

September 1954

Notes and Comments

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Recommended Citation

W. C. Ramm & T. J. Johnston, *Notes and Comments*, 32 Chi.-Kent L. Rev. 298 (1954).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol32/iss4/2>

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NOTES AND COMMENTS

ISLAND-HOPPING TOWARD JUSTICE.

For seven decades the Illinois courts appear to have been engaged in a somewhat protracted judicial island-hopping campaign¹ with the objective of reaching a comprehensive and just solution for legal problems involving rights of contribution and indemnification between so-called joint tortfeasors.² Since the initial assaults, a number of limited successes have been achieved but the ultimate objective still appears to remain over the horizon within the large area encompassed by the "no contribution" rule first announced by Lord Kenyon in the case of *Merryweather v. Nixan*.³

Despite its age, the *Merryweather* holding is quite unworthy of the veneration it has received. Hasty judicial consideration, the absence of any real reason to support the "no contribution" rule, and the unfairness attendant upon its wide application, make the acceptance originally accorded the decision, not only in Illinois but in most other jurisdictions, a matter difficult to understand. Yet it was widely accepted and was broadly interpreted to the point where one Illinois justice could say the holding was "unquestionable law."⁴ For present purposes, it will suffice to remember that the situation so presented is not one entirely unique in law⁵ and to note that the unjust potentialities inherent in the "no contribution" rule

¹ The campaign appears to have been begun in 1881, when the now obsolete case of *Goldsborough v. Darst*, 9 Ill. App. 205 (1881), was decided.

² As used herein, the phrase "joint tortfeasors" means those persons who may be joined as defendants under the provisions of Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 148. Although some nice objections might be raised to this terminology, its current convenient use, subject to the distinction hereinafter noted between tortfeasors who happen merely to be jointly liable and those who are guilty of conspiracy or concerted intentional wrongdoing, would seem to justify repetition of the phrase as so defined.

³ 8 Term. R. 186, 101 Eng. Rep. 1337 (1799). To refresh recollection, it might be noted that the Messrs. *Merryweather* and *Nixan* had there been found guilty as trespassers and converters at the suit of one *Starkey*. Unfortunately for *Merryweather*, he was so circumstanced that victim *Starkey* was able to obtain from him alone satisfaction in full of a substantial judgment which had been entered against both tortfeasors. While *Nixan* may have sustained a slightly blemished reputation from the decision, the contents of his pocketbook were not in any way impaired. To redress this patently unjust situation, *Merryweather* then sued *Nixan* in general assumpsit but was nonsuited at the assizes and, in the King's Bench, Lord Kenyon refused a rule to set aside the nonsuit. His Lordship said he had never heard of such an action where the former recovery had been based on a tort and, save for the vague suggestion that the rule should not extend to deny an employee's right to indemnity in some situations, that was that.

⁴ Chief Justice Scates, in *Nelson v. Cook*, 17 Ill. 443 at 449 (1856).

⁵ Consider, for example, the development of the doctrine with regard to contributory negligence as noted in Turk, "Comparative Negligence of the March," 28 CHICAGO-KENT LAW REVIEW 189-245 (1950), particularly pp. 190-1 and 197-9.

were eventually and necessarily discerned. Since then, Illinois courts, following an island-hopping strategy from one to another of a lengthening series of exceptions to the rule, have progressed toward the mitigation of some of its harsh consequences.

Actually, progress has been made along two different avenues of advance. Many decisions have applied the "no contribution" rule to what may properly be termed contribution in contrast to indemnity cases with little differentiation. Although contribution and indemnification are closely akin, the distinction between them deserves notice, for it marks a division of considerable practical importance. The attitude of the Illinois courts has long been characterized by a reluctance to apportion ultimate legal responsibility among several joint tortfeasors for harm done by them so, where the entire burden could be shifted completely by way of indemnity, thereby making apportionment unnecessary, important gains have been registered against the unjust aspects of the rule. On the other hand, where the attempt has been made to distribute the ultimate burden by way of contribution, so that all joint tortfeasors involved would carry some part of it, successes have been slight and slow of realization.

Two Illinois Appellate Court decisions describe clearly the present line of contact, in the indemnity sector, between the island-hopping forces of law revision and the entrenched "no contribution" rule. These are the cases of *Gulf, Mobile & Ohio Railroad Company v. Arthur Dixon Transfer Company*⁶ and *Palmer House Company v. Otto*,⁷ which decisions, not only because they were handed down in recent years but for the more substantial reason that they reflect progressive judicial attitudes, should be safe for a while from being relegated to a position of mere historical interest. In the first of these cases, the plaintiff railroad sought to recover an amount of compensation which it had been forced to pay to an injured employee,⁸ alleging that the primary cause of the employee's injury had been the dangerous manner in which the defendant's truck had been parked. The business contract between plaintiff and defendant did not include any sort of hold-harmless clause and the plaintiff had promptly notified defendant of the fact of injury and the surrounding circumstances, but the trial court nevertheless granted a motion by defendant to strike the complaint. The Appellate Court for the First District, on the other hand, reversed and remanded. When so doing, the court could have bottomed its decision on a number of earlier Illinois cases with analogous fact situations, but the scope of the rule of law which it announced could gain support only from an insecure dictum from one earlier Illinois case, which reflected a more enlight-

⁶ 343 Ill. App. 148, 98 N. E. (2d) 783 (1951).

⁷ 347 Ill. App. 198, 106 N. E. (2d) 753 (1952).

⁸ The employee's claim against the employer had been based on the Federal Employer's Liability Act, 45 U. S. C. A. § 51 et seq.

ened approach already taken in other jurisdictions. Without the full and comforting support afforded by ample precedent, the court chose to disregard the contractual relationship between the railroad and the trucker and declined to relate its rule of law to such relationship,⁹ preferring to state, instead, that the "vast growth of negligence law has markedly changed the characteristics of negligence actions. Legal negligence no longer embodies a concept of misbehavior just short of the criminal or the immoral. The courts have, therefore, had to find a way to do justice within the law so that one guilty of an act of negligence—affirmative, active, primary in character—will not escape scot free."¹⁰

The second case, that of *Palmer House Company v. Otto*,¹¹ decided a year later, involved the right of plaintiff hotel to indemnification for the amount of a judgment it had paid to one of its former guests who had been injured in the course of a negligently conducted furniture moving operation carried on by the defendant, an independent contractor. The guest had sued the hotel only but the latter had seasonably notified the mover with respect to the situation. Hotel and mover were contractually related, so one noteworthy aspect of the fact situation was not novel and the appellate court's reversal and remandment of a trial court judgment for defendant might be thought to have followed, as a matter of course, in the train of many earlier decisions. The case can, however, be regarded as a significant advancement of the indemnification doctrine for in it there occurred a judicial comparison, or balancing, of respective duties, and of the character of the breaches thereof, imposed on each of the tortfeasors solely by force of the common law. Prior thereto, the Illinois courts had closely associated the less reprehensible secondary negligence, which had to be shown by a successful indemnitee, with a legal duty created by or resulting from a statute, an ordinance, or the *respondeat superior* doctrine, so that, if both tortfeasors had breached ordinary, non-vicarious common law duties, they were said to stand *in pari delicto* and indemnity could not be awarded. Now, under the Palmer House case, there appears to be developing a salutary judicial willingness to disregard artificial or arbitrary distinctions based upon the nature or source of duties owed by the would-be indemnitee and his intended indemnitor to the injured third party.¹²

Consideration of the indemnity decisions should properly begin with the decision of the Illinois Supreme Court in the case of *Griffith v. Na-*

⁹ Previously, contractual privity had been looked upon as an essential foundation for an implied in law promise to indemnify.

¹⁰ 343 Ill. App. 148 at 156, 98 N. E. (2d) 783 at 787.

¹¹ 347 Ill. App. 198, 106 N. E. (2d) 753 (1952).

¹² The case also points up the detail that the indemnitee's recovery can be made to include attorney's fees and other expenses incurred in resisting the claim of the injured person.

tional Fireproofing Company.¹³ The effect of this case may honestly be said to be comparable to the result which would obtain if the firing of a .30 caliber bullet should be accompanied by the report of a sixteen-inch gun. The case needed only to decide whether an express hold-harmless agreement given by defendant sub-contractor to the plaintiff general contractor, intended to secure the latter against a statute-imposed duty to third persons, was void for contravention of public policy. For the same reasons which apply with respect to liability insurance policies, the agreement was held valid. But Mr. Justice Dunn was not content to limit his opinion to the confines of that narrow issue. Basing his dictum on a manifestation of that familiar phenomenon in American jurisprudence known as the "Massachusetts rule,"¹⁴ he sweepingly opined that the law should inquire into the real delinquency between joint tortfeasors and place liability on the one whose fault was the real cause of the injury. Plainly, the principle thus stated was straightforward, simple, and just, but it was also plainly antithetical to the then long-favored Merryweather doctrine. For announcing this principle, and thereby making possible the two holdings aforementioned, the judge deserves commendation. Nevertheless, the comment may fairly be made that the precise and curious coincidence of previous dictum and of subsequent fact situation which characterized the long chronological link between these cases is hardly something to be relied upon as a system to foster sound legal progress.

To complete the review of the indemnity area, four other cases merit mention and a deferential nod should be given to what is now an obsolete rule of law.¹⁵ Perhaps it would be more profitable, before merely reciting the names of these cases, to recount the analysis made of them for they disclose significant factual similarities. First, the wrongs to the injured persons were caused negligently and not by intention. Second, all were law actions between private litigants. Third, in each, some sort of express contract, not however including an indemnity or hold-harmless agreement, existed between the plaintiff-indemnitee and the defendant-indemnitor at the time the relevant tort liability was incurred. Fourth, in each, the in-

¹³ 310 Ill. 331, 141 N. E. 739, 38 A. L. R. 559 (1923).

¹⁴ See *Gray v. Boston Gaslight Co.*, 114 Mass. 149 (1873).

¹⁵ Although the general subject of workmen's compensation is beyond the scope of this paper, it should be noted that Ill. Rev. Stat. 1951, Ch. 48, § 138.5, purported to confer upon the employer the right to recover from the party whose conduct had proximately caused the injury for the amount paid out for compensation. This section was held unconstitutional in *Grasse v. Dealers Transport Co.*, 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375, on the basis it derogated against the employee's common-law right of action against the third person. The statute was amended, in 1953, so as to purport to save to the employer a right to reimbursement: Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5(b). The case of *Hyland v. 79 West Monroe Corp.*, 2 Ill. App. (2d) 83, 118 N. E. (2d) 636 (1954), however, would tend to indicate that employer may experience procedural difficulties in establishing his claim.

demnatee had promptly communicated the circumstances to the indemnitor. In two of the cases, those entitled *Chicago Railways Company v. Conway*¹⁶ and *Pennsylvania Company v. Roberts and Schaefer*,¹⁷ the indemnitees had been held liable because of the presence of a statutory provision. In the other two, being the cases of *Purple Swan Safety Coach Company v. Egyptian Transportation Company*¹⁸ and *Skala v. Lehon*,¹⁹ liability attached to the indemnitee by reason of applications made of the *respondet superior* doctrine.

All four cases acknowledged the existence of the "no contribution" rule, but each was decided favorably to the indemnitee because of exceptions to that rule. In one instance, the court recognized an exception in those cases where the indemnitee's conduct was no more than *malum prohibitum*.²⁰ In another, the court declined to apply the "no contribution" rule against an employer, held liable to his injured employee only because of their relationship, who was not *in pari delicto* with the builder of the defective machine.²¹ A third case avoided the rule by finding that the indemnitee-agent, an originating bus line, and the indemnitor-principal, a connecting carrier, were not joint tortfeasors.²² The last of the cases, somewhat more boldly, suggested that, as between indemnitee-employer and indemnitor-employee, the "no contribution" rule would be inappropriate where there had been no concerted action between the tortfeasors.²³

Beside these exceptions stands the old, and now practically obsolete, one which allows a municipality to secure indemnity from an abutting property owner or contractor whose conduct has caused a third person, using a public way, to sustain an injury, provided the latter has recovered therefor from the municipality.²⁴ Obviously, protection for the public treasury is a matter of far greater consequence, and quite unrelated to, the questionable end sought to be served by the "no contribution" rule. This line of cases needs no developing as the point retains little more than possible historical interest for the problem has now generally been obviated by municipal requirements with regard to express indemnification, with

¹⁶ 219 Ill. App. 220 (1920).

¹⁷ 250 Ill. App. 330 (1928). The employee's injury for which plaintiff sought indemnity had occurred in Pennsylvania, so the Illinois workmen's compensation statute was not applicable.

¹⁸ 256 Ill. App. 442 (1930).

¹⁹ 343 Ill. 602, 175 N. E. 832 (1931).

²⁰ *Chicago Railways Co. v. Conway*, 219 Ill. App. 220 (1920).

²¹ *Pennsylvania Co. v. Roberts and Schaefer*, 250 Ill. App. 330 (1928).

²² *Purple Swan Safety Coach Co. v. Egyptian Trans. Co.*, 256 Ill. App. 442 (1930). It might be noted that the decision was achieved prior to the adoption of the present Civil Practice Act.

²³ *Skala v. Lehon*, 343 Ill. 602, 175 N. E. 832 (1931).

²⁴ See *City of Canton v. Torrence*, 151 Ill. App. 129 (1909), for an illustration of this view.

sufficient sureties, before work from which a liability could arise may be undertaken.²⁵

A capsule statement of the indemnification principle, as presently applicable in Illinois, might then well read like this: The law will inquire into the relative delinquencies of persons joint liable for non-intentional tortious conduct and by means of a quasi-contractual remedy will ultimately place the full responsibility upon the one of them to whom the more serious delinquency attaches. To bring himself within the scope of this general principle, the successful indemnitee is obliged to comply with one condition precedent. He must promptly inform his intended indemnitor of the fact that the injured person claims redress in order that the indemnitor may be afforded a fair opportunity to assert any available defenses against the injured person.²⁶ Further, while such circumstances may no longer be considered crucial, the would-be indemnitee can be better assured of success if it can be shown that he was in privity with his intended indemnitor and that his liability to the injured person resulted either vicariously or else involved no more than the breach of some minor statutory provision.

Further extensions or modifications of the indemnification principle may yet be made but credit is certainly due to the judges and lawyers who have developed it to its present state. Unfortunately, their successful constructive work in the indemnity area has not been accompanied by any like degree of success in the companion field of contribution. Against the *Merryweather* doctrine, as applied with respect to distribution of responsibility in tort situations, the law revision forces established a small beachhead some sixty-five years ago but have been bogged down therein ever since. This stalemate is understandable for, while the same social policies favor both liberalized indemnification and a less strict rule of contribution, the more formidable legal obstacles have been, and continue to be, present in the contribution sector. Any attempted assertion of a right of contribution would entail a frontal assault on the "no contribution" rule whereas it has been possible to advance the indemnity principle, because of Lord Kenyon's hinted exception, around the flank under less arduous conditions. Direct advocacy of a scheme for the distribution of responsibility among joint tortfeasors would seem suspiciously like support for the idea of comparative negligence, a concept running counter to a traditional fondness on the part of Illinois judges for the contributory negligence doctrine.²⁷ Other complicating factors may be noticed in the lack of an ade-

²⁵ Mun. Code of Chicago, § 33-47, requiring a bond for sidewalk repair work, is typical.

²⁶ See *City of Chicago v. C. & N. W. Ry. Co.*, 186 Ill. 300, 57 N. E. 795 (1900).

²⁷ In general, see Gregory, *Legislative Loss Distribution in Negligence Actions* (University of Chicago Press, Chicago, 1936), pp. 49-50.

quate system for third-party practice and some confusion with respect to the proper offices of releases and covenants not to sue.

The beachhead aforementioned was auspiciously established, in 1889, through the case of *Farwell v. Baker*.²⁸ The plaintiff there, in an equity action, had been awarded a decree ordering that contribution be made by the defendants toward the amount of a judgment which plaintiff had satisfied. Both plaintiff and defendants had been creditors of a financially-straitened Iowa merchant and, independently of each other, had caused a stock of goods, thought by them to belong to the merchant, to be attached. Actually, title to the goods was elsewhere so the purported attachment turned out to be a conversion. At the time it affirmed a trial court decree for contribution proportionate to the indebtedness owed by the Iowa merchant to each of the parties, the Illinois Supreme Court selected a direct quotation from the English case of *Adamson v. Jarvis*²⁹ which unsurprisingly enough, had revealed some of the restrictions which were later imposed on the "no contribution" rule in the jurisdiction of its origin.³⁰ Under the holding in the *Farwell* case, the necessary elements for a successful contribution action then appeared to be: (1) the plaintiff's good faith and ordinary prudence; (2) notice to his fellow joint tortfeasors; (3) an equitable arrangement to determine the amounts to be contributed by them; and (4) the pursuit of an objective common to the parties from which their common liability had resulted.

Little notice of the indicated concept appears to have been taken since then³¹ except for the fact that the fairly recent case of *Aldridge v. Morris*,³² a wrongful death action, appears to have indirectly considered the "no contribution" rule. In that case, the reviewing court, when affirming a trial court judgment for defendant on other grounds, made a passing observation to the effect that, with respect to the matter of damages, the principle limiting an injured person to one full recovery would operate to override any interpretation of the "no contribution" rule which would

²⁸ 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400 (1889).

²⁹ 4 Bing. 66, 130 Eng. Rep. 693 (1827). The Illinois court erroneously referred to the case as being entitled *Adamson v. Bidgood*.

³⁰ In particular, the English court restricted the "no contribution" rule to those situations where the person seeking contribution could be said to know, or at least be presumed to have known, that he was engaged in an unlawful act.

³¹ The decision in the *Farwell* case was followed, six years later, in *Selz, Schwab & Co. v. Gunthman*, 62 Ill. App. 624 (1895), but that case, because of its identical fact situation, added little to the law. There is dictum in *Wallach v. Billings*, 195 Ill. App. 605 (1916), to the effect that one of a number of misfeasantly acting bank directors would have a right of contribution against his fellows for money paid to cover losses incurred through their mismanagement. The point would now seem to be covered by an express statutory provision: Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.42.

³² 337 Ill. App. 369, 86 N. E. (2d) 143 (1949).

deny a defendant the right to introduce evidence that some compensation, in return for a covenant not to sue for the injury, had been received from another person whose negligence had concurred in the injury, provided he was one whom the plaintiff might have joined in the action. Although that case, and those like it, should settle forever the two conflicting lines of earlier cases dealing with the admissibility of evidence regarding amounts paid for such covenants,³³ the unrefined, extra-judicial sort of contribution there countenanced cannot be said to really represent progress in the matter. As no relevant cases in the field of partnership have been found,³⁴ it can only be said that the Illinois common law on the subject of contribution appears to be confined within the perimeter fixed by the Farwell case.

This suspended development of the rule laid down in the Farwell case would tend to leave even the most optimistic lawyer uncertain as to the current state of the law but the query raises itself as to whether there is any justification for delaying the elimination of that uncertainty. The present validity of each of the three so-called reasons usually assigned in support of the "no contribution" rule would appear to be open to successful challenge, except possibly in those situations where the joint tortfeasors have conspired or acted in concert to cause intentional harm. It has been urged, as a primary reason, that the joint tortfeasor who is fully responsible for the harm done should bear a penal burden to discourage further wrongdoing, hence should not be rewarded with a right of contribution. The artificiality and futility of this reason is disclosed by brief reflection for, if only one of a number of joint tortfeasors discharges the joint responsibility, his fellows escape any penalty, are not discouraged, and may even be rewarded.

For a second reason, it has been suggested that courts should not clog their dockets with controversies between wrongdoers, thereby delaying the administration of justice to other litigants, approximately half of whom, presumably, are innocent of any wrongdoing. This reason, too, is seen to be unrealistic when one remembers that, nowadays, the establishment of tort liability seldom signifies opprobrium. Once the injured person has received full redress, there is no sensible reason why the law should stop short and leave outstanding rights and equities unadjusted. It has also been said, as a third reason, that courts lack facilities to deter-

³³ See *New York, Chicago & St. Louis R. R. Co. v. American Transit Lines, Inc.*, 408 Ill. 338, 97 N. E. (2d) 264 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 360. See also note in 27 CHICAGO-KENT LAW REVIEW 313. The opposite, and now superseded, rule may be noted in *Herberger v. Anderson*, 268 Ill. App. 403 (1932).

³⁴ Section 18 of the Uniform Partnership Act, Ill. Rev. Stat. 1953, Vol. 2, Ch. 106½, § 18, appears to be designed to create a right of contribution in favor of a partner who has been held as a joint tortfeasor.

mine the respective amounts to be contributed. Mere difficulty should not be a shield to protect injustice but is not this difficulty more imaginary than real? The complications that might attend upon the adoption of a full-scale comparative negligence doctrine could be avoided under a system of simple pro-rata contribution such as is employed among joint debtors, sureties, and the like.

There can, then, be little argument left to oppose the suggestion that the "no contribution" rule should be abrogated. The means to accomplish this abrogation, and for the simultaneous substitution of a certain, comprehensive, and just set of rules, may be found in the form of the Uniform Contribution Among Tortfeasors Act, first proposed in 1939. Examination of this statute in detail is not feasible here, but its four principal features may be summarized. A right of contribution for damages paid is there said to exist between all persons who could be proceeded against jointly in tort. The amount of contribution to be made is there determined on a pro-rata basis, *i. e.*, equal contribution unless, under special circumstances, some other arrangement could be deemed to be more appropriate. For the prompt adjudication of rights between the joint tortfeasors, a form of third-party practice is provided. Finally, the statute leaves undisturbed any right to indemnification which the courts might have recognized in the past or might recognize in the future. By this feature, any objection that the statute might unduly favor intentional tortfeasors has been obviated.³⁵

An Illinois version of this statute was proposed, under the auspices of the Chicago Bar Association, to the Sixty-sixth General Assembly in 1949. Perhaps that first year in former-Governor Stevenson's administration was not the most opportune time, the legislative hoppers then being well filled with all kinds of proposed legislation. Whatever the reason, the proposal was not acted upon and it ended up by being tabled by the House Committee on Judiciary at the end of the session.³⁶ In military operations and in the more prosaic enterprise of law revision, the island-hopping technique can reach a stage of diminishing returns. When unnecessary expense, undue delay, and needless uncertainty cause this stage to be reached, a change in strategy is in order. Now would seem to be the time for such a change, one from island-hopping to direct legislative assault. Notwithstanding the unfortunate prior experience, the ease and efficiency with which the ultimate objective could be gained makes another attempt,

³⁵ The text thereof is set forth in 9 U. L. A. 156 et seq. The proposal appears to stem from suggestions made in Bohlen, "Contribution and Indemnity Among Tortfeasors," 21 Cornell L. Q. 559 (1935) and 22 Cornell L. Q. 469 (1936). A table showing the list of adoptions appears in 9 U. L. A. 153 and 1953 Supp., 9 U. L. A. 33.

³⁶ The fate of H. B. 175, 66th Gen. Assembly, was briefly noted in 30 Chicago Bar Rec. 394 (June, 1949).

free from extraneous considerations,³⁷ well worth while. Justice should be at least as well served in the Prairie State as elsewhere. To that end, the next General Assembly could perform valuable service if it would consider favorably the adoption of the Uniform Contribution Among Tortfeasors Act or some non-complicated variation thereof.

W. C. RAMM

TRUST ADMINISTRATION UPON TERMINATION

The duties and powers of a trustee upon termination of a trust, with respect to both the real and personal property which forms the trust res, are not so cut and dried that the trustee can simply pick up his state statute book or a treatise on the subject and expect to put his finger on the solution for each precise problem involved in winding up the trust administration. Indeed, with regard to some of the problems which may arise, there may in fact turn out to be no authority at all; a conflict of authority; or, at best, a paucity of authority. But the problems will be there and will have to be solved so it is a matter of some comfort to know that, as a general rule, the trustee is not *ipso facto* deprived of all his power and authority upon the termination of the trust, hence he may continue to exercise such powers and perform such duties as are appropriate for the winding up of the trust and of his administration thereof.¹

Two cases, one arising from a trust under a will and the other resting on a land trust agreement, serve to illustrate the point. In the first, a New York case entitled *In re Jones' Will*,² the successor trustee of a terminated testamentary trust sought construction of a provision of the decedent's will which purported to confer a power of sale upon the trustee. At the same time, the trustee also sought to enjoin the remaindermen from interfering with the trustee's management, operation, and control of the trust property and to secure an accounting for certain moneys received by one of the remaindermen. The trust, created over thirty years ago, had been declared by the testatrix to run for the lives of two designated persons. Upon the death of the survivor of these two persons, certain

³⁷ The prior proposal may have been complicated by the submission of another measure having to do with comparative negligence. While a relationship exists between these two subject matters, each should be considered independently of the other and the merits of the one should not be tested by the merits, or demerits, of the other.

¹ General statements to that effect may be found in *Beeler v. Fidelity & Columbia Trust Co.*, 293 Ky. 361, 169 S. W. (2d) 16 (1943); *McBride v. McBride*, 262 Ky. 452, 90 S. W. (2d) 736 (1936); *Christine v. Baldwin*, 95 N. J. Eq. 83, 122 A. 369 (1923); and *McNeal v. Hauser*, 202 Okla. 329, 213 P. (2d) 559 (1949).

² — N. Y. —, 117 N. E. (2d) 250 (1954), affirming 281 App. Div. 900, 120 N. Y. S. (2d) 25 (1953), but reversing 281 App. Div. 900, 120 N. Y. S. (2d) 519 (1953).

realty which had composed the corpus of the trust remained unsold and, shortly thereafter, the defendant-remainderman had entered thereon and, over protest, had begun collecting the rental income. The trustee contended that the power of sale given by the will survived the termination of the trust and that he had the exclusive right to control the trust property pending a final accounting. A decree of the surrogate court construed the will provision so as to give the trustee an unlimited power of sale and also restrained the defendant from interfering with the trust property. This decree was affirmed by the Appellate Division but, upon further appeal, the New York Court of Appeals, while accepting the construction so given, reversed the restraining order on the ground that the trustee had no right, after the trust termination, to perform any administrative act concerning the realty, other than to exercise the power of sale, for the reason that the title to the realty, in all other respects, had vested in the remaindermen.

The second case, one arising in Illinois and entitled *Breen v. Breen*,³ required interpretation of a provision commonly found in land trust agreements in use in this area. By the terms of the agreement, the trust was to terminate not later than twenty years from the date of creation, at which time the trustee was to sell any realty which remained in the trust and was to distribute the proceeds among the beneficiaries. After more than twenty years had expired, partition proceedings were instituted between the beneficiaries on the theory that the trustee's powers had ceased and the interests of the several beneficiaries, clearly designated as being no more than personalty during the twenty-year period, had thereby become at least the equivalent of equitable interests in the land, hence were sufficient to support a partition suit.⁴ The Illinois Supreme Court, acting to settle the issue,⁵ rejected this theory on the ground the trustee, despite the expiration of the time period, still had a reasonable time within which to sell the realty and to make distribution of the proceeds.

These cases would indicate that, regardless where title to the trust corpus may be upon termination of the trust,⁶ doctrines of practical necessity may compel a continuation of the trust powers beyond normal limits. Some cases, in fact, have gone to the extent of holding that a trust does not become fully executed, hence does not terminate, until the subject matter of the trust has been properly distributed to the remaindermen unless something to the contrary appears on the face of the instru-

³ 411 Ill. 206, 103 N. E. (2d) 625 (1952).

⁴ See Ill. Rev. Stat. 1953, Vol. 2, Ch. 106, § 1 et seq.

⁵ There might be some doubt as to the court's power to pass on the question on direct appeal inasmuch as no freehold was involved: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199(1).

⁶ In re Thomas' Will, 254 N. Y. 292, 172 N. E. 513 (1930).

ment creating the trust.⁷ This period of time for the winding up of the trust must, however, be no more than is reasonable considering the circumstances of the particular case, the size of the estate, and the marketability thereof⁸ for a trustee might be removed, or compelled to act, if he delayed too long in the winding up process.

In the meantime, between termination date and complete distribution, many issues could arise over the specific administrative powers possessed by the trustee. Some courts have contented themselves with broad statements of the type appearing in the case of *In re Rothwell's Estate*⁹ where it was indicated that the trustee could perform any acts incidental to the conservation of the trust property. These acts would, in all probability, include such things as keeping the property insured, in a proper state of repair, producing an income if possible, and seeing to it that all proper taxes were paid, but the record is not clear. It is certain, however, that when a trust terminates the trustee will have the primary duty to account and distribute. The manner in which this duty is to be carried out, at least as to real property, will to some extent be dependent upon the quantity of estate taken by the trustee at the time the trust was set up, a factor to be determined from the intent of the settlor but commensurate with the purposes to be effectuated by the trust.¹⁰

If, for example, the settlor has provided for a remainder over after the termination of an antecedent beneficial life estate, the trustee will probably be held to have only a life estate so the title will vest in the remaindermen. Where, however, the trustee has been given property in fee simple, distribution may require the making of a conveyance from the trustee to the remaindermen but the answer on this point varies from jurisdiction to jurisdiction. In New York, for example, it has been held that there will be no necessity for a conveyance as the title to the realty would vest immediately in the remaindermen upon the termination of the trust.¹¹ Other jurisdictions have reached the same result by holding that, upon termination, a trust becomes passive with the result that the

⁷ *Commissioner of Internal Revenue v. Davis*, 132 F. (2d) 644 (1943); *Harlan v. Gleason*, 180 Md. 24, 22 A. (2d) 579 (1941); *Harshbarger v. Harrison*, 124 W. Va. 688, 22 S. E. (2d) 303 (1942).

⁸ Restatement, Trusts, Vol. 2, § 344.

⁹ 283 Mass. 563, 186 N. E. 662 (1933).

¹⁰ See, for example, *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012 (1909); *Wright v. Keasbey*, 87 N. J. Eq. 51, 100 A. 172 (1917); *Sequin State Bank & Trust Co. v. Locke*, 129 Tex. 524, 102 S. W. (2d) 1050 (1937).

¹¹ *In re Miller's Will*, 257 N. Y. 349, 178 N. E. 555 (1931); *Hutkoff v. Winmar Realty Co., Inc.*, 211 App. Div. 726, 208 N. Y. S. 25 (1925); *Cary v. Carman*, 116 Misc. 463, 190 N. Y. S. 193 (1921); *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. 322 (1890). This result is based on an interpretation given to New York Real Property Law, § 109, which states: "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease."

legal title vests in the remaindermen by virtue of the Statute of Uses.¹² In contrast, other states will require a conveyance from the trustee in order to vest title in the remaindermen. The Illinois case of *Kirkland v. Cox*¹³ will serve as an example of this view for it was there held that as legal title had been vested in the trustee nothing short of a reconveyance could divest him of that title. A later Illinois case, that of *McFall v. Kirkpatrick*,¹⁴ supports this view by pointing out that, inasmuch as the trust would not be executed until the trustee had conveyed to the remaindermen, the trust would remain active until that time, hence the Statute of Uses would not apply. Even where title vests without a conveyance, such a conveyance has been deemed desirable in order to perfect the record title, thereby making the property more readily disposable after it is in the hands of the remainderman,¹⁵ but such a conveyance will be presumed to exist after a reasonable length of time in the interest of protecting a purchaser from the beneficiary.¹⁶

Much the same diversity of opinion is evident where the corpus of the trust includes, or consists of, personal property. New York, in the case of *In re Miller's Will*,¹⁷ unlike the holding with regard to realty, has taken the position that the estate of the trustee in personal property will continue after termination of the trust until division and distribution takes place. While the Statute of Uses does not apply to personal property, one author has indicated that there is no longer any reason for such a distinction so, in the case of a passive trust in personal property, title should vest in the beneficiary.¹⁸ This trend appears to be evidenced by the Maryland case of *Chapman v. Baltimore Trust Company*¹⁹ wherein it was held that, upon the termination of a trust affecting personal property, any power or authority granted to a trustee was at an end and the title to such property had immediately become vested in the person last entitled to the beneficial use thereof.

Regardless of whether or not the trustee has title to the property after termination, he will usually be in the possession thereof so will have a

¹² *Hinds v. Hinds*, 126 Me. 521, 140 A. 189 (1928); *Zuckman v. Freiermuth*, 222 Minn. 172, 23 N. W. (2d) 541 (1946).

¹³ 94 Ill. 400 (1880).

¹⁴ 236 Ill. 281, 86 N. E. 139 (1908). See also *Emery v. Emery*, 325 Ill. 212, 156 N. E. 364 (1927), and *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012 (1909).

¹⁵ *In re Rothwell's Estate*, 283 Mass. 563, 186 N. E. 662 (1933).

¹⁶ *Reilly v. Conrad*, 9 Del. Ch. 154, 78 A. 1080 (1911).

¹⁷ 257 N. Y. 349, 178 N. E. 555 (1931). See also *Russell v. Bowers*, 27 F. Supp. 13 (1931), wherein there is at least a strong intimation that a trustee's estate in personalty is not destroyed simply by the termination of the trust.

¹⁸ See Newman, *The Law of Trusts and Trustees* (Foundation Press, Inc., Brooklyn, 1949), p. 387. It is interesting to note that the author cites, among others, the New York case of *In re De Rycke's Will*, 99 App. Div. 596, 91 N. Y. S. 159 (1904).

¹⁹ 168 Md. 34, 177 A. 285 (1935).

duty to divide and distribute the same among the remaindermen.²⁰ Whether the corpus is real or personal property, the question will then arise as to whether the distribution should be made in kind or whether the property ought to be sold by the trustee and the proceeds divided. Again, general rules purport to state that when the trust property is realty it should be distributed in kind but, when it is personalty, it should be sold and the proceeds divided.²¹ The exceptions to these rules are too numerous to deal with extensively but it may be noted that, with respect to realty, sales of the property are to be made where the settlor has expressed his intent that such a sale should be made or where the property could not be equally divided,²² whereas, with respect to personalty, the mode of distribution should, more properly, be based upon the express or implied intention of the settlor.²³ Even so, the expressed intent of the settlor has been disregarded where the nature of the property was such that, to follow his direction, an inequality among the remaindermen would be produced²⁴ or where the remaindermen, provided they are *sui juris*, have agreed upon a different mode of distribution.²⁵ Doctrines with regard to equitable conversion should not be overlooked for it may be noted that real estate obtained through foreclosure of mortgage partakes of the nature of personal property and must be treated as such.²⁶ Closely related to issues apt to arise on distribution is the one concerning the trustee's power to sell realty. Whether expressly given by the trust instrument or implied, this power has been held to be exercisable, as noted above, in order to

²⁰ *In re Thomas' Will*, 254 N. Y. 292, 172 N. E. 513 (1930).

²¹ See Scott, *The Law of Trusts* (Little, Brown & Co., Boston, 1939), Vol. 3, § 347.3, with regard to realty, and § 347.4, with regard to personalty.

²² Illustrative examples appear in *Stoff v. McGuinn*, 178 Ill. 46, 52 N. E. 1048 (1899); *Helfrich v. Dandy*, 160 Md. 338, 153 A. 57 (1931); *Dodson v. Ashley*, 101 Md. 513, 61 A. 299 (1905); *Fox v. Merchant's Bank & Trust Co.*, 155 Miss. 188, 124 So. 321 (1929); *Battenfeld v. Kline*, 228 Pa. 91, 77 A. 416 (1910); *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 160, 37 A. 701 (1897); and *Saros v. Carlson*, 244 Wis. 84, 11 N. W. (2d) 676 (1943). But see *Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056 (1901). In *Dreier v. Senger*, 3 N. J. Misc. 769, 130 A. 5 (1925), the court favored division rather than sale in the absence of a showing that the inequality in division could not be equalized by an extra allotment of personal property.

²³ The use of the word "divide" has been regarded as requiring a division and distribution in kind: *Gammon v. Gammon Theological Seminary*, 153 Ill. 41, 38 N. E. 890 (1894). In *Matter of Leeds*, 154 Misc. 228, 276 N. Y. S. 950 (1935), the court interpreted the word "pay" to call for a distribution in cash.

²⁴ *Waterman v. Aiden*, 115 Ill. 83, 3 N. E. 505 (1885), affirming 16 Ill. App. 536 (1885). The case was one in which the property consisted of numerous notes and accounts of doubtful value. The court ordered an immediate sale in preference to having the remaindermen run the risk that the property distributed to them in kind might prove to be worthless at maturity.

²⁵ *Bergman v. Rhodes*, 334 Ill. 137, 165 N. E. 598, 65 A. L. R. 344 (1929). The settlor had directed the trustee to sell the realty and distribute the proceeds, but the court indicated, provided all the remaindermen consented, they could compel a distribution in kind.

²⁶ *In re Miller's Will*, 257 N. Y. 349, 178 N. E. 555 (1931).

make for an equitable distribution but the exercise thereof has also been permitted, after termination and without regard to ownership, in order to enable the trustee to reimburse himself for expenses incurred in the administration of the trust.²⁷

There is very little primary authority concerning other specific powers which a trustee might be entitled to exercise after the trust has terminated.²⁸ A power of investment, for example, would almost without question cease when the trust ends.²⁹ The power to lease realty would usually also be limited to the term of the trust³⁰ and, while there is no ironclad rule on the point, one Illinois case indicates that a renewal option in favor of the tenant would have to fall in the event the trustee's interest ceased before the exercise thereof, especially where the testator had directed that the realty was to be sold upon the death of the life beneficiary.³¹ It is only in New York, however, that courts have gone to the length of saying that a trustee has no right to perform any act of administration with respect to realty after the trust has terminated.³²

It should be obvious that a clearer drafting of instruments used to create trusts would help to alleviate some of the problems that can arise at or upon termination. A trustee, however, is not forced to act at his peril for, as the trust is a creature of equity, he may always seek the aid of an equity court for the purpose of construing the instrument, reforming it, if necessary, to carry out the settlor's intentions, to secure instruction as to his duties in the execution of the trust, or to enforce the performance of those duties on all parties concerned. A prudent trustee, then, in case of doubt or difficulty, would do well to seek the aid of an equity court before he acts.

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²⁷ *McNew v. Vert*, 43 Ind. App. 83, 86 N. E. 969 (1909). The fact that the title to the property has vested in the remaindermen is not inconsistent with the idea that the trustee may also possess a power of sale exercisable after termination of the trust: *Schmidt v. Hinkley*, 115 Md. 330, 80 A. 971 (1911); *In re McLaughlin's Estate*, 193 Misc. 192, 82 N. Y. S. (2d) 784 (1948), affirmed in 275 App. Div. 659, 86 N. Y. S. (2d) 660 (1948).

²⁸ A general discussion of the subject appears in Durand, "Powers of Trustees upon Termination of Trusts," 45 Col. L. Rev. 865 (1945).

²⁹ *McBride v. McBride*, 262 Ky. 452, 90 S. W. (2d) 736 (1936); *Hodge v. Mackintosh*, 248 Mass. 181, 143 N. E. 43 (1924).

³⁰ *Grandy v. Robinson*, 180 Ore. 315, 175 P. (2d) 463 (1946).

³¹ *Hallin v. Hallin*, 2 Ill. App. (2d) 118, 118 N. E. (2d) 612 (1954).

³² In addition to the instant case, see *In re McLaughlin's Estate*, 193 Misc. 192, 82 N. Y. S. (2d) 784 (1948), affirmed in 275 App. Div. 659, 86 N. Y. S. (2d) 660 (1948); and *In re Miller's Will*, 257 N. Y. 349, 178 N. E. 555 (1931).