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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURY FROM OPERATION, OR USE OF HIGHWAY—
WHETHER OR NOT AMENDMENTS TO NON-RESIDENT MOTORIST STATUTES
PROVIDING FOR SERVICE ON PERSONAL REPRESENTATIVE OF DECEASED NON-
RESIDENT ARE CONSTITUTIONAL—Although statutes providing for sub-
stituted service upon non-resident motorists in actions arising from use
of local highways have received a great deal of judicial attention since
their inception, it became necessary for both the Court of Appeals of

New York and the Supreme Court of Michigan recently to decide a comparatively new problem growing from their application. Both courts were required to pass on the validity of amendments to the statutes of the respective states providing for substituted service on executors or administrators of non-resident motorists in the event of the death of the latter prior to the acquisition of jurisdiction. In the first of these cases, that of *Leighton v. Roper*,¹ the plaintiff, residing in New York, had been injured in an automobile collision occurring in that state. The driver of the other automobile, a resident of Indiana, died before any action had been instituted and the defendant had been appointed administrator of the estate by an Indiana court. The estate possessed no assets in New York except such as might grow out of an automobile liability insurance policy issued to the decedent by a foreign insurance company not licensed to do business in New York. A summons and a complaint in plaintiff's New York action to recover for damages, charging the decedent with negligence, were served on defendant, in his representative capacity, in the fashion directed by the New York statute.² Defendant appeared specially to quash the service and to dismiss the complaint on the ground that the statute, as applied to him, was unconstitutional. The service was sustained by the lower courts and their judgment was affirmed by the New York Court of Appeals. The Michigan case of *Flopa v. DuPre*³ arose under similar circumstances except that there the defendant's decedent, an Ohio resident, in his lifetime, had allowed his automobile to be driven on the highways of Michigan by a third person. While so operated, a collision occurred in which the plaintiff, a resident of Michigan, was injured. After defendant's appointment as administratrix by an Ohio court following the non-resident owner's death, plaintiff brought suit in Michigan. Service of process was had on defendant pursuant to the Michigan statute.⁴ That defendant also filed a special

¹ 300 N. Y. 434, 91 N. E. (2d) 876 (1950), affirming 275 App. Div. 994, 90 N. Y. S. (2d) 919 (1949), which had affirmed 194 Misc. 893, 87 N. Y. S. (2d) 527 (1948).

² Thompson's Laws N. Y., 1945 Supp., Vehicle and Traffic Law, § 52, p. 725, provides: "A non resident operator . . . of a motor vehicle . . . which is involved in an accident or collision in this state should be deemed to have consented that the appointment of the secretary of state as his true and lawful attorney for the receipt of process . . . shall be irrevocable and binding upon his executor or administrator. When the non resident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such non resident in the same manner . . . as is provided in the case of a non resident." The statute also provides for the continuance of the action against the executor or administrator upon proper motion and notice if the non resident should die during a duly commenced suit.

³ 327 Mich. 660, 42 N. W. (2d) 777 (1950).

⁴ Mich. Comp. Laws 1948, § 256.521. For re-enactment, see P. A. 1949, No. 300, § 403; Mich. Stat. Ann., 1949 Cum. Supp., § 9.2103. It reads, in part: ". . . the operation on a public highway in this state of a motor vehicle owned by a non resident if so operated with his consent, express or implied, shall be deemed equiva-

appearance and a motion to dismiss the complaint, likewise asserting that the statute was unconstitutional. The motion was denied by the trial court and the Supreme Court of Michigan affirmed.

All forty-eight of the American states, as well as the District of Columbia, presently have statutes providing for substituted service on non-resident motorists who become involved in automobile accidents while travelling over the highways or while within foreign jurisdictions.⁵ Such service is usually accomplished by statutory appointment of some state official as agent of the non-resident for purpose of receipt of process, the statute charging that official with the responsibility of notifying the non-resident motorist in some manner which complies with procedural due process requirements. As originally enacted, these statutes made no provision for service on the non-resident's executor or administrator in the event of the non-resident's death before or during suit. For that reason, it had been uniformly held that jurisdiction could not be obtained over the legal representative either because death terminated the agency, it not being coupled with an interest, or because strict construction of the statutes required that result.⁶ Two cases in that category went one step further and, at least by way of dicta, seriously questioned whether it would ever be possible, constitutionally, to subject the executor or administrator to service under some form of statutory amendment.⁷

lent to an appointment by such non resident of the secretary of state to be his true and lawful attorney . . . The death of such non resident shall not operate to revoke the appointment . . . and . . . any action growing out of such accident or collision may be commenced or prosecuted against his executor or administrator . . . and service of the summons shall be made" in the same manner as if the non resident was still living.

⁵ A compilation thereof appears in *Knoop v. Anderson*, 71 F. Supp. 832 at 836-7 (1947), and also in 27 CHICAGO-KENT LAW REVIEW 231-2, particularly notes 5-11, inclusive.

⁶ *Warner v. Maddox*, 68 F. Supp. 27 (1947); *Buttson v. Arnold*, 4 F. R. D. 492 (1945); *Brogan v. Maclin*, 126 Conn. 92, 9 A. (2d) 499 (1939); *Riggs v. Schneider's Ex'r*, 279 Ky. 361, 130 S. W. (2d) 816 (1939); *Downing v. Schwenck*, 138 Neb. 395, 293 N. W. 278 (1940); *Young v. Potter Title & Trust Co.*, 114 N. J. L. 561, 178 A. 177 (1935), affirmed in 115 N. J. L. 518, 181 A. 44 (1935); *Lepere v. Real Estate Land Title Trust Co.*, 11 N. J. Misc. 887, 168 A. 858 (1933); *Vecchione v. Palmer*, 249 App. Div. 661, 291 N. Y. S. 537 (1936); *Dowling v. Winters*, 208 N. C. 521, 181 S. E. 751 (1935); *Harris v. Owens*, 142 Ohio St. 379, 52 N. E. (2d) 522 (1944); *Donnelly v. Carpenter*, 55 Ohio App. 463, 9 N. E. (2d) 888 (1936); *Minehart v. Shaffer*, 86 Pittsb. L. J. 317 (1938); *State ex rel. Ledin v. Davidson*, 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589 (1934). The contention that death terminated the agency between the non-resident motorist and the secretary of state was also presented in the instant cases. The courts refused to sustain the contention on the ground that the agency was not one created by common law but was one based on an exercise of the policy power, hence the principle did not apply: *Oviatt v. Garretson*, 205 Ark. 792, 171 S. W. (2d) 287 (1943); *Gesell v. Wells*, 134 Misc. 594, 236 N. Y. S. 381 (1929). The Tennessee statute treats the agency as one at common law, but declares it to be irrevocable until one year after the death of the non-resident motorist: *Tenn. Pub. Acts 1949*, Ch. 47, p. 174.

⁷ *Vecchione v. Palmer*, 249 App. Div. 661, 291 N. Y. S. 537 (1936); *State ex rel. Ledin v. Davidson*, 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589 (1934).

Notwithstanding, six states⁸ in addition to New York and Michigan have passed amendments of the type here under consideration in recognition of the fact that the injured person's remedy should not be made to depend on the continued existence of the non-resident motorist.⁹

The United States Supreme Court, in the case of *Hess v. Pawloski*,¹⁰ carved out the constitutional path to be followed by service statutes by noting that the state might, in the public interest, "make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike who use its highways."¹¹ It there adopted a theory which recognized that the "physical" concept of jurisdiction, laid down under a rule that had forbidden states from exercising jurisdiction over persons and things beyond territorial limits,¹² had been greatly extended so that a more functional approach to the problem of jurisdiction might be taken.¹³ The constitutional question which confronted the courts in the instant cases, then, was whether or not the police power, under which highway use is regulated, could be extended one step farther so as to bring personal representatives of non-resident drivers within the purview of the modern service statutes.

Prior to the instant cases, the decision in *Knoop v. Anderson*¹⁴ represented the only direct adjudication on the fundamental constitutional issue. The plaintiff there, an Iowa resident, had been negligently injured on an Iowa highway by a truck owned by a South Dakota resident. The owner of the truck died subsequent to the accident and the defendant had been appointed administratrix of the owner's estate by a South Dakota court. In a suit based on such negligence, begun in an Iowa state court, service of process was made in the fashion directed by the

⁸ Pope's Ark. Stat. 1944, Supp. § 1375; Fla. Stat. Ann., 1949 Supp., Ch. 47, § 47.29(2); Iowa Code 1946, Vol. 1, Ch. 321, §§ 321.498-9; Md. Ann. Code (Flack) 1939, Art. 56, § 186.189; Neb. Rev. Stat. 1943, Vol. 2, Ch. 25, art. 5, § 25-530, as amended in 1949; Wis. Stats. 1949, Ch. 85, § 85.05(3).

⁹ *Leighton v. Roper*, 194 Misc. 893 at 899, 87 N. Y. S. (2d) 527 at 533 (1948), quoted from the 1944 report of the New York Judicial Council, p. 253, to the effect that "the more serious the accident in which the non resident was involved, the more likely it will be that death will have resulted and if the executor or administrator of such non resident could not be sued here, it is obvious that in those cases where the remedy granted by § 52 of the Vehicle and Traffic Law would be most efficacious, the statute may be rendered ineffective by the subsequent death of the non resident motorist."

¹⁰ 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

¹¹ 274 U. S. 352 at 356-7, 47 S. Ct. 632 at 633, 71 L. Ed. 1091 at 1094-5.

¹² *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878).

¹³ A discussion pointing up the trend away from the physical test of jurisdiction, as laid down in *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1915), and a more functional approach may be found in a note in 34 Ky. L. J. 139.

¹⁴ 71 F. Supp. 832 (1947), noted in 2 Ark. L. Rev. 456, 33 Corn. L. Q. 276, 61 Harv. L. Rev. 355, 33 Iowa L. Rev. 407, 19 Miss. L. J. 356, 15 U. of Chi. L. Rev. 451; 57 Yale L. J. 647.

Iowa statute, which had been amended to provide for service on executors and administrators.¹⁵ After the defendant had removed the case to the federal district court on the ground of diversity of citizenship, that court, on its own motion, raised the jurisdictional question and held, after argument, that jurisdiction was lacking because the portion of the statute applying to executors or administrators was invalid. That conclusion was reached on the basis of three principles, to-wit: (1) a judgment against an estate represented by an executor or administrator on a tort committed before decedent's death had to be *in rem* and not *in personam*; (2) any judgment would be unenforceable in the state of domicile of the foreign representative; and (3) no foreign representative has legal standing outside the jurisdiction of his appointment.

The court in the Knoop case apparently conceived that only two types of judgment were possible. One, running against the assets of the estate, would necessarily be an *in rem* judgment, requiring jurisdiction over the res; the other would be *in personam*, but would be against the administrator personally as if he were an administrator *de son tort*. It is apparent that neither type of judgment would be appropriate to cases of this character for the court of suit gets no control over the assets of an estate being administered elsewhere and the legal representative, in all probability, has not made the statutory official his personal agent to accept service in his, the legal representative's, behalf. The case of *Stacy v. Thrasher*,¹⁶ however, sets out a third possibility. The United States Supreme Court there said that the argument that there is privity between an administrator appointed in one state and an executor appointed in another "assumes that the judgment is *in rem* and not *in personam*, or that the estate has a sort of corporate unity or entity. But this is not true in either fact or legal construction. The judgment is *against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care.*"¹⁷ It is clear that it is the more limited type of judgment last mentioned which is appropriately sought in cases like the instant ones, so constitutionality of the statutory amendments here concerned should not be questioned on the first of the grounds used in the Knoop case.

The second argument against validity, one based upon the unenforceability of the judgment in the state of the executor's appointment, has no sound basis in legal reality. It has been held that the effect of a judgment and the constitutionality of jurisdiction should be treated as

¹⁵ Iowa Code Anno., Vol. 15, Tit. 13, Ch. 321, §§ 321.498-9.

¹⁶ 47 U. S. (6 How.) 44, 12 L. Ed. 337 (1848).

¹⁷ 47 U. S. (6 How.) 44 at 60, 12 L. Ed. 337 at 344. Italics added.

two distinct questions.¹⁸ A better approach would be to allow the court in which the judgment must eventually be enforced to settle the question of its effect, leaving the constitutional question of jurisdiction to be passed on by the court in which the action is brought.

It is the third objection, one which rests on the general rule that an executor or administrator is not subject to suit outside the jurisdiction of his appointment,¹⁹ which presents the most serious argument on the negative side of the question here involved. A careful examination of its attributes and legal foundations is, therefore, necessary. The proposition that a foreign executor is not amenable to suit outside the jurisdiction of his appointment owes its existence to the fact that it is a concomitant to the rule which prohibits an executor from bringing suit in a foreign jurisdiction.²⁰ A sort of balancing of equities was thereby created,²¹ but the foundation of the rule prohibiting the bringing of suit by the foreign executor rested on the supposition that the foreign executor would thereby be allowed to withdraw assets to the domiciliary state, subjecting local creditors to possible inequalities in the law of the place of appointment if such local creditors were forced to pursue their remedies in that jurisdiction.²² The case of *Blake v. McClung*,²³ however, has served to dissipate the fear of unequal administration so the rule prohibiting suit by a foreign executor has become so relaxed, by statute, that it is, for all practical purposes, inoperative.²⁴

Notwithstanding this, the corollary which prohibits suit against a foreign executor has remained more inflexible. Some jurisdictions, in retaining this rule, have adopted the attitude that since an executor or administrator derives his authority from the state in which he is appointed, he has no power to act outside of that state in his representative character.²⁵ By following this line of reasoning, the conclusion has been

¹⁸ *Craig v. Toledo, A. A. & N. M. R. Co.*, 30 Ohio S. & C. P. 146, 2 Ohio N. P. 64 (1895).

¹⁹ *Vaughan v. Northrup*, 40 U. S. (15 Pet.) 1, 10 L. Ed. 639 (1841). See also 21 Am. Jur., *Executors and Administration*, § 985; 34 C. J. S., *Executors and Administrators*, § 1012; and note in 27 L. R. A. 101.

²⁰ *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918). See also *Woerner, The American Law of Administration* (Little, Brown & Co., New York, 1899), 2d Ed., § 160.

²¹ *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918); note in 33 Corn. L. Q. 276 at 279.

²² *Story, Conflict of Laws*, 5th Ed., § 512.

²³ 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432 (1898).

²⁴ *Beale, Conflict of Laws*, Vol. 3, § 507.2.

²⁵ *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940); *In re Cowham's Estate*, 220 Mich. 560, 190 N. W. 680 (1922); *In re Thompson's Estate*, 339 Mo. 410, 97 S. W. (2d) 93 (1936). See also *Restatement, Conflicts of Law*, § 512, comment (a), and annotation in 40 A. L. R. 292 (1926).

reached that an essential element of jurisdiction is lacking in a suit against a foreign executor,²⁶ to-wit: a competent defendant; one which cannot be conferred by consent,²⁷ or by personal service within the territorial area of the court.²⁸ It is for this reason that general legislative attempts to subject foreign executors to suit have failed.²⁹ This reasoning, superficially examined, seems quite persuasive, but when it is recalled how the foundation of the rule has been undermined the forcefulness of the argument becomes greatly diminished. This becomes even the more apparent when it is noted that some courts have refused to apply the "limited authority" theory, insisting that the proper basis for the rule is one of comity and convenience in order to protect the orderly administration of estates.³⁰

The rule prohibiting suits against foreign executors has been rendered even less effective as the result of a number of exceptions previously developed. It has been said, for example, that the rule does not apply where a complete failure of justice would result if equity were to withhold relief,³¹ or where the personal representative collects or brings assets into the foreign jurisdiction.³² Further indication tending to show that the rule is not immutable may be found in the fact that where a foreign administrator or executor institutes an action, the weight of authority allows the forum to have jurisdiction to render judgment

²⁶ *Thorburn v. Gates*, 225 F. 613 (1915).

²⁷ *Burrowes v. Goodman*, 50 F. (2d) 92, 77 A. L. R. 249 (1931); *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44, 67 Am. St. Rep. 177 (1897); *Greer v. Ferguson*, 56 Ark. 324, 19 S. W. 966 (1892); *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455 (1849). But see contra: *Newark Savings Inst. v. Jones*, 35 N. J. Eq. 406 (1882). See also annotation in 77 A. L. R. 251.

²⁸ *Scruggs v. Scruggs*, 105 F. 128 (1900); *Security Ins. Co. v. Taylor*, 2 Biss. 446, 21 Fed. Cas. 12 and 607 (1871); *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940); *In re Thompson's Estate*, 339 Mo. 410, 97 S. W. (2d) 93 (1936). Contra: *Laughlin v. Soloman*, 180 Pa. 177, 36 A. 704, 57 Am. St. Rep. 633 (1897).

²⁹ *McMaster v. Gould*, 240 N. Y. 379, 148 N. E. 556, 40 A. L. R. 792 (1925); *Helme v. Buckelew*, 229 N. Y. 563, 128 N. E. 216 (1920). Contra: *Dewey v. Barnhouse*, 75 Kan. 214, 88 P. 877 (1907); *Craig v. Toledo, A. A. & N. M. R. Co.*, 3 Ohio S. & C. P. 146, 2 Ohio N. P. 64 (1895). The New York Court of Appeals, in the instant case, distinguished between the legislation before it and that found in the two New York cases here cited on the ground that the statutes in the latter were too general in application.

³⁰ *Stacy v. Thrasher*, 47 U. S. (6 How.) 59, 12 L. Ed. 343 (1848); *Filer & Stowell Co. v. Rainey*, 120 F. 718 (1903); *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106 (1871); *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918), affirmed in 184 App. Div. 443, 171 N. Y. S. 568 (1918).

³¹ *Kirkbride v. Van Note*, 275 N. Y. 244, 9 N. E. (2d) 852 (1937). See also 24 C. J., *Executors and Administrators*, § 2721; 34 C. J. S., *Executors and Administrators*, § 1013(3).

³² *Sylvania Industrial Corp. v. Lillienfeld*, 132 F. (2d) 887, 145 A. L. R. 612 (1943); *In re Paine's Estate*, 128 Fla. 151, 174 So. 430 (1937); *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926 (1890).

against the foreign executor on a counterclaim.³³ As a form of consent jurisdiction is recognized in such cases, there is little support for the third objection advanced in the Knoop case.

By contrast, both courts concerned in the instant cases predicated the validity of the statutory amendments in question upon a reasonable exercise of the police power, sanctioned by *Hess v. Pawloski*.³⁴ When the limiting phraseology of the amendments, the fundamental purpose of such service statutes, and the valid exercise of the police power are weighed against the frail bases of the negative constitutional arguments heretofore considered, it would appear that the decisions achieved in the instant cases were justified. In addition to what might be termed legal reasons for validity, practical reasons also exist. In the first place, if the deceased non-resident motorist carried automobile liability insurance, the assets of the foreign estate would be protected up to the limits of the policy beside being spared the cost of defending the suit. If the policy or the insurance company should be within the state where the injury arose, there would be little sense in directing the injured person to sue elsewhere.³⁵ Secondly, the expense and inconvenience involved, if the injured person is to be forced to litigate in the state of the executor's appointment, might well deter the bringing of suits which ought to be brought. In the third place, there is no logical reason why the beneficial remedy provided by service statutes of the character in question should be made to depend on the accident of survival in a day when, too frequently, the very acts which give rise to a cause for suit also serve to terminate life.

It must be emphasized, however, that the statutes of a majority of states are incomplete for lack of any amendment similar to the one here discussed. In those jurisdictions, the legislatures should act to protect the remedy. If they do so act, the legislation could readily be sustained by courts willing to take a forthright attitude on the point.

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³³ *Lawrence v. Nelson*, 143 U. S. 215, 12 S. Ct. 440, 36 L. Ed. 130 (1892); *Lackner v. McKechney*, 252 F. 403 (1918); *Palm v. Howard*, 31 Ky. 316, 102 S. W. 267 (1907). See also annotation in 77 A. L. R. 249 (1932).

³⁴ 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). The New York Court of Appeals, in particular, held that consent jurisdiction, as manifested by the amendment, was also possible.

³⁵ See note in 33 *Corn. L. Q.* 276 (1947). In *Furst v. Brady*, 375 Ill. 425, 31 N. E. (2d) 606 (1940), noted in 19 *CHICAGO-KENT LAW REVIEW* 293, an ancillary administrator was allowed to defend the action against the non-resident motorist's estate when the court treated the insurance policy as an asset within the state where the action was brought. This approach, however, offers only a partial solution. It does not cover those cases where the policy is not present and the insurance company is not licensed to do business in the state where the accident occurred. That was the precise situation facing the court in *Leighton v. Roper*, cited in note 1, ante.

BAILMENT—CARE AND USE OF PROPERTY, AND NEGLIGENCE OF BAILEE—WHETHER OR NOT A CONSIGNEE, IN THE ABSENCE OF INSTRUCTION FROM THE CONSIGNOR, HAS A DUTY TO DECLARE THE FULL VALUE OF GOODS RETURNED TO THE CONSIGNOR VIA CARRIER—A novel decision recently handed down by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Kassvan v. Thomas F. McElroy Company*,¹ concerned the duty of a consignee to declare the full value of goods being returned by carrier to the consignor. The defendant therein, a Chicago furrier, had requested the plaintiff, a New York furrier, to ship some furs on approval. Plaintiff shipped some \$4,000 worth of furs to defendant via Railway Express at a declared value of \$400, being approximately ten per cent. of their true value, in conformity with an insurance policy held by plaintiff.² Plaintiff made no offer to pay charges on the return shipment nor were any instructions given concerning the return of the furs, although this was the first transaction of its type entered into between the parties. The defendant, finding the furs were not of the type desired, returned the shipment the same day at a declared value of \$50, inasmuch as a full declaration of value would have involved an extra shipping charge of several dollars. The furs were lost while en route to the plaintiff and the \$50 value so declared served to limit the carrier's liability for the loss. Plaintiff thereupon instituted an action based on the theory that defendant had been negligent in fixing the reduced valuation rather than a full valuation on the merchandise. The trial court agreed with plaintiff and awarded a judgment for the full value of the furs less the amount collected from the carrier. The Circuit Court of Appeals reversed and remanded with an instruction that the complaint be dismissed.

The relationship developed between the parties was obviously one of a bailment for mutual benefit, hence, in attacking this problem, it is reasonable to start with the basic assumption that, where goods are sent by one to another, the bailee-consignee must use reasonable care both in safeguarding and in returning the goods.³ The problem, therefore, becomes one as to precisely what would, in a factual situation of this character, constitute the exercise of a reasonable degree of care on the part of the bailee-consignee.

Cases involving the consignee's duty to value properly the goods when depositing them with a carrier for return to the consignor have not arisen

¹ 179 F. (2d) 97 (1950).

² The insurance policy stipulated that: "It is understood and agreed that in respect to shipments by Railway Express Agency, the assured will declare to the Express Agency a valuation of 10% of the amount of each shipment." See 179 F. (2d) 97 at 98.

³ *Crescent Bed Co. v. Jonas*, 206 Cal. 94, 273 P. 28 (1928).

too frequently. Those which have arisen have been decided largely on the basis of the particular facts involved so that very little law, in the form of general principles, can be said to have evolved from them. Courts have, however, when deciding this issue, placed emphasis on one or more of four elements. Those elements are (1) the valuation placed upon the goods by the consignor at the time of the original shipment,⁴ (2) whether the consignor placed such valuation upon the goods of his own volition or at the request of the consignee,⁵ (3) the prior course of dealing between the parties insofar as it might tend to establish a common practice,⁶ and (4) the instructions, if any, given by the consignor in regard to the return of the goods.⁷

Illustration of the importance of the valuation placed upon the goods by the bailor-consignor is provided by two decisions. In the case of *Louisville Woolen Mills v. Britt*,⁸ the consignee received no notice that any valuation had been placed on the goods by the consignor when he shipped them. The consignee returned the goods at a nominal valuation and they were lost. When reversing a judgment for the plaintiff-consignor, the court held that, as the consignee had never been informed as to any valuation placed upon the goods by the consignor, the consignee was in no position to make an exact declaration of their value, as a consequence of which he was not liable for their undervaluation.⁹ It is certainly logical to say that a consignee should not be deemed negligent in failing to place a full valuation upon goods when he lacks any notice that the consignor has placed such a valuation thereon at the time of the original shipment. In *Whitehouse Bros. v. S. H. Abbott & Son*,¹⁰ the plaintiff-consignor sent the goods by express at a nominal valuation of \$50 and instructed the defendant to value them at \$50 if they were returned the same way. Despite the fact that the defendant-consignee returned the goods by parcel post at a \$25 valuation, the court held that he was not negligent because, if plaintiff had deemed the valuation to be placed on the goods a matter of importance, the plaintiff would not have directed that the same be sent at the

⁴ *Newman v. Clayton F. Summy Co.*, 133 F. (2d) 465 (1942); *Louisville Woolen Mills v. Britt*, 90 Pa. Super. 517 (1927); *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

⁵ *Rich's, Inc. v. Empire Gold Buying Service, Inc.*, 69 Ga. App. 279, 25 S. E. (2d) 88 (1943); *Graubart v. Posner*, 188 Misc. 722, 68 N. Y. S. (2d) 910 (1947).

⁶ *Northern Assur. Co., Ltd. v. Wolk*, 182 Misc. 112, 49 N. Y. S. (2d) 754 (1944), affirmed without opinion in 269 App. Div. 768, 55 N. Y. S. (2d) 389 (1945).

⁷ *R. C. Read & Co. v. Barnes*, 252 S. W. 224 (Tex. Civ. App., 1923); *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

⁸ 90 Pa. Super. 517 (1927).

⁹ 90 Pa. Super. 517 at 519.

¹⁰ 228 S. W. 599 (Tex. Civ. App., 1921).

nominal valuation.¹¹ Although the consignee had disregarded instructions to some extent, he had placed approximately the same valuation on the goods as had the consignor and it was the latter who had made the first undervaluation.

The second element of significance in matters of this kind is adequately depicted in the cases of *Graubart v. Posner*¹² and *Rich's, Inc. v. Empire Gold Buying Service, Inc.*¹³ In the first of these cases, evidence which tended to prove that the original nominal valuation by the plaintiff-consignor was placed upon the goods at the request of the defendant-consignee was regarded as immaterial by the trial court. A new trial was ordered to determine whether the consignor had, in fact, placed the original nominal valuation of its own volition or because of the request of the consignee. The court held that if the former was true, judgment should be for the consignee as the consignor would then be deemed to have authorized such nominal valuation. On the other hand, if the latter was true, judgment should be for the consignor. In the second case, the original undervaluation had been requested by the consignee upon his order blank. The decision was properly awarded to the plaintiff-consignor on the ground that it would be manifestly unjust to allow the consignee to avoid liability for the undervaluation when it had requested that original undervaluation. To hold otherwise, the court indicated, would allow the consignee, by his own action, to destroy the consignor's remedy against the carrier.

The third element, that is the problem of whether the consignee is negligent in undervaluing the goods when the two parties have consistently undervalued the goods in the course of many previous dealings, was presented in the case of *Northern Assurance Company, Limited v. Wolk*.¹⁴ There, both plaintiff-consignor and defendant-consignee had valued the goods at a mere \$50. They were lost in the course of a return shipment by the consignee. Negligence was said to be lacking in the doing of that which, in fact, these business men had been doing successfully for many years. It can, therefore, safely be said that, where both of the parties have consistently undervalued the goods and the consignor has never objected to the practice, the consignor has impliedly authorized the procedure to be followed. Obvious unfairness would exist in holding the consignee liable for doing that which he had apparently been authorized to do.

Absence of instruction regarding the manner of return can be noted

¹¹ See 228 S. W. 599 at 601.

¹² 188 Misc. 722, 68 N. Y. S. (2d) 910 (1947), noted in 32 Minn. L. Rev. 293.

¹³ 69 Ga. App. 279, 25 S. E. (2d) 88 (1943).

¹⁴ 182 Misc. 112, 49 N. Y. S. (2d) 754 (1944), affirmed without opinion in 269 App. Div. 768, 55 N. Y. S. (2d) 389 (1945).

in the case of *R. C. Read & Company v. Barnes*.¹⁵ The consignor there involved had sent goods by express at a nominal valuation of \$50. They were lost while being returned by the consignee via parcel post uninsured. It was held that, there being no instruction or agreement as to the manner of return, the defendant-consignee was not negligent in the manner in which he returned the goods. Here again it may be noted that the consignor had placed only a nominal valuation on the goods in the original shipment. As no specific instruction was given to the consignee concerning the manner of return, the court had to determine whether the manner pursued amounted to a careless handling of the property. Some reliance was placed on the decision in *Whitehouse Bros. v. S. H. Abbott & Son*,¹⁶ previously noted, wherein a low valuation had been fixed by the consignee despite instruction, but the outcome of the case was in favor of the consignee. It might be said, from these holdings, that the valuation placed upon the goods by the consignor at the time of the original shipment is more important, in determining the consignee's duty of valuation, than is the absence or presence of any certain instruction on the point. May it not be that the consignor's conduct operates as a tacit instruction to the consignee to do likewise?

A closely analogous situation is to be found in the duty of valuation that is placed upon a bailee who has received the goods by personal delivery from the bailor and has agreed to return them. If the bailee, under a duty to return, should for some reason decide to send the goods by carrier, rather than to deliver personally to the bailor, the bailee then becomes the consignor. Under such circumstance, it is not unreasonable for a court to hold that the bailee would be negligent if he undervalued the goods at the time of placing them with the carrier.¹⁷ It must be remembered that the bailee then makes the initial move in the situation and lacks any similar act of the bailor to follow.

Returning to the instant case, attention is directed to the fact that the court therein concerned believed that to require the consignee-defendant to place a full valuation upon the furs at the time of the return shipment, when the consignor-plaintiff had not done so in the original shipment, would be to require the defendant to exercise a higher degree of care in respect to the plaintiff's property than the plaintiff had been willing to exercise in the first instance.¹⁸ Upon a review of all of the cases, therefore, it would seem that the result achieved would be the only logical one to be

¹⁵ 252 S. W. 224 (Tex. Civ. App., 1923).

¹⁶ 228 S. W. 601 (Tex. Civ. App., 1921).

¹⁷ *Schlesinger v. Lennon*, 145 N. Y. S. 929 (1914); *Rhind v. Stake*, 28 Misc. 177, 59 N. Y. S. 42 (1899).

¹⁸ 179 F. (2d) 97 at 100.

attained. Where the consignee has been held liable, some aspect of fault on his part has been present. In the instant case, the consignee did nothing wrong. He only undervalued the goods as the consignor had done before him.¹⁹ He had been given no specific instruction as to how to value the goods. He had not requested the consignor to undervalue the property at the time of the original shipment. He had been furnished with no guide from any prior course of dealing between the parties which could be said to have established a practice for either full valuation or undervaluation. In the light of these facts, the court was right in placing the risk of loss on the person who took the initiative in the undervaluation.

J. KIRKLAND

CARRIERS—CARRIAGE OF GOODS—EFFECT OF FAILURE OF SHIPPER TO FURNISH CARRIER WITH WRITTEN NOTICE OF DAMAGE TO GOODS WITHIN TIME FIXED BY TERMS OF BILL OF LADING—Two recent cases arising within the state of Illinois deal with the problem of the effect to be given to a failure on the part of the shipper to give written notice to the carrier, pursuant to provisions contained in the bill of lading, of damage done to goods shipped. In the first of these cases, that of *Hopper Paper Company v. Baltimore & Ohio Railroad Company*,¹ the plaintiff, on August 10th, delivered a carload of paper to defendant for carriage by rail. A railway wreck, involving two of defendant's trains, led to an almost total destruction of the carload of paper.² On August 18th, the carrier advised the consignor by wire that the paper had been destroyed. On the following July 30th, defendant received a letter from the consignor to which was attached a written claim for the loss. In a suit filed in the United States District Court following such demand, the defendant asserted, by way of defense, that no claim in writing had been received by it within nine months after failure to make delivery, as was required both by statute³ and by the uniform bill of lading there utilized. Judgment in the lower court, however, was given for the plaintiff and, on appeal, the decision was affirmed by the Court of Appeals for the Seventh Circuit.

¹⁹ It is true that the valuation fixed by the consignee was \$350 smaller than the one chosen by the consignor and required by the insurance policy. The consignor's action was predicated on the assumption that the consignee was negligent in not placing a full valuation on the goods. An alternative count, based on a failure on the part of the consignee to follow the valuation fixed by the consignor, might have succeeded as the difference between the figures was substantial, much more so than the difference noted in *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

¹ 178 F. (2d) 179 (1949).

² Salvage from the wreck was sold by the defendant, without the plaintiff's knowledge, but no accounting was made of the proceeds.

³ 49 U. S. C. A. § 20(11).

In the second case, that of *Berg v. Schreiber*,⁴ the plaintiff had purchased a shipment of jeep parts and had arranged to have the same delivered via the defendant's truck line. The defendant was a common carrier operating under a tariff rate and a uniform bill of lading approved by the Interstate Commerce Commission. Upon delivery, plaintiff discovered the presence of damage and so notified the defendant. An insurance adjuster, acting on behalf of the defendant, made a list of the damaged parts in conjunction with one of the plaintiff's men, which list was given to the plaintiff with a request that plaintiff file a written claim of loss based thereon. No such written claim was filed but suit was instituted to recover the amount of the damage suffered. Judgment thereon in the trial court favored the plaintiff, but was reversed in the Appellate Court for the First District on the basis of a failure to file a claim in writing within nine months.⁵ After granting leave to appeal, the Illinois Supreme Court agreed with the reversal and ordered the suit be dismissed.

Before further analysis of the problem is made, it might be well to note that the federal court, in the first case, was of the opinion that the statute involved was not a limitation law enacted for the special protection of interstate carriers but was, rather, a statute designed to provide carriers with such knowledge and information as would enable them to make prompt investigation.⁶ It believed, therefore, that a failure to give written notice of a claim for damage or loss, in accordance with the stipulation in the shipping contract, could either be excused or be disregarded where the carrier had, or was chargeable with, actual knowledge of all of the conditions and circumstances.⁷ The Illinois Supreme Court, on the other hand, relying on parts of the same precedent cited by the federal court,⁸ reached the conclusion that the parties could not

⁴ 405 Ill. 528, 92 N. E. (2d) (1950), affirming 337 Ill. App. 477, 86 N. E. (2d) 125 (1949). Tuohy, J., dissented to the opinion in the Appellate Court. It is understood that a petition for a writ of certiorari is pending before the United States Supreme Court.

⁵ No bill of lading had been used, but a uniform bill had been adopted and placed on file with the Interstate Commerce Commission.

⁶ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915).

⁷ In general, see 13 C. J. S., Carriers, § 240(a), p. 487.

⁸ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915). As the Blish case appears to be one of leading significance, it might be well to set out the facts thereof. The plaintiff there had shipped a carload of flour. The consignee found the flour to be rancid and returned the same to the carrier which wired plaintiff for instructions. Several telegrams passed between the parties, in the last of which plaintiff made claim for the value of the entire car. A judgment for plaintiff was affirmed on the basis that the telegrams between the parties, being properly identified to link up with the particular shipment, accomplished the statutory objective of providing reasonable notice.

waive the terms of the contract, so that the provisions of the uniform bill of lading controlled the outcome of the case. The seeming inconsistency in the two decisions produces a question as to whether or not the two cases are diametric opposites or whether there is some basis for distinction between them.

At common law, carriers were held to strict accountability for damage done to goods or for failure to deliver the same, an attitude based not so much upon contractual terms as on a public policy designed for the protection of the shipper. In 1915, Congress enacted the Carmack amendment to the Hepburn Act of 1906,⁹ one designed to abrogate the common law doctrine by putting in its place certain uniform statutory rules as to liability growing out of a breach of duty or default on the part of the carrier¹⁰ and also to supersede special regulations and policies upon the subject which had grown up in certain of the states or by contract.¹¹ While the statute purported to forbid the carrier from exacting any more drastic terms designed to limit or lessen its liability than those enumerated, a practice developed, through the use of a uniform bill of lading, suitably worded, of turning those limitations into stipulations binding on the shipper.¹² By so doing, a question developed as to whether or not these provisions became so absolute that they could not, under any cir-

⁹ Section 20(11) of 34 Stat. 593 (June 29, 1906), was amended on March 4, 1915, and again amended on August 9, 1916, by what is commonly known as the second Cummins Amendment. Subsequent amendments occurred on Feb. 28, 1920; July 3, 1926; March 4, 1927; April 23, 1920; and Sept. 18, 1940. The statute presently reads: "That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice." See 49 U. S. C. A. § 20(11). It will be noted that the only requirement for a *written* notice, under this provision, is one imposed on the carrier, not the shipper.

¹⁰ The Congressional purpose is explained in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1912). See also *Atlantic Coast Line R. Co. v. Sandlin*, 75 Fla. 539, 78 So. 667 (1918); *Missouri O. & G. Ry. Co. v. French*, 52 Okla. 222, 152 P. 591 (1915).

¹¹ See *New York, P. & N. R. Co. v. Peninsular Produce Exch. of Md.*, 240 U. S. 34, 36 S. Ct. 230, 60 L. Ed. 511 (1915); *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 S. Ct. 715, 59 L. Ed. 1137 (1915); *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868 (1913); *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 34 S. Ct. 380, 58 L. Ed. 703 (1913).

¹² See, for example, the provision set out in the opinion in *Berg v. Schreiber*, 405 Ill. 528 at 531, 92 N. E. (2d) 88 at 89 (1950). The bill there, in part, read: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss, damage, injury or delay occurred, within nine months after delivery of the property . . . or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. . . . Where claims are not filed . . . in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

cumstance, be waived or ignored, so as to prevent the possibility of discrimination between shippers.

In that connection, courts are generally agreed that where no notice of any sort has been given to the carrier, who is, as a consequence, unaware of the damage which might have been done, no waiver or estoppel will be considered.¹³ This strict view is proper, for abuse could readily creep in if clear contract terms are to be utterly disregarded. On the other hand, where notice of a sort has reached the carrier, but it is claimed to be inadequate, two views have been developed as to the necessity for strict compliance. Courts are inclined to say, in these situations, that the issue is one of a practical problem to be dealt with in a practical way, but they are not in agreement concerning the sufficiency of the practical measures used in particular cases. Under one line of development, if there has been a substantial compliance with the purpose to be subserved by the giving of notice, the necessity for formal written notice will be excused, but the compliance must be "substantial."¹⁴ In direct contrast, other courts have held that if written notice is required by the bill of lading, oral notice will not suffice even though it would be sufficient if such requirement had not been imposed.¹⁵

Illustrative of the second of these attitudes is the case of *Southern Pacific Company v. Stewart*¹⁶ in which plaintiff's shipment of cows had been destroyed in transit and while in the defendant's pens. Written notice was supposed to be given but none was furnished. The defendant's agents, however, had clear actual knowledge of the facts, had shown concern over the cattle during the trip, and had even been negotiating for a settlement of plaintiff's claim. The court, apparently, could see nothing in the case but the requirement that the claim should be made in writing, for which reason it refused to make allowance for any waiver or to consider the possibility of compliance in the form of oral conversations. A similar result was attained in *Chicago, St. Paul, Minneapolis*

¹³ *Chicago, R. I. & P. Ry. Co. v. McElreath*, 69 Okla. 9, 169 P. 628, L. R. A. 1918C 425 (1917).

¹⁴ *Kidwell v. Oregon Short Line R. Co.*, 208 F. 1 (1913); *Cohen v. Southern Ry. Co.*, 358 Ill. 532, 193 N. E. 480 (1934); *Waxelbaum v. Southern Ry. Co.*, 168 Ill. App. 66 (1912); *E. H. Emery Co. v. Wabash R. Co.*, 183 Iowa 687, 166 N. W. 600 (1918); *Cudahy Packing Co. v. Bixley*, 199 Mo. App. 589, 205 S. W. 865 (1918); *Bond Stores v. Overland Package Freight Service*, 171 Misc. 135, 13 N. Y. S. (2d) 928 (1939); *Union P. Ry. Co. v. Pacific Market Co.*, 27 Wyo. 501, 200 P. 108 (1921).

¹⁵ *Manby v. Union P. Ry. Co.*, 10 F. (2d) 327 (1926); *Lewis v. Roth*, 328 Ill. App. 571, 66 N. E. (2d) 510 (1946); *Louisville & N. R. Co. v. Patton*, 288 Ky. 450, 156 S. W. (2d) 474 (1941); *Carbie Mfg. Co. v. Western Exp. Co.*, 149 Minn. 467, 184 N. W. 35 (1921); *Mt. Arbour Nurseries v. American R. Exp. Co.*, 221 Mo. App. 241, 300 S. W. 1051 (1928); *Schaff v. Ike Exstein & Bro.*, 270 S. W. 589 (Tex. Civ. App., 1925).

¹⁶ 248 U. S. 446, 39 S. Ct. 139, 63 L. Ed. 350 (1919).

& *Omaha Railway Company v. Kileen*¹⁷ where the carrier sued to collect freight charges and the shipper filed a counterclaim for damage done to the goods. The counterclaim was resisted on the basis that no notice had been given within nine months and the court agreed even though the carrier had offered to adjust the claim and one of its adjusters had inspected the cars. It was there held that the clause in the bill of lading requiring written notice was not against public policy, was one which, generally, could not be waived because of the possibility of abuse, and that the carrier could not be estopped from asserting non-compliance as a defense, otherwise the door would be opened to the possibility of widespread discrimination.

Aside from the question as to whether the statutory provisions were not more nearly aimed at discrimination by carriers against shippers, rather than in favor of the latter, it might be said, in answer to holdings of the character mentioned, that the fundamental reason for a stipulation requiring written notice of a claim for damages is not one to provide a carrier with an escape from a just liability, but to convey reasonable information to it that a shipment has been damaged, so as to give it a chance to examine and determine the extent of the injury.¹⁸ That idea is concisely expressed in the opinion in the first of the instant cases.¹⁹ The court there said: "Concededly, one of the principal evils at which the Act was aimed was discrimination by carriers. . . . But permitting knowledge to supply the written notice is not discrimination, nor is it a preference in favor of a particular shipper at the expense of the others. *It is a mode of proof, applicable alike to all railroads and in favor of all shippers.*"²⁰ It, therefore, permitted the presence of actual knowledge to override the failure to furnish written notice.

If the stipulation as to notice is "addressed to a practical exigency and is to be construed in a practical way,"²¹ and if it is not "to be the spirit or intention of the time-limiting clause that any formality or technical exactness be required, but that it is merely intended to give

¹⁷ 243 Wis. 161, 9 N. W. (2d) 616 (1943). See also *L. M. Kirkpatrick Co. v. I. C. Ry. Co.*, 190 Miss. 157, 195 So. 692, 135 A. L. R. 607 (1940). In the Illinois case of *Lewis v. Roth*, 328 Ill. App. 571, 66 N. E. (2d) 510 (1946), the court likewise held that no waiver of the provision could be considered.

¹⁸ *St. Louis, I. M. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917 (1916); *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915); *Minot Beverage Co. v. Minneapolis & St. L. R. Co.*, 65 F. Supp. 293 (1946); *Cohen v. Southern Ry. Co.*, 358 Ill. 532, 193 N. E. 480 (1934); *Babbitt v. Grand Trunk Western R. Co.*, 285 Ill. 267, 120 N. E. 803 (1918).

¹⁹ *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F. (2d) 179 (1949).

²⁰ 178 F. (2d) 179 at 182.

²¹ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190 at 198, 36 S. Ct. 541, 60 L. Ed. 948 at 953.

reasonable notice to the railroad company while the facts are still fresh, in order to permit a reasonable investigation and examination of the claim,"²² there is every reason why the extreme formalism observed in the cases mentioned, and insisted upon by the Illinois Supreme Court, should be rejected. Three fairly recent cases, in addition to the decision in the Hopper Paper Company case, seem to suggest a trend away from that view,²³ a trend which the Illinois court does not seem to have noticed²⁴ but one which ought to be followed where the carrier is conscious of the harm which has been inflicted.

M. J. GLINK

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER AN EMPLOYER'S PROMISE TO PAY HIS EMPLOYEES WHILE THEY WERE IN THE ARMED SERVICES BECAME A BINDING LEGAL OBLIGATION WHEN AN EMPLOYEE, RELYING UPON THE PROMISE, REMAINED ON THE JOB UNTIL HE ENTERED THE ARMED FORCES—The Superior Court of Pennsylvania recently considered and decided the problem expressed in the foregoing title when it passed on the case of *Mickshaw v. Coca Cola Bottling Company, Incorporated, of Sharon, Pennsylvania*.¹ The defendant corporation had publicly announced, at the start of conscription of men prior to World War II, that it would pay its employees the difference between the pay that they would receive while in the armed forces and the average monthly wage which they had received at the bottling plant before they were drafted. The plaintiff remained in the employ of the defendant for approximately two years before he received a notice to report for a physical examination prior to induction. He quickly joined the Coast Guard and spent thirty-seven months in active service. Upon his return, he resumed his job with the defendant and subsequently brought suit for the difference in wages as promised. The Pennsylvania court, after stating that it could find no cases in this country directly in point, affirmed a judgment of the trial court in favor of the plaintiff. In arriving at that holding, the court found that consideration for the promise was present. It said that it could take judicial notice of the fact that many new war industries sprang up in the early days of World War II and that there was great opportunity for the average worker to get a higher wage in a war production plant. By

²² *Cohen v. Southern Ry. Co.*, 358 Ill. 532 at 540, 193 N. E. 480 at 483.

²³ *Minot Beverage Co. v. Minneapolis & St. L. R. Co.*, 65 F. Supp. 293 (1946); *Louisville & N. R. Co. v. Patton*, 288 Ky. 450, 156 S. W. (2d) 474 (1941); *Indiana Harbor Belt R. Co. v. Alpirin*, 139 Neb. 14, 296 N. W. 158 (1941).

²⁴ The holding in *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F. (2d) 179 (1949), does not seem to have been brought to the attention of the Illinois Supreme Court at the hearing of the appeal in *Berg v. Schreiber*.

¹ 166 Pa. Super. 148, 70 A. (2d) 467 (1950).

remaining with the defendant company in reliance upon its promise, the plaintiff was said to have forborne a valuable right. As the defendant was said to have bargained for this forbearance and, in return, had secured the benefit of good will in the community, of better employee morale and loyalty, and of opportunity to keep operating during a period of scarcity of labor, the circle of consideration was said to be complete.

Having thus found consideration to be present, the Pennsylvania court went on to cite two English decisions to lend support for the position taken.² The two cited cases, along with a third,³ arose under somewhat similar circumstances during the first World War. They are not precisely the same, however, for the act there requested by the promisor was different. In each instance, the offer appears to have been made in patriotic haste to encourage voluntary enlistment in His Majesty's service rather than with an eye toward keeping men on the job. The consideration found to support those promises lay in the act of enlisting, even though, in one instance, the plaintiff had enlisted counter to the wishes of his managers, who wanted him to stay on the job for a while longer. It was said that an offer had been communicated to the employees, pursuant to a corporate resolution, which, being accepted by the plaintiff's act of enlisting, became binding upon the defendant and incapable of unilateral alteration.

Although the court in the principal case cited only English decisions, several excellent analogous situations dealt with in the United States would have added support to the court's finding, situations growing out of offers to pay extra benefits to employees over and above the regular wage paid for working. Those that primarily warrant consideration are the bonus, the pension, and the death benefit cases. Employers who have made such offers, and have later refused to perform, have defended against suits brought on such offers on the proposition that the offers concerned were for the payment of gratuities. Courts have, therefore, been faced with the problem of finding a binding consideration in order to be able to enforce such promises against the offerors.⁴

The first of these analogous examples which seems most appropriate to the instant case is the bonus situation. From a practical standpoint, it would be possible to say that what the ex-serviceman in the present case received was an offer of a bonus providing he would remain on the job until he was called into service. Where an employer, by the offer of a bonus, has sought to reserve the continuous faithful service of those of his

² *Davies v. Rhonda District Urban Council*, 87 L. J., K. B. 166 (1917); *Budgett v. Stratford Cooperative and Industrial Society, Ltd.*, 32 Times Law R. 378 (1916).

³ *Shipton v. Cardiff Corporation*, 87 L. J., K. B. 51, 116 L. T. 687, 1917 W. N. 175 (1917).

⁴ 56 C. J. S., *Master and Servant*, § 169, p. 828.

employees who are not bound by an employment contract for a definite term, courts have had little trouble in finding consideration present wherever the employee has relied on the promise and has continued to work for the promisor.⁵ A more difficult question is presented when the employee, to whom the offer of a bonus payable at the end of a certain period is made, is already under a binding contract to work for that period. As the employee is already under a pre-existing obligation to perform, he can hardly be said to give any consideration, hence the offer would be for a mere gratuity without binding effect.⁶

Akin to the bonus problem, is the pension question with its query as to whether or not continued service in reliance upon the offer of a pension amounts to good consideration to enforce such an offer. Pension promises of this type are generally held to amount to enforceable contracts.⁷ Perhaps the leading case in this field is that of *Schofield v. Zion's Co-operative Mercantile Institution*.⁸ The defendant company there set up a pension plan for its employees with the stated purpose to promote the welfare of the officers and employees of the institution and thereby to encourage long and faithful service. Retirement age under the plan was set at sixty-five and the pension rate was to be based on the salary and length of service, but the plan specifically provided that no employee was to obtain any legal right thereunder. After the plaintiffs had been pensioned at the rate originally provided, the defendant tried to reduce the monthly allotment. Plaintiffs' claim to a vested right to the original amount was met by defendant's

⁵ *Scott v. Duthie*, 125 Wash. 470, 216 P. 853, 28 A. L. R. 328 (1923). The defendant therein made the following offer: "For the purpose of inducing general department foremen of this company to continue their work with this company and to refrain from accepting work elsewhere until this company shall complete ships which it has contracted to build for the United States, J. F. Duthie & Co. promises the general department foremen now in its employment, that upon completion of the contracts, the company will divide one-half million dollars among the foremen who continue till completion of the contract."

⁶ *Hilde v. International Harvester Co. of America*, 166 Minn. 259, 207 N. W. 617 (1926), and annotation in 28 A. L. R. 331. But see contra *Black v. W. S. Tyler Co.*, 12 Ohio App. 27 (1917), and *Andrews v. Bellman*, 50 S. D. 21, 208 N. W. 175 (1926), where the court indicated that the employee would have stayed on the job anyway even if a bonus had not been offered, hence did nothing additional to form the basis of consideration. In the *Black* case, the employee was discharged because his department was discontinued before the dividend became payable. For a complete discussion on the point as to whether there is consideration for a change in the terms of employment, see 158 A. L. R. 231.

⁷ An extensive annotation in 96 A. L. R. 1093 covers the cases. In *Cowles v. Morris & Co.*, 330 Ill. 1, 161 N. E. 150 (1928), the court assumed that a pension scheme constituted an enforceable contract but held that the promisor was not obligated to stay in business until all pensions were fully paid.

⁸ 85 Utah 281, 39 P. (2d) 342, 96 A. L. R. 1083 (1934), noted in 34 Mich. L. Rev. 420. See also *Hunter v. Sparling*, 87 Cal. App. (2d) 711, 197 P. (2d) 807 (1948), in which the court stated that it is the general rule throughout the country that continued service after knowledge of a pension plan constitutes ample consideration for the employer's promise to pay.

assertion that there was no contractual relationship but only an offer for a mere gift which could be changed at will. The court said: "Clearly, such facts, circumstances, and history do not evidence an offer of a gratuity, but an offer to pay certain sums when plaintiffs shall have completely performed a certain set of acts, offered as an inducement to them to perform the acts, and given as a consideration for their complete performance. When the plaintiffs had completely performed their obligation and the board of pensions had determined their right to pension, made allowance thereof, and retired them, the contract was complete and binding, and not subject to modification by the company without consent of plaintiffs."⁹

Along with the bonus and pension situations, is another type of employee benefit plan which provides helpful analogy for the instant case. An employer may offer a death benefit plan by which he promises to pay the employee's designated beneficiary a fixed sum upon the death of the employee provided the employee shall remain in the service of the employer. Foremost among the cases involving that issue is *Tilbert v. Eagle Lock Company*.¹⁰ The corporate defendant there issued certificates to its employees which certificates were payable to the named beneficiary upon the death of the employee. The motive for issuance, as advertised, was to maintain efficiency and loyalty on the part of the employees but, by express wording, the certificates were not to confer any legal right. The plaintiff's husband, an employee, died a few hours before a notice of revocation of the plan was published. In a suit that followed upon refusal to honor the certificate, the company defended on the ground of an absence of consideration. Judgment was rendered for the beneficiary, however, when the court held that, regardless of the wording of the certificate, the same amounted to a promise which became binding when accepted inasmuch as the deceased employee, by forbearing the right to terminate his employment, had conferred a benefit upon the corporate defendant. It may, in fact, be said that courts appear to have little trouble in finding an executed consideration for the unilateral contracts involved in such cases despite the purported disclaimer of legal liability which typically accompanies the offer.¹¹

In all of the foregoing analogies, the courts have found that the servant or employee gave up a definite right by refraining from seeking employment elsewhere while feeling confident that each would receive additional remuneration for remaining on the job. It is, of course, hornbook law that either a benefit to the promisor or a detriment to the promisee

⁹ 85 Utah 281 at 288, 39 P. (2d) 342 at 345.

¹⁰ 116 Conn. 357, 165 A. 205 (1933).

¹¹ See, for example, *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N. E. 697 (1935), noted in 49 Harv. L. Rev. 148.

will be sufficient consideration for a contract,¹² hence the consideration is clearly sufficient where there is both a benefit to the promisor as well as a detriment to the promisee. That there was a detriment to the workman in the instant case when he gave up his right to find employment under better economic conditions cannot be doubted. He gave up a very valuable right when, under the conditions of wartime inflation, he remained at a bottling plant in a non-essential industry for only an average salary. He not only passed up the possibility of a higher paying job but also the chance at draft deferment as an employee in a war plant. Along with that detriment to the promisee, there was also a distinct benefit to the promisor in the fact that the corporation was getting what it desired, in return, by way of advertising and satisfactory service. As it bargained for this continued service, it is not unreasonable to suppose that what it received as a consequence of its undertaking must have been regarded as beneficial to the corporation.

There is also the possibility of going a step beyond the concept of acceptance of a unilateral offer, by act and forbearance, and finding a binding contract by making use of the doctrine of promissory estoppel.¹³ In *Hunter v. Sparling*,¹⁴ for example, the California Appellate Court used that doctrine as an alternative ground upon which to enforce a pension plan, and a lower court in Pennsylvania has done the same thing.¹⁵ Even though that doctrine seems to be firmly established in the law of Pennsylvania,¹⁶ the court in the instant case rightly based its decision on a consideration to be found in a bargained-for forbearance. Promissory estoppel, by contrast, is generally applicable to cases wherein one has suffered a detriment in reliance upon an unbargained-for promise.¹⁷

It may occasion some surprise that there have not been more cases in the nature of this one when it is remembered that no small number of civilians left their jobs to enter the armed services. Many firms undoubtedly made good on their promises. If some did not, it is possible that

¹² 12 Am. Jur., Contracts, § 79, p. 570.

¹³ Restatement, Contracts, Vol. 1, § 90, declares: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

¹⁴ 87 Cal. App. (2d) 711, 197 P. (2d) 807 (1948).

¹⁵ *Langner v. Superior Steel Corp.*, 105 Pa. Super. 579, 161 A. 571 (1932), reversed on other grounds in 318 Pa. 490, 178 A. 490 (1935). But compare with *Umshler v. Umshler*, 332 Ill. App. 494, 76 N. E. (2d) 231 (1947), and *Shear Co. v. Harrington*, 266 S. W. 554 (Tex. Civ. App., 1924).

¹⁶ In addition to the case cited in note 15, ante, see *Fried v. Fisher*, 328 Pa. 497, 196 A. 39, 115 A. L. R. 147 (1938).

¹⁷ Snyder, "Promissory Estoppel in New York," 15 Brooklyn L. Rev. 27 (1949).

returning servicemen did not wish to jeopardize steady jobs by bringing actions to recover the benefits offered. Many employers, of course, did not have to resort to the making of bonus offers as the government saw to it that essential man-power was kept in vital work until needed elsewhere. It is comforting to know, however, that established legal doctrines are adequate to deal with problems of this character should a recurrence thereof arise in the future.

J. A. STANEK

STATUTES—PLEADING AND EVIDENCE—WHETHER OF NOT A STATUTE MAY BE IMPEACHED BY EVIDENCE ALIUNDE THE LEGISLATIVE JOURNAL—It was recently held, in the Indiana case of *State of Indiana ex rel. Cline v. Schricker*,¹ though not without dissent, that acts passed by a state legislature, but passed after the date indicated in the state constitution for the final adjournment of that body had been reached,² were constitutional. The legislature accomplished the apparent impossibility of extending its existence by the simple and time-honored expedient of stopping the clock in the assembly room shortly before the constitutionally authorized time for the session had expired and by not starting the clock again until the acts in question had been passed. The presiding officers of both branches of the Indiana legislature attested and certified that the bills were genuine and correct, which fact also appeared, at least superficially, from the journals of the Senate and of the House. On suit by the state at the relation of a resident to challenge the validity of these acts, a majority of the Indiana Supreme Court affirmed the holding of a lower court that such authentication was substantially conclusive of the fact that the laws were passed in conformity with the state constitution. Justice Gilkinson dissented on the ground that the constitutional provision concerning adjournment was self-executing and necessarily rendered the acts void. He agreed, with the majority, that proper authentication of an enrolled act is conclusive, as a matter of law, but felt that the acts in question were not properly authenticated because the authority of those purporting to attest thereto had expired prior to the passage of the bills.

The decision achieved in the instant case is the result of an application of the principle of the separation of powers to a comparatively novel

¹ — Ind. —, 88 N. E. (2d) 746 (1950), rehearing denied 89 N. E. (2d) 547 (1950). Gilkison, J., wrote a dissenting opinion.

² Ind. Const. 1859, Art. IV, § 29, states: “. . . No session of the General Assembly, except the first under this constitution, shall extend beyond the term of sixty-one days, nor any special session beyond the term of forty days.”

set of facts. It is disputed by no one that each department of both the federal and the state government has certain fields in which its powers are without enforceable constitutional limitation. Arguments do arise, however, when it becomes necessary to define those fields, for certain aspects of legislative procedure lie beyond the realm of judicial review. In that regard, provisions may be found in every constitution governing the procedure of the legislature. Some of these provisions may be classified as being of mandatory character, enforceable by the judiciary, while others are directory only, hence unenforceable before the courts.³ The construction given to, and application of, a particular constitutional limitation will depend first upon the language used and secondly upon the ability of a given court to determine whether there has been a breach of that limitation.⁴

All courts feel that the ability to review legislative procedure is restricted to some extent. Most courts will not look behind an enrolled bill to determine whether proper legislative procedure has been followed for they consider the enrolled bill to be conclusive on the point.⁵ Justification for this majority view is said to be found in the fact that the legislative journals are frequently inaccurate, perhaps quite often falsely kept, and that an exercise of control by the judiciary over legislative procedures would require a violation of the principle of separation of powers leading to the assumption, by the judiciary, of ultimate control over all other departments of government.⁶ A substantial minority of jurisdictions, however, do allow resort to be made to the legislative journals, at least to some extent. Most of them will permit the journal to have control over the enrolled bill,⁷ but a few will consult the journal only to determine if there has been compliance with an affirmative constitutional requirement that certain matters be entered thereon.⁸ The reasoning

³ See Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931).

⁴ *Ibid.*, particularly p. 80.

⁵ See *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892); *Allen v. State*, 14 Ariz. 458, 130 P. 1114 (1915); *State ex rel. Hammond v. Lynch*, 169 Iowa 148, 151 N. W. 81 (1915); *Weeks v. Smith*, 81 Me. 538, 18 A. 325 (1889); *Kelly v. Marron*, 21 N. M. 239, 153 P. 262 (1915); *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893).

⁶ Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931), at p. 68.

⁷ *Freeman v. Simmons*, 107 Fla. 438, 145 So. 187 (1932); *Cahn v. Kingsly*, 5 Ida. 416, 49 P. 985 (1897); *Worthy v. Bush*, 262 Ill. 560, 104 N. E. 904 (1914); *Scott v. State Board of Assessment and Review*, 221 Iowa 1060, 267 N. W. 111 (1936); *City of Belleville v. Wells*, 74 Kas. 823, 88 P. 47 (1906); *Stetter v. State*, 77 Neb. 777, 110 N. W. 761 (1906); *Ritchie v. Richards*, 14 Utah 345, 47 P. 670 (1896); *State v. Swan*, 7 Wyo. 160, 51 P. 209 (1897).

⁸ *Amos v. Mosely*, 74 Fla. 555, 77 So. 619 (1917); *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750 (1888); *Palatine Ins. Co. v. Northern Pac. Ry. Co.*, 34 Mont. 268,

of this minority has been well expressed, in its behalf, by Judge Cooley. He once wrote that “. . . courts tread upon very dangerous ground when they venture to apply rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done.”⁹

Irrespective of whichever of the above rules should be the one to follow, courts are practically unanimous in disallowing the impeachment of a bill by evidence *aliunde* the journal.¹⁰ They feel that the adoption of a contrary view would destroy the confidence people now have in legislative action, would put an insuperable burden on those attempting to live under the laws of the state, and would tend to validate a confusing welter of evidence of doubtful character. They have, therefore, rejected extrinsic evidence designed to disclose a failure to comply with constitutional provisions such as those which require that a certain number of readings be given to a bill, which call for publication of notice of consideration of special laws, or demand the taking of many other purely procedural steps.¹¹

To disallow evidence *aliunde* the journal to impeach a fraudulent bill would seem to be an extension of the rule beyond its logical bounds, but some courts have done just this and, in so doing, have closed their eyes to a variety of legislative legerdemain. In the case of *Clough v. Curtis*,¹² for example, the time allowed by a federal statute for the term of a territorial legislature had expired and the speaker had adjourned the legislature *sine die* without objection. After the speaker and some of the legislators had departed, those who remained behind destroyed the minutes, authorized an entry to the effect that the speaker had left the chair while the legislature was in session, elected a speaker *pro tem*,

85 P. 1032 (1906); *Rash v. Allen*, 1 Boyce (N. J.) 444, 76 A. 370 (1910); *Town of Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903); *Board of Com'rs v. Call*, 123 N. C. 308, 31 S. E. 481 (1898).

⁹ Cooley, *Const. Lim.*, 8th ed., p. 159.

¹⁰ *Byrd v. State*, 12 Ala. 266, 102 So. 223 (1924); *Road Improvement District v. Sale*, 154 Ark. 551, 243 S. W. 825 (1922); *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *State v. Carlen*, 89 Fla. 361, 104 So. 577 (1925); *Speer v. Mayor of Athens*, 85 Ga. 49, 11 S. E. 802 (1890); *Hoppel v. Brethaner*, 70 Ill. 166 (1873); *Wheeler v. Board of Com'rs*, 245 Ky. 388, 53 S. W. (2d) 740 (1932); *Bethlehem Supply Co. v. Pan. Southern Petroleum Corp.*, 207 La. 149, 20 So. (2d) 737 (1944); *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203 (1887); *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675 (1907); *State v. Armour Packing Co.*, 135 N. C. 62, 47 S. E. 411 (1904); *Ritzman v. Campbell*, 5 Ohio 358, 112 N. E. 591 (1915); *McNeal v. Ritterbusch*, 29 Okla. 233, 116 P. 778 (1911); *White v. Hinton*, 3 Wyo. 753, 30 P. 953 (1892).

¹¹ In general, see annotation in 40 L. R. A. (N. S.) 30.

¹² 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

and proceeded to enact certain disputed legislation. In a suit by the speaker to compel the secretary of the territory to correct the minutes, the court held the legislative journal conclusive.¹³ In another case, that of *Capito v. Topping*,¹⁴ it was held that evidence could not be introduced to show that the legislature had actually adjourned two days later than the date recorded in the journal, the question there being one as to whether or not the governor had signed a certain bill within the constitutionally authorized time. Several other cases have disallowed extrinsic evidence tending to prove lack of a quorum,¹⁵ while the case of *Carr v. Coke*¹⁶ held the enrolled bill to be conclusive even in the face of evidence that the signatures thereon had been procured by fraud.¹⁷

There are, however, a few well-reasoned authorities which permit the use of evidence *aliunde* the legislative journal in cases such as those discussed in the preceding paragraphs.¹⁸ In the only other case directly in point with the instant case, that of *State ex rel. Landis v. Thompson*,¹⁹ the Florida legislature continued in session beyond the constitutional term and enacted certain legislation after the date fixed for the expiration thereof. On attack upon this legislation by the state, the court held the measures void, stating that any attempt by the state legislature to continue to act as such after the expiration of the date for adjournment designated in the constitution amounted to a fraud upon the people necessarily exposing such purported legislation to direct attack. Much the same view has been expressed in certain Nebraska cases²⁰

¹³ The court did point out, however, that the decision might have been different had private rights been involved.

¹⁴ 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089 (1909).

¹⁵ *Robertson v. State*, 130 Ala. 164, 30 So. 494 (1901); *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771 (1928); *Amos v. Gunn*, 84 Fla. 285, 94 So. 615 (1922); *Wade v. Atlantic Lumber Co.*, 51 Fla. 638, 41 So. 72 (1906); *Norman v. Kentucky Bd. Managers World's Columbian Exposition*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556 (1892).

¹⁶ 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737 (1895).

¹⁷ The decision would seem unsound in that the evidence went to deny the existence of an enrolled bill in much the same way as would be the case if the signatures on the enrolled bill had been forged.

¹⁸ See cases listed in Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931), at p. 931. Not included among such cases is the decision in *Harbage v. Tracy*, 64 Ohio App. 151, 28 N. E. (2d) 520 (1939), where impeachment of the legislative journal was permitted, not for the purpose of ultimately impeaching the enrolled bill, but in order to invalidate the mileage claims of the general assemblymen which were based on false statements, contained in the journal, that the legislature had met a certain number of times in a stated period. But see contra: *Earnest v. Sargent*, 20 N. M. 429, 150 P. 1018 (1915).

¹⁹ 121 Fla. 550, 164 So. 192 (1935).

²⁰ *Hull v. City of Humboldt*, 107 Neb. 326, 186 N. W. 78 (1921); *State v. Junkin*, 79 Neb. 532, 113 N. W. 256 (1907); *State v. Frank*, 61 Neb. 679, 85 N. W. 956 (1901).

where it has been held that extrinsic evidence may be used to supply missing or ambiguous portions of the journal, so that if the specific point involved in the present case should arise in that jurisdiction there is fair reason to believe that Nebraska would follow the holding in the Florida case. Language in the Louisiana case of *State v. Mason*²¹ indicating that the legislative journal must be the repository of actual fact might also serve to indicate a possible course of holding there, although later cases to be found in that state are less positive.²² The Indiana case under discussion is the only one definitely to reject the right to show the true state of affairs and the only case to give validity to a doubtful expedient.

The cases considered would seem to be capable of division into two distinct classes, that is (a) those which question the validity of legislative procedure, and (b) those which dispute either the qualification of the legislature to act as a body or which challenge the existence of an enrolled bill. Presumptions in favor of proper action could well support the views expressed as to the first class, but not the second, for there the very existence of those things which some courts have conclusively presumed to be correct is the nub of the issue. Assaults of this type are not at war with either the rule as to enrolled bills nor that which presumes the correctness of the legislative journal. They go far deeper and attack the qualifications of the body which, purporting to sit as a legislature, actually usurps powers which the people have not delegated to their representatives. Realistically, as their acts are the acts of a nonentity, they should be declared void. Judicial failure to contain a conclusive presumption which attaches to an enrolled bill within the sphere dictated by logic opens the door to consequences which could prove to be far more serious than those projected by a few informal procedural lapses.

J. C. CARTER

²¹ 43 La. App. 919, 9 So. 776 (1891).

²² See, for example, *Bethlehem Supply Co. v. Pan. Southern Petroleum Corp.*, 207 La. 149, 20 So. (2d) 737 (1944).