed despite a provision in the union contract covering the hiring which, while stipulating for time off for voting purposes, indicated that the time off was to be without pay. The Iowa case of

24 Venue as to corporations is controlled by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 132, which permits suit, among other places, in the county where the corporate defendant "is doing business." An individual defendant, under ibid., § 131, may only be sued in the county of his residence or one in which the "transaction or some part thereof" occurred.

25 If in Cook County, he may also utilize the services of the Superior Court of Cook County: Ill. Const. 1870, Art. VI, § 23.

26 Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 177.

27 Ibid., Ch. 37, § 333.

28 Ibid., Ch. 37, § 357.

1 — Minn. —, 63 N. W. (2d) 547 (1954), appeal dismissed 348 U. S. 853, 75 S. Ct. 78, 99 L. Ed. 43 (1954).

2 Minn. Stat. Ann. 1954, § 206.21.

Lorentzen v. *Deere Manufacturing Company*,[3] a civil suit to recover wages deducted when the employee left two hours before the end of the regular shift although the employer had designated a period of time following working hours as the time in which to vote,[4] resulted in a judgment against the employer. The third case, entitled *Williams* v. *Aircooled Motors, Inc.*,[5] a civil suit for unpaid wages which arose in New York, required a determination of the point as to whether or not the employee was entitled to time-off pay at the overtime rate[6] when the employer designated the last two hours of the working day as the voting period. A judgment ordering payment at the higher level of compensation was there affirmed. In all three decisions, the statutes concerned were found to be constitutional as being no more than a valid exercise of the police power of the state without involving any contravention of the contract[7] or equal protection and due process provisions[8] of the federal constitution.

While statutes of the kind under consideration have existed for many years, a brief look into the background of earlier decisions may serve to place these recent cases in proper perspective. Illinois appears to have been the first state to go into the subject by virtue of the holding in the case of *People* v. *Chicago, Milwaukee & St. Paul Railway Company*.[9] In that case, the Illinois Supreme Court upheld a portion of the statute which gave an employee the right to absent himself from work in order to vote[10] but it did declare that the requirement there imposed that the employer should pay wages for the time so taken was unconstitutional and invalid. It indicated that the part of the statute declared invalid was open to objection because it interfered with freedom of contract, was discriminatory in operation by virtue of the fact it distinguished between those who did and those who did not employ others, and also because it deprived employers of property without due process of law. Despite this, the statute appears to have survived a subsequent revision of the state Election Code and the exact language thereof is still to be found therein.[11]

3 — Iowa —, 66 N. W. (2d) 499 (1954).

4 Iowa Code 1950, § 49.109, stating that the two-hour voting period "may be designated by the employer," was construed to mean that the two hours selected had to fall within the working period.

5 307 N. Y. 332, 121 N. E. (2d) 251 (1954), affirming 283 App. Div. 187, 127 N. Y. S. (2d) 135 (1954).

6 N. Y. Cons. Laws, Election Law, § 226, provided that the employee who took time off to vote should suffer no deduction "from the usual salary or wages" paid.

7 U. S. Const., Art. I, § 10.

8 Ibid., Amend. XIV, § 1.

9 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610 (1923). Accord: McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235 (1927). But see also Zelney v. Murphy, 387 Ill. 492, 56 N. E. (2d) 754 (1944).

10 Laws 1908, p. 80, § 25, as amended.

11 Ill. Rev. Stat. 1953, Vol. 1, Ch. 46, § 17—15, as well as § 7—42. One small change was made by increasing the minimum penalty for violation from a fine of

Twenty-three years passed before the problem was again considered by the courts. At that time, perhaps because of a change in the economic scene, the Appellate Division of the New York Supreme Court, in the case of *People* v. *Ford Motor Company,*[12] upheld a similar statute on the ground the discriminatory burden placed on the employer was so slight as to be not oppressive. In addition, some weight was placed on the fact that the statute had gone unquestioned for some fifty years. By contrast, the Kentucky Supreme Court, the very next year, in the case of *Illinois Central Railroad Company* v. *Commonwealth,*[13] struck down the statute of that state [14] as being unconstitutional. Although the corporation there concerned might well have defended on the ground the prosecuting witness had not applied for leave of absence prior to the day of election and that the "usual salary or wages" were paid,[15] the attack centered on the fundamental issue as to validity and the court took advantage of the opportunity to declare the statute unconstitutional as being violative of due process requirements. Not long thereafter, an intermediate California court, through the medium of the case of *Ballarini* v. *Schlage Lock Company,*[16] reached the conclusion that the California statute[17] was in the public interest and was valid, replying to the argument that the statute abridged a constitutional freedom to contract by indicating that the statutory provisions, being a part of every employment contract made within the state, were as much a part thereof as if they had been expressly and voluntarily incorporated therein.

The final expression on the constitutional issues involved did not come until, in 1952, the Supreme Court of the United States got around to considering the principal aspects of the problem through the case of *Day-Brite Lighting, Inc.,* v. *State of Missouri.*[18] It appeared therein that the

$5.00 to one of $50.00. As to whether a law, once declared to be unconstitutional, may be later held to be valid without re-enactment, see Pierce v. Pierce, 46 Ind. 86 (1874). But see also State v. O'Neil, 147 Iowa 513, 126 N. W. 454, Ann. Cas. 1912B 691 (1910).

12 271 App. Div. 141, 63 N. Y. S. (2d) 697 (1946), noted in 47 Col. L. Rev. 135. Lawrence, J., wrote a dissenting opinion which rested on the Illinois case cited in note 9, ante. The statute there concerned is cited in note 6, ante.

13 305 Ky. 632, 204 S. W. (2d) 973 (1947), noted in 20 Rocky Mountain L. Rev. 417. See also the companion case of International Shoe Co. v. Commonwealth, 305 Ky. 636, 204 S. W. (2d) 976 (1947).

14 Ky. Rev. Stat., § 118.340.

15 The employment contract expressly specified that payment was to be made only for hours actually worked.

16 100 Cal. App. (2d) 859, 226 P. (2d) 771 (1950).

17 Cal. Election Code, Ch. 1851, §§ 1-2.

18 342 U. S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952), noted in 27 N. D. Law. 156, affirming 362 Mo. 299, 240 S. W. (2d) 886 (1951). Jackson, J., wrote a dissenting opinion. See also the memorandum opinion in Tide Water Assoc. Oil Co. v. Robinson, 344 U. S. 804 and 888, 73 S. Ct. 27 and 181, 97 L. Ed. 626 and 687 (1952).

statute at hand provided that the employee might absent himself "from any services or employment in which he is then engaged or employed, for a period of four hours between the opening and closing of the polls" without any penalty.[19] The defendant corporation at first refused, then permitted, the complaining witness and his fellow employees the right to leave work an hour and one-half before the usual quitting time but did not pay for this time off. The Missouri Supreme Court affirmed a criminal conviction of the corporation for violation of the statute in question and it, in turn, was upheld by the federal court. The latter, after disclaiming super-legislative functions or the right to pass on the wisdom of the legislation, said that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided,"[20] but it is important to note that the statute, while held valid, was not interpreted. Since then, with the constitutional aspects of the issue virtually settled, the main problems have had to do with the applicability of these statutes to the varying facts of specific cases, as in the instances noted above, but not without some comment as to the necessity for laws of this type.[21]

While only a few of these pay-while-voting statutes have been subjected to scrutiny to date, the fact should not be overlooked that a substantial number of such statutes exist.[22] Variations may be noted among them with regard to the length of the authorized absence, the type of election covered, the extent of the advance notice which must be given the employer, and the like, but all are essentially directed at permitting the employee to take time off from work without loss of usual income or other penalty and most provide that a violation thereof will involve the employer

19 Mo. Rev. Stat. 1949, § 129.060.

20 342 U. S. 421 at 423, 72 S. Ct. 405, 96 L. Ed. 469 at 472.

21 See, for example, the opinion of Thompson, Jr., in Lorentzen v. Deere Manufacturing Co., — Iowa — at —, 66 N. W. (2d) 499 at 503. He notes that "conditions have changed since the statute under consideration first became law in 1892. Then hours of work were much longer, and means to transportation to the polls were much slower. Without the protection of the statute many employed persons might have been deterred from voting. Now . . . the necessity for such protection is much less apparent. Indeed, the wisdom of payment to the employee for voting may be questioned."

22 In addition to the statutes cited above, see Ariz. Code 1939, § 55-514; Ind. Stat. Ann. 1953, Tit. 29, § 4807; Kans. Gen. Stat. Ann. 1949, Ch. 2, Art. 4, § 418; Flack Md. Code Ann. 1951, Art. 33, § 180; Mass. Ann. Laws 1951, Ch. 149, § 178; Neb. Rev. Stat. 1951, § 32-1046; N. M. Stat. Ann. 1953, § 3-10-7; Ohio Rev. Code 1953, § 3599.06; Okla. Stat. Ann. 1936, Ch. 14, Tit. 26, § 438; S. D. Code 1947, § 16.1211; Tex. Penal Code 1949, Art. 209; Utah Code Ann. 1943, § 25-12-18; W. Va. Code Ann. 1949, § 121; Wis. Stats. 1953, Elections, § 6.047; Wyo. Rev. Stat. Ann. 1937, § 36-617. See also notes in 47 Col. L. Rev. 135 and 20 Rocky Mountain L. Rev. 417.

in a misdemeanor. The principal argument offered in justification of these statutes is that they tend to encourage employees, in the public welfare, to exercise their elective franchise, a matter of such moment that any discriminatory aspects are outweighed by the greater public good subserved thereby.[23]

It is doubtful whether any citizen should be paid to perform this particular civic duty[24] but, as courts permit, or are unable to prevent, legislation of such wide latitude in the economic field, legislatures should be realistic and diligent enough to keep statutes of this character abreast of the times. The development of modern means of transportation, the shortening of working hours, and the adoption of minimum pay scales render these statutes obsolescent if not actually obsolete. These statutes ought, therefore, more properly be repealed rather than be subjected to interpretation and enforcement.

H. L. Baccus

Witnesses—Competency—Whether Confidential Revelations by Client to Attorney Regarding Future Criminal or Fraudulent Transactions Must be Divulged—An important but seldom raised issue relating to the attorney-client privilege was recently decided by the Supreme Court of New Jersey in the recent case entitled *In re Selser*.[1] The respondent therein, a practicing lawyer, had represented a notorious gambling racketeer for many years, with interruptions in the relationship during the time the respondent served as an assistant prosecuting attorney.[2] This racketeer, although not under arrest or indictment, experienced other troubles in that he had been summoned to appear as a witness before the Kefauver Committee,[3] became one of that committee's star witnesses, and was later murdered. When a local grand jury began an investigation into gambling activities in the county, the respondent was summoned as a witness and

23 The contention has been made that pay-while-voting statutes are analogous to minimum wage legislation. It is difficult to see how statutes calling for minimum payment for services performed can be said to compare with those directing payment for no services at all.

24 See, in particular, the forceful dissent of Jackson, J., in Day-Brite Lighting, Inc. v. Missouri, 342 U. S. 421 at 427, 72 S. Ct. 405, 96 L. Ed. 469 at 474. He appears to consider statutes of this nature as a "confession of failure of popular representative government."

1 15 N. J. 393, 105 A. (2d) 395 (1954), reversing 27 N. J. Super. 257, 99 A. (2d) 313 (1953). Heher, J., wrote a dissenting opinion, concurred in by Oliphant and Wachenfeld, JJ.

2 Following the attorney's resumption of private practice, the racketeer again retained him, particularly with respect to a complaint filed against his associates for gambling, on which charge these men were sentenced to prison.

3 Special Committee to Investigate Organized Crime in Interstate Commerce: S. Res. 202, 81st Congress, as amended by S. Res. 60 and S. Res. 129, 82nd Congress.

answered some questions,[4] but refused to answer four of the questions propounded[5] on the ground they involved privileged communications between an attorney and client. The Attorney General thereupon sought a rule to show cause but this was denied by the trial court and the intermediate reviewing court. When the matter was taken to the highest court of the state, that court, by a divided vote, held the attorney was obliged to answer the questions as the matter concerned fell beyond the scope of the attorney-client privilege.

Both the majority and the minority opinions in the case trace the development of this privilege, an ancient one which operates to prevent an advocate from being called as a witness against his client.[6] It has been said that Cicero, when prosecuting the Roman governor of Sicily, expressed regret that he could not summon the latter's *patronus* but whether this Roman precedent serves as the original basis for the English rule cannot now be proved.[7] The privilege is, however, firmly imbedded in the common law with one authority pointing out that it was recognized as early as 1280 A. D. in an ordinance of the City of London[8] and another[9] indicating that the privilege was first recognized, in 1577, in the case of *Berd* v. *Lovelace.*[10] The privilege seems, at one time, to have been based upon a concern for the oath and honor of the attorney rather than from any regard for the client but, by the 19th century, was recognized as being necessary to permit of full consultation between attorney and client without fear of public disclosure.[11] Being presently designed for the client's protection, only he may waive it, and the attorney is required to assert the privilege, where applicable, unless it has been so waived by the client.[12]

[4] He testified that, while he had occupied the office of first assistant prosecutor, the racketeer had come to advise him that he had "protection" money coming to him but he said this, and subsequent offers of bribes, were turned down.

[5] Two of the questions would have required the respondent to divulge the names of persons, disclosed to him by his client, who had been paid "protection" money or who had been the recipients of "political" contributions. The other two questions related to a visit made by the racketeer to the home of a prominent political figure to voice complaint over the lack of protection accorded to the "racket."

[6] Wigmore, Evidence, 3d Ed., Vol. 8, p. 558.

[7] Radin, "The Privilege of Confidential Communication between Lawyer and Client," 16 Cal. L. Rev. 487 (1928).

[8] Drinker, Legal Ethics (Columbia University Press, New York, 1953), pp. 15 and 132.

[9] Wigmore, op. cit., p. 547.

[10] Cary 62, 21 Eng. Rep. 33 (1577). It was there indicated that a solicitor would be exempt from examination concerning matters involved in the litigation.

[11] Wigmore, op. cit., p. 550, states: "The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent."

[12] See Canon 37 of the Canons of Professional Ethics, and 58 Am. Jur., Witnesses, p. 259 et seq.

It is apt, at this point, to consider how the privilege comes into being for, to bring the matter within the rule, there must be both professional employment and professional confidence.[13] Even then, limitations can exist for no privilege will result if the client consults his attorney, not as to prior wrongdoing, but as to intended future wrongdoing. It need not appear, in this instance, that the attorney was engaged in a conspiracy with the client or be in any way involved, for the attorney may be innocent and still the guilty client must let the truth come out.[14] In addition, it is for the trial judge to determine, as part of the judicial function, whether the facts justify allowance of the claim.

Modernly, the privilege is said to exist (1) where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) provided the communications relate to that purpose; (4) are made in confidence; (5) by the client; and (6) at his instance, are to be permanently protected (7) from disclosure by himself or by the legal adviser, unless (8) the protection is waived.[15] These elements, with very little difference, will be found incorporated in the common law or in the forty-odd statutes which have been enacted on the subject,[16] none of which have chanced to disfigure the common law rule or to unsettle its logical development. In this state, the privilege has been recognized as being a part of the common law and the circumstances of the individual case will determine whether or not it exists.[17] Once the right to the privilege has been established, the privilege continues even though the litigation, or other occasion for the legal advice, has ended[18] for it survives the death of the client.[19]

There is no doubt, however, that the privilege will be lost if it is abused[20] for, as exercise of the privilege results in the exclusion of evidence, it runs counter to another fundamental theory, one to the effect that it is only by virtue of the fullest disclosure of the facts that courts will be led to the truth. Commenting on this conflict underlying the two theories, Mr. Justice Cardozo once said that "the recognition of [the] privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others

13 Granger v. Warrington, 8 Ill. (3 Gil.) 299 (1846); Wigmore, op. cit., p. 573.

14 Clark v. United States, 289 U. S. 1 at 13, 53 S. Ct. 465, 77 L. Ed. 993 at 999 (1933).

15 Wigmore, op. cit., p. 558.

16 The statutes are listed and compared in Wigmore, op. cit., at pp. 558 et seq.

17 Dickerson v. Dickerson, 322 Ill. 492, 153 N. E. 740 (1926).

18 Under the original theory, the privilege terminated when the attorney-client relationship ended: Wigmore, op. cit., §2290, particularly p. 549.

19 See In re Estate of Busse, 332 Ill. App. 258, 75 N. E. (2d) 36 (1947), for an application of this principle to a civil suit.

20 Lanum v. Patterson, 151 Ill. App. 36 (1909); Wigmore, op. cit., p. 627.

of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each."[21]

It was at this very point that the judges in the instant case came to a disagreement. Both the majority and minority opinions were in substantial agreement as to the law but judicial thinking parted company on the question of whether or not the privilege had been lost because the consultations held with the respondent, who was then admittedly acting as attorney for the client, did or did not relate to future wrongdoing. The majority, concluding that the privilege had been abused, treated the unusually large number of consultations between the client and the respondent as evidence of a continuing intention, on the part of the client, to corrupt public officials in order that the client could carry on his illegal gambling activities.[22] While the respondent was expressly absolved of any knowledge of his client's illegal purpose, the unusual circumstances were said to "give color to the charge"[23] and afford prima facie evidence that a claim to privilege was not justified. Inasmuch as the client would have been denied the benefit of the privilege had he remained alive, the majority reached the obvious result that it would be detrimental to the public welfare to permit the attorney to remain silent.

By contrast, the minority judges, pointing out that all the questions put to the respondent related to past acts or events concerning which the client was subject to interrogation by the senatorial investigating committee or by the local grand jury, expressed the belief that the evidence rose no higher in dignity than mere conjecture and surmise and, as such, was inadequate to make out a prima facie showing of proposed illegality to the extent necessary to drive away the professional privilege. While the case does nothing to strike down or seriously impair the privilege as to confidential communication between attorney and client, it does reveal the sharp cleavage which can exist in judicial minds when two conflicting policies meet. Bearing in mind the fact that the case arose at a time when the public was expressing concern about widespread gambling and corruption of public officials, one is left to wonder whether the result might not have been different had the social conditions been less predominant.

J. T. FISHER

21 Clark v. United States, 289 U. S. 1 at 15, 53 S. Ct. 465, 77 L. Ed. 993 at 1000 (1933).

22 The majority stated: "We cannot be so naive as to suppose that Moretti [the client] had these 200 and more conferences, averaging over four a week, solely to prepare for the pleading *non vult* of his associates, or for the defense of his own prospective post-mortem indictment, or for his appearance before the Kefauver committee, where all he was required to do was to tell the truth." 15 N. J. 393 at 411, 105 A. (2d) 395 at 405.

23 See Clark v. United States, 289 U. S. 1 at 15, 53 S. Ct. 465, 77 L. Ed. 993 at 1000 (1933).