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Discussion of Recent Decisions

I. R. Lichtenstein

G. Adler

R. C. Bartlett

J. F. Mirabella

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NUMBER 1

DISCUSSION OF RECENT DECISIONS

COMMERCE — POWER TO REGULATE SALE AND PRODUCTION OF GOODS — STATUS OF LOFT BUILDING MAINTENANCE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT OF 1938—In the case of *Kirschbaum v. Walling*¹ the United States Supreme Court held that where substantial portions of a loft building are leased to various tenants some of whom manufacture goods for sale in interstate commerce, and, as a part of the consideration for the rent charged, the services of elevator operators, porters, engineers, watchmen, and other building maintenance employees are furnished to all tenants, the building owner's employees who render such services are engaged in "the production of goods for commerce" within the scope of the Fair Labor Standards Act.²

The plenary power of Congress to regulate all phases of interstate

¹ —U. S.—, 62 S. Ct. 1116, 86 L. Ed. (adv.) 1054 (1942), affirming 124 F. (2d) 567 (1941) which had affirmed 38 F. Supp. 204 (1941). *Arsenal Building Corp. v. Walling*, 125 F. (2d) 278 (1941), reversing 38 F. Supp. 207 (1941), was consolidated with this case. Justice Roberts wrote a dissenting opinion. For a local application of the problem see *Brandell v. Continental Illinois Nat. Bank & T. Co.*, 43 F. Supp. 781 (1941), holding that building service employees of a building housing a national bank are not within the scope of the act in question.

² Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. A. § 201 et seq. The especially pertinent sections are in 29 U. S. C. A. §§ 203(j), 207(a) and 208(a).

commerce is well established.³ The problem in the instant case, however, concerns the question as to the degree to which Congress has chosen to exercise its broad power through the pertinent statute. The peculiar phrasing found in the Fair Labor Standards Act does not appear in any other federal statute. Consequently, the definitions of interstate commerce developed under such other statutes are inapplicable. It must also be borne in mind that the court itself, in the instant case, stressed the impossibility of formulating a mathematical definition for the key phrase "engaged in production for commerce."⁴ Its limits must be ascertained from a consideration of specific factual situations as they come to the attention of the courts. This case, therefore, cannot with any degree of certainty be extended beyond the scope of the facts presented by it.

Whether the establishments and employees in question were exempted from the provisions of the act by Section 13(a) (2) relating to employees of service establishments,⁵ was a problem which could be disposed of easily. The court resolved this issue by stating: "Selling space

³ Typical of many recent and highly significant remarks illustrating this proposition is *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 37, 57 S. Ct. 615, 81 L. Ed. 893 at 911 (1937), where the court said: "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' . . . to adopt measures 'to promote its growth and insure its safety' . . . 'to foster, protect, control and restrain.' . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." See also *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656, 82 L. Ed. 954 (1938); *United States v. Carolene Products Company*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); *Mulford v. Smith*, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941). But see *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349, 61 S. Ct. 580, 85 L. Ed. 881 (1941). The Fair Labor Standards Act had been declared a constitutional exercise of the commerce power in *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430 (1941), and in *Opp. Cotton Mills, Inc. v. Administrator of the Wage and Hour Division*, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed., 624 (1941).

⁴ According to Justice Frankfurter: "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle." — *Kirschbaum v. Walling*, — U. S. — at —, 62 S. Ct. 1116 at 1118, 86 L. Ed. (adv.) 1054 at 1056 (1942).

⁵ 29 U. S. C. A. § 213 (a) (2).

in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce."⁶ Such a view is consistent with the legislative history of the act. Service industries were expressly exempted because it was feared that, if they were compelled to pay the established minimum wages and conform to the maximum hours, such industries would be driven out of business.⁷

As the employer in the instant case was not expressly exempted from the operation of the act, the further question arose as to whether he was covered by it. It should be noted that the act applies to employees falling in either of two categories: those engaged in interstate commerce, or those engaged in the production of goods for interstate commerce. The Administrator's definition of employees "engaged in commerce"⁸ excludes the possibility that the employees in question were so engaged. The issue was, therefore, narrowed to whether they were engaged in "the production of goods for interstate commerce."

It becomes necessary, then, to consider whether it is possible for an employer who makes neither interstate sales nor purchases, and who engages in no production whatsoever, to have on his pay-roll employees who are engaged in production for commerce. The court answered this question by stating: "But the provisions of the Act expressly make its application depend upon the character of the employees' activities. And, in any event, to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged."⁹ A superficial reading of Sections 6 and 7 of the act¹⁰ would indicate, however, that building maintenance employees are not engaged in "production for commerce." Certainly, common accounting practice does not classify them as production employees. Moreover, the key phrase is further defined in Section 3(j) which reads as follows: ". . . for the purposes of this chapter an employee shall be deemed to

⁶ — U. S. — at —, 62 S. Ct. 1116 at 1121, 86 L. Ed. 1054 at 1060 (1942).

⁷ The court said, in *Fleming v. Kirschbaum*, 124 F. (2d) 567 at 572 (1941), that: "In reaching our conclusion [that the employees in question were not engaged in a service establishment] we have given weight to the fact that the exemption as to service establishments was added by the conference report to the exemption as to retail establishments already contained in subparagraph (2) of Section 13(a) of the bill."

⁸ Interpretative Bulletin No. 1, "General Statement as to the Coverage of the Fair Labor Standards Act of 1938" (Wage and Hour Division, United States Department of Labor, 1938), reprinted in Prentice-Hall, *Labor Service*, para. 11, 205; Interpretative Bulletin No. 5, "Further Statement as to the Coverage of the Fair Labor Standards Act of 1938" (Wage and Hour Division, United States Department of Labor, October 1938, revised November 1939), reprinted in Prentice-Hall, *Labor Service*, para. 11, 209.

⁹ — U. S. — at —, 62 S. Ct. 1116 at 1120, 86 L. Ed. 1054 at 1059 (1942). The first sentence in the quotation is consistent with a plain reading of the act. Such is also the view of the Administrator as expressed in the Interpretative Bulletins referred to in note 8, ante.

¹⁰ 29 U. S. C. A. §§ 206-7.

have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."¹¹

It will be observed that every member of the foregoing sequence, except the last one, relates to activity of a productive nature. By removing them from the sequence and reconstructing the sentence, the following reading is then obtained: ". . . for the purposes of the Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." In this fashion, the pertinent phrase will be readily recognized as one of the "catch-all" type. Customarily these are used to catch elements which it was intended to include in the sequence, but which may have been overlooked in drafting the statute. It is generally considered, according to the doctrine of *ejusdem generis*, that such a "catch-all" will never include elements which do not fall in the same category as those enumerated. Moreover, it does not seem likely that Congress intended that these words, falling as they do in a section of the act which consists entirely of definitions, should be literally applied to the sections relating to coverage. Had this been the legislative intent, it would seem more likely that the language would have been incorporated directly in the latter section, or, at least, that broader words would have been used in that section. It requires an especially strained construction to give to the key phrase "engaged in production for commerce," as found in the coverage section, an interpretation which is foreign to the plain English meaning of the words themselves.

Both the Administrator and the court have, however, done precisely that. The former, in an early interpretative bulletin, expressed the view that the act ". . . applies, typically but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods move in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself . . ." As a consequence, he concluded that: "Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of goods. Enterprises cannot operate without such employees. If they were not doing work 'necessary to the production' of the goods they would not be on the pay roll."¹² Accordingly, in the numerous in-

¹¹ 29 U. S. C. A. § 203(j).

¹² See note 8, ante. The support for so broad a view of the act apparently lies in the preliminary declaration of policy by Congress which recites that it sought to remedy certain evils, namely: ". . . labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . ." which, Congress found, burdens ". . . com-

stances where maintenance and other non-producing employees have been found on the payrolls of establishments engaged in such production, the Administrator has attempted, generally with success, to enforce the act in their favor.¹³

Though this bulletin was not even a regulation and, hence, was in no wise binding upon the courts, at least one court, in deciding one of the instant cases, gave tacit approval to the Administrator's "presence on the pay-roll" test.¹⁴ The United States Supreme Court, however, rejected the test because it could prove too broad, saying: "If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."¹⁵

It is an obvious fact that in a modern complex society every individual is to a degree "necessary" to every activity which is carried on, so it is a little difficult to arrive at the conclusion reached by the court that the work of the employees in these cases has so close and immediate a tie with the processes of production that they must be regarded as engaged in an occupation "necessary to the production of goods for commerce." If these employees do not have only "the most tenuous relation" to the production of goods, it is difficult to imagine any workers who could occupy such a position.

I. R. LICHTENSTEIN

CONSTITUTIONAL LAW — DUE PROCESS — WHETHER THE FOURTEENTH AMENDMENT GUARANTEES AN INDIGENT DEFENDANT THE RIGHT TO COUNSEL IN A NON-CAPITAL CRIMINAL CASE—In the recent case of *Betts v. Brady*¹ the petitioner had been indicted in Maryland for robbery. Due to lack of funds he was unable to procure the assistance of counsel to conduct his defense. He asked the trial judge to appoint counsel for him, but the judge refused, stating that in that locality counsel for an indigent defendant was appointed by the court only in cases involving prosecutions for murder and rape. Without waiving his asserted right to counsel, the defendant elected to be tried without a jury. Witnesses were summoned at his request and he examined them and cross-exam-

merce and the free flow of goods in commerce. . . ." — 29 U. S. C. A. § 202(a). From this declared policy, the Administrator argued that: ". . . Congress intended the widest possible application of its regulatory power over interstate commerce; and the Administrator in interpreting the statute . . . should properly lean toward a broad interpretation of the key words. . . ."

¹³ For a complete tabulation of the cases wherein various maintenance employees, directly on the producer's pay-roll, have been held covered by the act, see Prentice-Hall, *Labor Service*, para. 10, 276 et seq.

¹⁴ *Fleming v. Arsenal Building Corp.*, 125 F. (2d) 278 (1941).

¹⁵ — U. S. — at —, 62 S. Ct. 1116 at 1121, 86 L. Ed. 1054 at 1059 (1942).

¹ — U. S. —, 62 S. Ct. 1252, 86 L. Ed. (adv.) 1116 (1942); a writ of certiorari was awarded, 315 U. S. 791, 62 S. Ct. 639, 86 L. Ed. 564 (1942), directed to the Court of Appeals of Maryland, which had denied petitioner's petition for a writ of habeas corpus.

ined the state's witnesses. The judge found him guilty and sentenced him to serve a term in the state penitentiary. The petitioner thereupon sought a writ of habeas corpus, thereby presenting two principal issues to the court for consideration. He argued that the Sixth Amendment to the United States Constitution, with its specific guarantee of the right to have assistance of counsel for defense, had been incorporated in the Fourteenth Amendment. He further claimed that the requirement of "due process of law," which has often been held to require a fair hearing,² included the right to have the court appoint counsel to assist an indigent defendant in a non-capital case.

In denying the writ the United States Supreme Court held that the Sixth Amendment, which has been construed to require the appointment of counsel for indigent defendants,³ applied only to Federal criminal prosecutions and is not a rule so fundamental and essential to a fair trial that it is made obligatory on the states by the Fourteenth Amendment. It was stated that the provisions of the colonial and early state constitutions were only meant to guarantee that the assistance of counsel should not be denied, not that counsel would be appointed for indigent persons. In view of this, and of the further fact that only two state constitutions at present guarantee the appointment of counsel to aid indigent defendants, the court held that the right to such appointment was not deemed by the people to be either fundamental or essential to a fair trial, hence was not included in the concept of "due process." *Powell v. Alabama*⁴ was distinguished on the ground that it involved a capital case wherein the defendants were ignorant colored boys, while the instant case concerned a non-capital offense and a defendant who was not wholly ignorant. Even then, want of counsel in a particular case, the court intimated, might result in a conviction so wanting in fundamental fairness as to violate due process.

The dissenting opinion⁵ argued that the petitioner had been denied the procedural protection guaranteed by the due process clause of the Constitution. The discussions by the sponsors of the Fourteenth Amendment, in both the House and the Senate, showed that their purpose was to make secure, from invasion by the several states, those fundamental safeguards and liberties secured by the Bill of Rights. As a consequence the dissenting justices felt that the Fourteenth Amendment incorporated the Sixth and made it applicable to the states, thus guaranteeing that counsel would be furnished in all criminal cases for defendants unable to provide assistance for themselves. Even if this view were not accepted, still the dissenting judges felt that the convic-

² *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).

³ *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

⁴ 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

⁵ Written by Mr. Justice Black, in which Mr. Justices Douglas and Murphy concurred.

tion should be reversed on the ground that the right to assistance of counsel is essential to the substance of a hearing, hence that right is within the procedural protection afforded by "due process."

The distinction which the majority in the instant case makes between guaranteeing that right to counsel will not be denied and insuring the appointment of counsel for indigent defendants appears unrealistic. If the object was to insure that no defendant in a criminal case should be denied counsel in order that a fair trial might be had, the object would seem to be defeated in all cases where a defendant was unable financially to employ counsel himself. If the constitutional provisions imposed upon the states the duty to provide a fair trial and orderly procedure, it would seem that the obligation is cast upon the state to provide counsel for those defendants unable to do so themselves, because in modern criminal procedure a trial can hardly be fair if defendant has no counsel. As will appear later, most of the states have assumed this obligation. If the administration of justice is to be impartial, then in contrast for each defendant financially able to secure representation, the state should see that counsel is supplied for those who are not. As was said in *Webb v. Baird*: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public."⁶

The result reached by the court in the instant case is somewhat surprising, not only because of the result and of the language in the earlier case of *Powell v. Alabama*⁷ and cases following it, but also because of what has come to be the prevalent judicial view of due process. It is true that the *Powell* case involved a capital crime and the language of the decision limited it to such a case, yet many judges since have thought that it had expanded the Fourteenth Amendment to include within it the guarantee of counsel contained in the Sixth. For instance, Mr. Justice Sutherland, speaking for the court in *Grosjean v. American Press Co.*,⁸ said: "But in *Powell v. Alabama* we held . . . that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." On a still later occasion, the same court said: "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge . . . the right of one accused of crime to the benefit of counsel . . . In these and other

⁶ 6 Ind. 13, at 18 (1854).

⁷ See note 4, ante.

⁸ 297 U. S. 233 at 243-4, 56 S. Ct. 444 at 450, 80 L. Ed. 660 at 665 (1936).

situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."⁹ The present court is now rejecting that understanding of the Fourteenth Amendment and is apparently limiting the application of the Powell case to prosecutions for capital crimes where the defendant is so ignorant as to be incapable of conducting his own defense.

In support of the majority view it might be argued that though the Sixth Amendment provides for jury trials in criminal cases, it has been held that a state may modify or abolish that right.¹⁰ If so, why should it not be equally held that assistance of counsel can be modified or denied? The answer would be that a fair trial may be had without a jury, since a judge may, and usually does, conduct fair and impartial trials without a jury. On the other hand, a fair trial can hardly be had when the state is represented by competent counsel aided by numerous assistants and a large office force while the defendant, uninitiated in legal processes, stands alone unaided by counsel. In *Palko v. Connecticut*,¹¹ after stating that it had been held that a state could abolish trial by jury but could not abridge the right of one accused of crime to have counsel, the court said: "The right to trial by jury . . . may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty . . . We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the 14th Amendment by a process of absorption . . . The hearing must be a real one, not a sham or a pretense. For that reason ignorant defendants in a capital case were held to have been condemned unlawfully when . . . they were refused the aid of counsel."

On the second main issue, it would seem that had the court decided that due process of law included the right to have counsel, its decision would have been more consistent with the prevailing notion of due process. A total of thirty-five states require that indigent defendants, in non-capital as well as capital cases, be provided with counsel on request;¹² twenty-five by statute,¹³ eight by judicial decision or practice,¹⁴ and two by constitutional provision.¹⁵ There is no clear pro-

⁹ *Palko v. Connecticut*, 302 U. S. 319 at 324, 58 S. Ct. 149 at 153, 82 L. Ed. 288 at 291 (1937).

¹⁰ *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678 (1876).

¹¹ See note 9, ante.

¹² See annotation 84 L. Ed. 383 and appendix to instant case.

¹³ Ariz., Ark., Calif., Idaho, Ill., Iowa, Kan., La., Minn., Mo., Mont., Neb., Nev., N. H., N. J., N. Y., N. D., Ohio, Okla., Ore., S. D., Tenn., Utah, Wash., Wyo.

¹⁴ Conn., Fla., Ind., Mich., Pa., Va., W. Va., Wis.

¹⁵ Ga., Ky.

vision in nine,¹⁶ in two exist dicta in harmony with the state court below,¹⁷ and in only two has the requirement in non-capital cases been affirmatively rejected.¹⁸ It could easily be said that so wide-spread a protection of the right would indicate that the people generally regard it as fundamental and essential to an orderly concept of law.

Due process of law has been held to include the right to a hearing;¹⁹ the right to a hearing has been held to include the right to assistance of counsel;²⁰ the right to have the aid of counsel means furnishing counsel to the defendant who is unable to secure such for himself.²¹ Assistance of counsel is just as important in non-capital as it is in capital cases.²² To a man faced with the prospect of a term of years in the penitentiary a distinction between capital and non-capital cases must seem invalid under a system set up to guarantee personal liberty as well as life. The Fourteenth Amendment itself makes no distinction between life and liberty. A fair hearing would seem just as necessary in a prosecution which may result in loss of liberty as in one which may result in loss of life for many might regard loss of liberty as worse than loss of life itself. State action, to accord due process, must be consistent with fundamental principles of liberty and justice.²³ Due process, it would seem, should require that a state appoint counsel in non-capital as well as capital cases. As the Supreme Court of Wisconsin once said: "would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial . . . and yet say to him when on trial, that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?"²⁴ It cannot be true that the public is in-

¹⁶ Colo., Dela., Me., Mass., N. M., N. C., R. I., S. C., Vt.

¹⁷ *Gilchrist v. State*, 234 Ala. 73 at 74, 173 So. 651 (1937); *Reed v. State*, 143 Miss. 686 at 689, 109 So. 715 (1926).

¹⁸ *Gilley v. State*, 114 Tex. Crim. Rep. 548, 26 S. W. (2d) 1070 (1930); but see *Brady v. State*, 122 Tex. Crim. Rep. 275 at 278, 54 S. W. (2d) 513 (1932). The instant case is the second.

¹⁹ See note 2, ante.

²⁰ *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Avery v. Alabama*, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940); *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925); *Ex parte Hidekuni Iwata*, 219 F. 610 (1915). See also *Cooley*, Const. Lim. (8th Ed.), I, 700.

²¹ *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930); *Sheppard v. State*, 165 Ga. 460, 141 S. E. 196 (1928); *Reliford v. State*, 140 Ga. 777, 79 S. E. 1128 (1913); *Carpenter v. County of Dane*, 9 Wis. 274 (1859); *Webb v. Baird*, 6 Ind. 13 (1854).

²² *Commonwealth v. Beard*, 48 Pa. Super. Ct. 319 (1911); *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 A. 73 (1929); *Ex parte Chin Loy You*, 223 F. 833 (1915); *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

²³ *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936); *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270 (1926).

²⁴ *Carpenter v. County of Dane*, 9 Wis. 249 at 251 (1859).

terested in the protection of an accused person in proportion to the magnitude of his alleged offense.²⁵ The result of the instant case, therefore, seems inconsistent with the concept of equal justice under law.

The present Illinois Criminal Code provides, in part, that: "Every person charged with crime shall be allowed counsel . . ."²⁶ No distinction is made between capital and non-capital cases. The court, moreover, is directed to assign competent counsel to indigent defendants. The problem involved in the instant case is, then, not likely to arise in Illinois unless the statute be changed. In that respect the policy in Illinois seems more consistent with those previously generally accepted notions of due process than does the result in the instant case.

G. ADLER

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — WHETHER POWER OF A STATE TO ENJOIN PEACEFUL PICKETING VIOLATES RIGHT TO FREE SPEECH — In the case of *Bakery & Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl*¹ the United States Supreme Court held that picketing of a manufacturing baker, by a driver's union with a grievance against technically independent jobbers who bought from this manufacturer, was protected by the constitutional guarantee of freedom of speech.² On the same day, in the case of *Carpenters & Joiners Union of America v. Ritter's Cafe*,³ the same court held that picketing of a restaurant, whose owner had let a contract for an unconnected and apparently unrelated building to a non-union contractor, was not protected by that guarantee.

The two cases bear a resemblance to each other in that the picketing in each case was entirely peaceful. Likewise, the picketing in each case was secondary in nature⁴ for its object was to induce one with whom the union technically had no dispute to cease doing business with, or otherwise exert pressure upon, the one against whom the dispute lay. Upon closer scrutiny, however, the two cases will be seen to differ in

²⁵ *Commonwealth v. Beard*, 48 Pa. Super. Ct. 319 at 323 (1911).

²⁶ Jones Ill. Stat. Ann. 1936, § 37.707; Ill. Rev. Stat. 1941, Ch. 38, § 730.

¹ 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. (adv.) 781 (1942) affirming 284 N. Y. 784, 31 N. E. (2d) 765 (1940). Justice Douglas wrote a concurring opinion in which Justices Black and Murphy concurred.

² It may be observed that the right of freedom of speech, protected by the First Amendment from abridgement by Congress, is among those fundamental rights and liberties which are protected, by the due process clause of the Fourteenth Amendment, from impairment by the states: 11 Am. Jur., Constitutional Law, § 839, particularly cases cited at p. 1109, note 18.

³ 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. (adv.) 785 (1942) affirming decision of Tex. Civ. App. reported in 149 S. W. (2d) 694 (1941). Justice Black wrote a dissenting opinion in which Justices Douglas and Murphy concurred. Justice Reed wrote a separate dissenting opinion.

⁴ The term "secondary" has been given varying definitions; the one adopted herein is purely arbitrary. Although there is sound economic argument for giving equal latitude to both types of picketing, the distinction is so frequent in the opinions as to require notice of it.

two principal respects. First, the one being picketed in the Wohl case was able to exert the desired pressure to aid the union without incurring any legal liability whatsoever; while, in the Ritter case, the restaurant owner was already under contract and could exert such pressure only by breaching or threatening to breach that contract.⁵ This distinction was not stressed in the opinion of the court. The second difference, pointed to by the court, was the presence in the Wohl case of an "interdependence of economic interest of all engaged in the same industry"⁶ which factor was lacking in the Ritter case. Thus the Wohl case may be regarded as an extension of the doctrine first enunciated by way of dictum in the Senn case,⁷ but later developed in the Thornhill,⁸ Carlson,⁹ and Swing¹⁰ cases; while the Ritter case is a limitation upon that doctrine.

It will readily be recognized that, prior to its association with the right of free speech, the privilege of peaceful picketing had been denied where the one picketed could not exert the pressure demanded of him without breaching a pre-existing contract.¹¹ Similarly, a limitation had been imposed where there was not a sufficient community of interest between the union and the one being picketed.¹² But the cases decided on either of these grounds treated picketing as being basically a tort which could only in some instances be privileged.¹³ Clearly, if this same approach to the problem be taken, the differences in the cases under discussion become controlling and justify the difference in result. On the other hand, the right to publicize a fact has not been denied merely because the party referred to was not legally free to change his position.¹⁴ Still less has freedom of speech been thought to be subject to limitation because an interdependence of economic interest does not exist between the speaker and the one about whom he is speaking. Therefore, if picketing be an aspect of the constitutional privilege of free speech, these differences would become unimportant.

This, then, presents the question of whether the United States Supreme Court has ever actually held that the conduct of peaceful picket-

⁵ It might have been argued that the picketing in the Ritter case was punitive in its intent. This point, however, was not discussed in the opinion.

⁶ 315 U. S. 722 at —, 62 S. Ct. 807, 86 L. Ed. (adv.) 785 at 788 (1942), quoting from *American Federation of Labor v. Swing*, 312 U. S. 321 at 326, 61 S. Ct. 568, 85 L. Ed. 855 at 857 (1941).

⁷ *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937).

⁸ *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

⁹ *Carlson v. State of California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940).

¹⁰ *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941), and comment thereon in 19 *CHICAGO-KENT LAW REVIEW* 290.

¹¹ *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105 S. E. 911, 16 A. L. R. 222 (1921).

¹² *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910, 116 A. L. R. 477 (1937).

¹³ For a discussion of this theory see Oliver Wendell Holmes, Jr., "Privilege, Malice and Intent," 8 *Harv. L. Rev.* 1 (1894).

¹⁴ *People v. Armentrout*, 118 Cal. App. 761, 1 P. (2d) 556 (1931).

ing is but a phase of free speech.¹⁵ It must first be understood that the identification of the right to picket with the constitutional right to speak freely has never been beyond argument.¹⁶ Prior to the Senn case,¹⁷ picketing was generally treated as a tort. The circumstances under which this tort was privileged were at first either non-existent or rare.¹⁸ As the need for concerted action by organized labor became intensified, the privilege was extended, largely on the basis of public policy.¹⁹ However, the use of picketing remained more narrowly limited than did other economic weapons.²⁰

The Senn case was the first intimation by the United States Supreme Court that a definite relationship existed between picketing and the right of free speech. It there said: "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."²¹ But it must be noted that this often-quoted statement was pure dictum.²² The Thornhill²³ and Carlson²⁴ cases appear to embody this dictum into decision, but with great reservation. The statutes involved in those cases were specifically found by the court to comprehend "every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of an employer."²⁵ Each statute, on its face, could have been easily invoked to bar such conduct as the distribution of handbills near a business place, casual conversations with other persons who happened to be in the locality at the same time, trips to the struck shop to observe who was being employed as a strike-breaker, and numerous other acts which fall short, both in purpose and effect, of a picket line.

The Swing case²⁶ caused many authorities to believe that the right

¹⁵ Undoubtedly, many authorities following the Swing case, ante note 10, were under the impression that the association of picketing with the right of free speech was then complete. For a classification of the cases, see note in 90 U. of Pa. L. Rev. 201.

¹⁶ For a statement of the arguments against making such identification, see Ludwig Teller, *Labor Disputes and Collective Bargaining* (Baker, Voorhis & Co., New York, 1940) §§ 134-40.

¹⁷ Ante, note 7.

¹⁸ The history of the development of the law of injunctions against picketing may be found in Felix Frankfurter and Nathan Greene, *The Labor Injunction* (Macmillan Co., New York, 1930).

¹⁹ See Jerome R. Hellerstein, "Secondary Boycotts in Labor Disputes," 47 Yale L. J. 341 (1938), for a review of the cases and arguments in favor of expanding the right to conduct secondary activity.

²⁰ *Id.* at 343.

²¹ 301 U. S. 468 at 478, 57 S. Ct. 857, 81 L. Ed. 1229 at 1236 (1937).

²² The issue before the court in the Senn case, was whether the Wisconsin Labor Code, in so far as it barred injunctions against peaceful picketing, infringed upon the employer's rights under the Fourteenth Amendment.

²³ Ante, note 8.

²⁴ Ante, note 9.

²⁵ *Thornhill v. Alabama*, 310 U. S. 88 at 99, 60 S. Ct. 736 at 743, 84 L. Ed. 1093 at 1101 (1940); *Carlson v. State of California*, 310 U. S. 106 at 112, 60 S. Ct. 746 at 748, 84 L. Ed. 1104 at 1108 (1940).

²⁶ Ante, note 10.

of peaceful picketing was co-extensive with that of free speech.²⁷ The instant cases show, however, that the decision therein was, and should be, limited to the issue posed by the court at the outset of the opinion, namely, whether the "constitutional guarantee of freedom of discussion [is] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute."²⁸

In attempting to evaluate the present status of the law on the subject, a quotation from the Ritter case may be of value. The court there said: "It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing *may* be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication."²⁹ Thus, while recognizing that "peaceful picketing may be a phase of free utterance," the court has once more expressly asserted the power of the state to "confine the sphere of communication to that directly related to the dispute." It has justified this restriction upon the ground that it "leaves open to the disputants other traditional modes of communication."

But this reasoning, though consistent with sound tort law, appears to be without precedent in its application to the constitutional guarantee of free speech. Except for cases involving protection of public morals, other cases in which the United States Supreme Court has considered the scope of freedom of speech have concerned restrictions based upon the power to prevent violent overthrow of government, disturbance of the peace, or interference with the free and equal use of public places.³⁰ In a case from this group, it was said: ". . . they [freedom of speech and of the press] are so intimate to liberty . . . that there is an instinctive and instant revolt from any limitation of them either by law or a charge under the law. . . ." ³¹ In another such case, the Supreme Court was confronted with an ordinance which purported to regulate the distribution of handbills. Therein, the court held that the ordinance was invalid because: "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the

²⁷ Ante, note 15.

²⁸ 312 U. S. 321 at 323, 61 S. Ct. 568 at 569, 85 L. Ed. 855 at 856 (1941).

²⁹ 315 U. S. 722 at —, 62 S. Ct. 807, 86 L. Ed. (adv.) 785 at 788 (1942). Italics added.

³⁰ For a complete discussion of the cases dealing with the right of free speech see Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard University Press, Cambridge, Mass., 1941) 433.

³¹ *Schaefer v. United States*, 251 U. S. 466 at 474, 40 S. Ct. 259 at 261, 64 L. Ed. 360 at 364 (1920).

misuse or littering of the streets."³² Very recently, the court again stated the issue: "The question in every case [involving infringement of free speech] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress [or the state] has a right to prevent."³³ The mere fact that free speech may be exercised in one locality does not justify its restriction in another.³⁴

The principles on this subject may be summarized in the following appropriate language: "The power of a state to abridge freedom of speech . . . is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. . . . The limitation upon individual liberty must have appropriate relation to the safety of the state."³⁵ In view of these remarks, it can hardly be said that freedom of speech is subject to limitation as to the mode of expression, unless that mode be one which violates the police power. Yet, by associating the right of picketing with that of free speech, while at the same time imposing restrictions upon the former which do not burden the latter, the court has established a hybrid doctrine of semi-free speech. The court, by the device of this hybrid doctrine, has thus reserved to itself the power to review every state court injunction against picketing but has not hampered itself to any greater extent than if it were a state court dealing with picketing as a tort subject to privilege. However beneficial this result may be to our social and economic welfare, it remains a legal novelty.

I. R. LICHTENSTEIN

COURTS—JURISDICTION—WHETHER JURISDICTION OF CITY COURTS IN ILLINOIS EXTENDS TO CIVIL CAUSES ARISING OUT OF THE CITY—Through its recent decision in the case of *Werner v. Illinois Central Railroad Company*¹ the Illinois Supreme Court has severely limited the jurisdiction of the city courts of Illinois by directly construing the jurisdictional section of the City Court Act² for the first time since its adoption in its present

³² *Lovell v. City of Griffin*, 303 U. S. 444 at 451, 58 S. Ct. 666 at 669, 82 L. Ed. 949 at 953 (1938).

³³ *Schenk v. United States*, 249 U. S. 47 at 51, 39 S. Ct. 247 at 249, 63 L. Ed. 470 at 473 (1919), quoted with approval in *Bridges v. California*, — U. S. — at —, 62 S. Ct. 190 at 193, 86 L. Ed. 149 at 152 (1941).

³⁴ *Schneider v. Irvington*, 308 U. S. 147 at 163, 60 S. Ct. 146 at 151, 84 L. Ed. 155 at 166 (1939), where it was said: ". . . the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

³⁵ *Herndon v. Lowry*, 301 U. S. 242 at 258, 57 S. Ct. 732 at 739, 81 L. Ed. 1066 at 1075 (1937).

¹ 379 Ill. 559, 42 N. E. (2d) 82 (1942), reversing 309 Ill. App. 292, 33 N. E. (2d) 121 (1941).

² Ill. Rev. Stat. 1941, Ch. 37, § 333 which reads: ". . . That the several courts

form.³ The facts of the case may be briefly stated. Plaintiff resided in De Witt County. He was employed by the defendant and was injured in the course of his employment in Pana, Christian County. He brought suit in the City Court of East St. Louis, St. Clair County, to recover damages for personal injuries. Service of process was had upon the defendant at its office in East St. Louis. Judgment was rendered for plaintiff. Defendant appealed on the ground that the city court was without jurisdiction in the matter since the cause of action did not arise in the city. The plaintiff, to support the judgment, asserted that the act restricted the jurisdiction of the city courts to cases arising in the city in criminal prosecutions, but that in civil cases the city courts had jurisdiction of any cause, regardless where arising, as long as they had power to deal with the subject matter and had secured personal jurisdiction of the defendant by service within the city. In reversing the judgment, the court decided that the phrase "arising in said city" following the words "and in all criminal cases" appearing in the statute refers also to the preceding words "in all civil cases." City courts are thus held to have no jurisdiction in personal injury cases where the injury occurred outside the city in which the court is located.

At least eight earlier cases,⁴ arising in the Illinois Appellate Court, none of which the court referred to in its opinion, had considered the meaning of the pertinent statute and had held that city courts had jurisdiction under it of transitory causes of action arising outside the city as long as the court had properly obtained personal jurisdiction of the defendant. Two earlier Illinois Supreme Court cases, although not expressly construing the statute, had indirectly held that transitory causes of action arising outside the city could be tried in the city courts.⁵ The

of record now existing in and for cities . . . shall have concurrent jurisdiction with the circuit court within the city in which the same may be in all civil cases both law and chancery and in all criminal cases arising in said city. . . ."

³ The first act on the subject after the adoption of the Constitution of 1870 was passed in 1874 and read: "City courts shall have concurrent jurisdiction with circuit courts within the city in which the same may be, in all civil cases, and in all criminal cases except treason and murder." Ill. Rev. Stat. 1874, p. 345. In 1901 it was amended into substantially its present form, reading: ". . . in all civil cases and in all criminal cases arising in said city. . . ." Laws 1901, p. 136. The 1915 amendment merely inserted the phrase "both law and chancery" after "all civil cases." Laws 1915, p. 350. The adoption of the phrase "arising in said city" would seem to have been made with intention of limiting only the criminal jurisdiction of the city courts.

⁴ *Knickerbocker Ice Co. v. Leyda*, 128 Ill. App. 66 (1906); *Konow v. Nichols*, 128 Ill. App. 409 (1906); *Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338 (1911); *Security Ins. Co. v. Slack*, 183 Ill. App. 579 (1913); *Swanson v. Moline, R. I. & E. Traction Co.*, 204 Ill. App. 144 (1917); *Buchanan v. Scottish Union & Nat. Ins. Co.*, 210 Ill. App. 523 (1918); *Gunter v. Mystic Workers of the World*, 212 Ill. App. 178 (1918); *McGlynn & McGlynn v. Louisville & N. R. Co.*, 313 Ill. App. 396, 40 N. E. (2d) 539 (1942).

⁵ *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480 (1910); *Frank Simpson Fruit Co. v. Atchison, T. & S. F. R. Co.*, 245 Ill. 596, 92 N. E. 524 (1910).

court, however, in the present opinion, said that the latter two cases were not in point, and, instead, relied on five previous Illinois Supreme Court cases. Of those relied on, two were decided before the statute was amended into its present form in 1901;⁶ one was a criminal case arising outside the city, to which class of cases the statute plainly referred, and is hardly applicable to the present situation;⁷ while one was a case which dealt with the jurisdiction of the Municipal Court of Chicago.⁸ The fifth case, most nearly in point, held that the City Court of Chicago Heights had no power to send its original process beyond the city limits.⁹ None of the cases relied on was, therefore, authority for the present decision.

The appellate court cases referred to above, on the other hand, seem more consistent with both a logical and a grammatical reading of the pertinent statute. A careful rereading of the wording indicates that the phrase "arising in said city" seems to have been intended to refer only to the immediately preceding words "and in all criminal cases." As was said in *Konow v. Nichols*:¹⁰ "It is our opinion that the true construction of [the act referred to] gives to City Courts concurrent jurisdiction with the Circuit Court within the city where they may be situated, in three classes of cases: first, all civil cases; second, all criminal cases arising in said city; and third, appeals from justices of the peace in said city.

"We think if the legislature had intended to confine the jurisdiction to 'civil and criminal cases arising in the city' it would have so expressed itself, and not said 'all civil cases,' and, as we read it, in contradistinction thereto, 'all criminal cases arising within the city.'" ¹¹ As late as March, 1942, the Appellate Court of Illinois used similar language and reached the same result in a case involving a set of facts almost identical to that in the instant case.¹²

Not only from a grammatical standpoint but also from a well settled rule of statutory construction, sometimes known as the "last antecedent phrase" doctrine, the result reached in the appellate court cases seems to arrive more nearly at the correct meaning of the statute. This doctrine indicates that, in a statute, relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding and are not to be extended to include other words or phrases unless such extension is clearly required by the intent of the context. This principle, clearly set out by the Illinois Supreme Court in *Stevens v. Illinois Central Rail-*

⁶ *Joslyn v. Dickerson*, 71 Ill. 25 (1873); *Hercules Iron Works v. Elgin, J. & E. Ry. Co.*, 141 Ill. 491, 30 N. E. 1050 (1892).

⁷ *Miller v. People*, 230 Ill. 65, 82 N. E. 521 (1907).

⁸ *People ex rel. Sokoll v. Municipal Court*, 359 Ill. 102, 194 N. E. 242 (1935).

⁹ *Supreme Hive of Ladies of Maccabees of the World v. Harrington*, 227 Ill. 511, 81 N. E. 533 (1907).

¹⁰ 128 Ill. App. 409 (1906).

¹¹ *Ibid.*, at p. 413.

¹² *McGlynn & McGlynn v. Louisville & N. R. Co.*, 313 Ill. App. 396, 40 N. E. (2d) 539 (1942).

road Company,¹³ would require that the qualifying phrase "arising in said city" be held to limit only the phrase "and in all criminal cases" immediately preceding it and not extended to also limit the more remote phrase "in all civil cases."¹⁴ The Illinois Appellate Court, in the McGlynn case referred to, when considering the very statute here in question, said: "The words, 'arising in said city' appearing in the Act, through application of ordinary principles of statutory construction, refer to criminal cases only. A general rule of statutory construction in the interpretation of the language of the Act would give no meaning whatsoever to the second preposition 'in' immediately preceding the phrase 'all criminal cases arising in said city' if we adopted any other construction. Relative and qualifying words, and phrases, both grammatically and legally, refer to the last antecedent, unless a contrary intent clearly appears."¹⁵ By these tests, the instant decision appears to be unsupported.

The present decision, thus narrowly limiting the jurisdiction of the city courts in civil cases, causes speculation as to whether or not it will be applied to similarly limit their jurisdiction in divorce actions. Language used in the case of *Smith v. Herdlicka*¹⁶ tended to imply that city courts would not have jurisdiction in a divorce action where the plaintiff did not live in the city. The 1939 amendment to the Divorce Act¹⁷ purported to make it possible for a plaintiff to bring a divorce action in any city court in the county where he or she resided regardless of whether such residence was or was not within the city itself. Acting on the belief that jurisdiction had thus been conferred, the city courts have granted divorces to such non-resident plaintiffs.¹⁸ The present decision would seem to warrant a belief that no such authority has been conferred, but rather, that the city courts will hereafter be limited not only to suits by residents but also to cases in which the grounds for divorce arose within the city.¹⁹ To say the least, the volume of business handled by the city courts faces serious curtailment.

G. ADLER

EXECUTORS AND ADMINISTRATORS — MANAGEMENT OF ESTATE — RIGHT TO PAY REAL ESTATE PROPERTY TAXES UNPAID AT TIME OF DECEDENT'S DEATH—
In the case of *In re Estate of Muldoon*¹ the Illinois Appellate Court for

¹³ 306 Ill. 370, 137 N. E. 859 (1923).

¹⁴ See also *Neb. State Railway Com. v. Alfalfa Butter Co.*, 104 Neb. 797, 178 N. W. 766 (1920); *Traverse City v. Blair Township*, 190 Mich. 313, 157 N. W. 81 (1916); *Mass. Gen. Hosp. v. Inhabitants of Belmont*, 233 Mass. 190, 124 N. E. 21 (1919); *State v. Centennial Brewing Co.*, 55 Mont. 500, 179 P. 296 (1919).

¹⁵ 313 Ill. App. 396 at 403, 40 N. E. (2d) 539 at 543 (1942).

¹⁶ 323 Ill. 585, 154 N. E. 414 (1926).

¹⁷ Ill. Rev. Stat. 1941, Ch. 40, § 6.

¹⁸ See 18 CHICAGO-KENT LAW REVIEW 17 (1939).

¹⁹ There is further cause to doubt the constitutionality of the 1939 amendment of the Divorce Act, in that it resulted in an enlargement of the provisions of the City Court Act without so indicating in its title, an apparent violation of Ill. Const. 1870, Art. IV, § 13.

¹ 315 Ill. App. 109, 42 N. E. (2d) 306 (1942).

the First District has decided that the executors of the estate of a deceased property owner are entitled to take credit in their account for real property taxes paid on the lands of the deceased which had become a lien prior to his death but which were not presented for collection until after that date. The taxes were for the years 1928 and 1929. The owner died in August, 1929, after the taxes had become a lien, but it was not until May, 1930, and March and April, 1931, that the tax books for 1928 and 1929, respectively, came into the hands of the county tax collector for collection. The executors paid these taxes in installments over a five-year period, but without first securing authorization from the probate court. Objections to the executors' account were filed by the legatees on the ground that the taxes so paid were not a proper claim against the estate since they were due and payable only after the testator's death. The court found, however, that, as liability attached on April 1 of each year, the deduction was proper.

The decision of the court was predicated solely on the tax question. Both parties apparently agreed that real estate taxes are a personal obligation of the owner. Counsel for the legatees even stated, as his theory of the case, that: "Payment of taxes . . . by the executors was improper, since the taxes did not constitute the basis for a valid claim against the estate, *because they did not become due and payable until after the death of the deceased.*"² The narrow question of whether the lien date (April 1)³ or the date when the tax books were delivered to the county collector⁴ should control was all that was decided. Cases which, at first reading, would seem to establish the latter date as the correct one were distinguished.⁵

It is submitted, however, that the question is not solely, nor primarily, a revenue matter. The Probate Act provides that: "When it appears to the probate court that it is for the interest of any estate being administered in that court that the taxes on real estate forming a part of the estate be paid, the court may authorize the executor or administrator of the estate to pay taxes from any moneys on hand."⁶ The effect of this provision was not considered in the instant case, since no application for authority was made, but it would seem that this section should at least have been considered with the revenue provisions in arriving at the correct answer.

The problem, however, goes deeper than a mere reconciliation of the language of two statutes. The solution depends, in the last analysis, upon whether a devisee of real property can compel exoneration, under these circumstances, from the legatees or whether he must take the property

² Brief of appellant in 315 Ill. App. 109, 42 N. E. (2d) 306 (1942).

³ Ill. Rev. Stat. 1941, Ch. 120, § 697.

⁴ Ill. Rev. Stat. 1941, Ch. 120, § 653.

⁵ *Sexton v. Sikking*, 90 Ill. App. 667 (1900); *Mercy Hospital and Mercy Orphan Asylum v. Wright*, 213 Ill. App. 634 (1919). See also *Shaw v. Camp*, 56 Ill. App. 23 (1894).

⁶ Ill. Rev. Stat. 1941, Ch. 3, § 403, substantially the same as Laws, 1891, p. 2, § 1, from which it is derived.

subject to all liens and encumbrances existing at the date of the decedent's death.⁷ Despite any personal liability which may exist for real property taxes, such taxes are primarily a lien upon the real property against which assessed. If the devisee could have compelled the payment of the taxes, then the executor was obviously justified in paying them without compulsion. The provisions of the Probate Act quoted above would then be merely directory. If, however, the devisee could not have enforced exoneration, it is hard to see how the executor could have paid the taxes voluntarily without being liable therefor to the residuary legatees.

At common law, and thus in Illinois, unless there has been a change,⁸ the devisee of real estate charged with a lien which was also a personal obligation of the decedent was entitled to have the real estate exonerated by the discharge of the lien out of the personal estate, at least in so far as residuary legatees were concerned. The rule was otherwise where there was no personal obligation, as where the decedent bought property already subject to a mortgage, for in such cases there was no right of exoneration.⁹ Most of the cases which have arisen involving this question have concerned such encumbrances as mortgages and purchase money liens. The general theories evolved would seem to be equally applicable to tax liens, however, and thus it has been held that a devise subject to payment by the devisee of existing liens requires the payment of unpaid tax liens,¹⁰ and exoneration has been denied where taxes were a lien upon the land but were not a personal obligation of the testator.¹¹

There are no cases directly in point in Illinois, and the only conclusion which can be drawn is by way of analogy. It was held in *Sutherland v. Harrison*¹² that the heirs could compel payment of a vendor's lien out of the personal estate, and this case was later held to be authority for discharging an existing mortgage on property purchased by the testator subsequent to the execution of the will, but which was his personal obligation by reason of assumption, before the widow's share was determined.¹³ It would thus seem that the general common law rule has been at least tacitly accepted by our courts, and, by analogy, should apply to tax liens.¹⁴

An important exception to the general rule of exoneration, how-

⁷ This was recognized by the appellee, who stated in his brief that it was immaterial that the taxes were a lien on April 1, since the heirs or devisees could compel exoneration by compelling payment if the decedent was personally liable. This point was not mentioned in the opinion.

⁸ Ill. Rev. Stat. 1941, Ch. 28, § 1.

⁹ For a general discussion see 28 R.C.L. 304, 8 Ann. Cas. 592, 5 A.L.R. 488, 72 A.L.R. 709, 120 A.L.R. 577.

¹⁰ In re O'Neill's Estate, 266 Pa. 9, 109 A. 526 (1920).

¹¹ Barlow v. Cain, 146 Ark. 160, 225 S.W. 228 (1920).

¹² 86 Ill. 363 (1877).

¹³ Watts v. Killian, 300 Ill. 242, 133 N.E. 295 (1921).

¹⁴ "A tax lien is an encumbrance upon the land, and payment, subsequent to purchase, to discharge a pre-existing lien, is no more the payment of a tax in any proper sense of the word than is a payment . . . of any other encumbrance, for

ever, has been developed. The common law rule is to be applied only where the will itself is not explicit on the point as to whether the devisee is to take free of liens or with encumbrances. If, then, it can be shown that the enforcement of exoneration would be contrary to the plain intent of the testator, as where its enforcement would virtually transfer most of the estate to the devisee, to the exclusion of the legatees, the rule will not be applied.¹⁵ In view of the notorious delinquent tax situation in this area, this exception might well prove determinative, for in many cases, exoneration of the real estate by payment of delinquent property taxes might leave the residuary legatees with nothing.

Assuming that the common law rule is applicable, it then becomes necessary to examine into the nature of Illinois real property taxes to determine whether they are the personal obligation of the owner or not. Although the Illinois Supreme Court has, on occasion, stated that "there is no personal liability for a delinquent real estate tax"¹⁶ and commentators speak of personal liability for real estate taxes by reason of ownership when taxes are assessed with the condition "if any exists,"¹⁷ it would seem that there is personal liability, at least to a limited extent, as provided by the statutes. First and foremost, of course, such taxes are a lien against the property against which they are levied,¹⁸ but they may also be collected out of the personal property of the owner.¹⁹ However, if the property, upon foreclosure of the tax lien, sells for less than the amount of accrued taxes, no deficiency judgment can be entered against the owner,²⁰ and an action of debt against the owner can be brought only after the land has been forfeited to the state for want of bidders at a tax sale.²¹ There is personal liability for forfeited taxes, but whether the same could be asserted against the owner prior to forfeiture does not seem so clear. The statute does provide that "the owner of property on the first day of April in any year shall be liable for the taxes of that year,"²² and only the owner on that date can deduct the taxes

instance a mortgage." *Magruder v. Supplee*, 316 U. S. — at —, 62 S. Ct. 1162 at 1165, 86 L. Ed. (adv.) 1025 at 1027 (1942).

¹⁵ *Hannibal Trust Co. v. Elzea*, 315 Mo. 485, 286 S.W. 371 (1926); *Kellam's Ex'rs v. Jacob*, 152 Va. 725, 148 S.E. 835 (1929); *Cadoo v. Cadoo*, 95 N.J. Eq. 430, 123 A. 712 (1924); *Savings Trust Co. of St. Louis v. Beck*, (Mo. App.), 73 S.W. (2d) 282 (1934); *Howell v. Ott*, 182 Miss. 252, 180 So. 52 (1938), error overruled 182 Miss. 252, 181 So. 740 (1938).

¹⁶ *Peo. ex. rel. McDonough v. Chicago, M., St. P. & P. R. Co.*, 354 Ill. 438 at 442, 188 N.E. 404 at 406 (1933).

¹⁷ See *Weightstill Woods*, "Three Officer Plan for Quick Liquidation of Tax Judgment Liens in Illinois: Proposal to Bring Chicago's No Man's Lands Into Use," XXIII *Chicago Bar Record* 45 (1941).

¹⁸ Ill. Rev. Stat. 1941, Ch. 120, § 697.

¹⁹ Ill. Rev. Stat. 1941, Ch. 120, § 699.

²⁰ Opinion of the Illinois Attorney General, No. 1104, May 20, 1938, published in 1938 *Atty. Gen. Report and Opinions* 169.

²¹ Ill. Rev. Stat. 1941, Ch. 120, § 756.

²² Ill. Rev. Stat. 1941, Ch. 120, § 509.

for federal income tax purposes.²³ Whether he would also have to pay the taxes if the lien were to be extinguished, as by acquisition by the state, after the assessment date but before the collection date, or whether the tax authorities could present a provable claim in bankruptcy if the property had been transferred prior thereto, has not been established. The exact nature of the personal liability for taxes would have to be determined before it could be decided whether exoneration could be enforced or not.

The decision in the instant case does not present a conclusive answer to the problem. However, as the case now stands, it does point a distinct warning to everyone concerned with the administration of an estate which involves real property, and particularly tax-delinquent property. If the executor may pay taxes which became a lien prior to death of the testator, but which were not due until afterwards, he may pay taxes which were delinquent at the date of the decedent's death. And if he *may* pay them, why could he not be *required* to pay them? The result, in many such cases, would be apt to cut the legatees off without a cent. The decision is dangerous, therefore, not for what it decides, but for what it leaves undecided. It may have far-reaching consequences.

R. C. BARTLETT

NE EXEAT—PROCEEDINGS TO PROCURE WRIT—WHETHER PLAINTIFF MAY BE EXCUSED FROM FILING BOND WITH GOOD AND SUFFICIENT SURETY—In the recent case of *Andersen v. Andersen*¹ the chancellor, in a suit for divorce, issued a writ of ne exeat republica on the plaintiff's sworn statement that her husband was about to leave the jurisdiction of the state. Plaintiff's bond was set by the court at \$100 without surety, through defendant's bond was set at \$1000. Defendant, after arrest and detention for failure to post such bond, petitioned the court to quash such writ.² At the hearing thereon the defendant showed that he had not, at any time, any intention of leaving the jurisdiction; that he had been employed in the state for some fourteen years earning a substantial salary; and that he had not removed any of his property therefrom. He also urged that the plaintiff had not complied with the provisions of the pertinent statute.³ The trial judge, nevertheless, refused to quash the writ and remanded the defendant to custody. On appeal from the denial of such motion, the Appellate Court for the First District reversed

²³ G.C.M. 6273, Internal Revenue Cumulative Bulletin, VIII-I Cum. Bull. 168 (1929).

¹ 315 Ill. App. 380, 43 N.E. (2d) 176 (1942).

² Ill. Rev. Stat. 1941, Ch. 97, § 11, authorizes the court, at any time, to consider whether the writ should be quashed even though it may have appeared advisable to issue the same in the first instance.

³ Ill. Rev. Stat. 1941, Ch. 97, § 5, states: ". . . the court or judge shall also take or cause to be taken of the plaintiff before the writ shall issue, bond with good and sufficient surety, in such sum as the court or judge shall deem proper, conditioned that the said plaintiff will prosecute his complaint or petition with effect, and that he will reimburse to the defendant such damages and costs as he shall wrongfully sustain by occasion of the said writ or any alias or pluries writ."

and remanded with directions to quash the writ on the ground that the statute does not permit any discretion on the part of the court to waive the giving, by the plaintiff, of a bond with good and sufficient surety. It also intimated that the amount of the plaintiff's bond was too low to comply with the statutory purpose of requiring plaintiff to indemnify defendant against such damage as might be incurred by an improper use of the writ.

The English writ of *Ne Exeat Regno*, issued to restrain an individual from leaving the kingdom,⁴ has found its counterpart in the chancery process of this country and is granted, upon cause shown, to prevent a defendant from leaving the jurisdiction until performance of the decree be insured.⁵ Statutory authority may exist enlarging the scope of the writ, as is the case in Illinois, where it is expressly provided that it shall not be necessary to show that plaintiff's demand is one cognizable only before a court of equity.⁶ Where the statute is silent, the general principles applicable to the writ are those developed in England,⁷ but, being a remedy of great severity, it should be applied to private rights with great caution⁸ and then only upon an adequate showing of cause.⁹

Since the use of the writ in divorce proceedings depends solely upon the statute, rather than on general equitable principles,¹⁰ the power of the court to grant the writ is necessarily circumscribed by any statutory limitations thereon. It is also fundamental that any mandatory statutory provision must be obeyed to give validity to the writ. The presence of the word "shall" in the statute in question, particularly in connection with the requirement that no writ "shall be granted but upon complaint or petition filed, and affidavit to the truth of the allegation therein contained," and the further requirement that the court "shall also take. . . bond with good and sufficient surety,"

⁴ 1 Blackstone, Comm. 266, n. 10; also 45 C.J. 589.

⁵ *Cable v. Alvord*, 27 Ohio St. 654 (1875); *Fisher v. Stone*, 4 Ill. 68 (1841); *Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N.E. (2d) 657 (1937).

⁶ Ill. Rev. Stat. 1941, Ch. 97, § 1.

⁷ *Bailey v. Cadwell*, 51 Mich. 217, 16 N.W. 381 (1883); *Samuel v. Wiley*, 50 N.H. 353 (1870).

⁸ The instant case suggests that its use should not be sanctioned where defendant's intention, in leaving, is for some temporary reason as contrasted with an intention never to return. In this respect see Ill. Rev. Stat. 1941, Ch. 97, § 8, which provides that a mere temporary absence shall not constitute a breach of the condition of defendant's bond if he returns before his personal appearance became necessary.

⁹ *Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N.E. (2d) 657 (1937); *Brophy v. Sheppard*, 124 Ill. App. 512 (1906); *Garden City Sand Co. v. Gettins*, 102 Ill. App. 261 (1902), affirmed in 200 Ill. 268, 65 N.E. 664 (1902).

¹⁰ It should be remembered that divorce proceedings, though heard in a court of chancery by reason of Ill. Rev. Stat. 1941, Ch. 40, §§ 5, 7 and 8, are not matters of general equitable cognizance: *Smith v. Johnson*, 321 Ill. 134, 151 N.E. 550 (1926); hence, the sole authority for the use of the writ of *ne exeat* in a divorce case must rest upon Ill. Rev. Stat. 1941, Ch. 97, § 1, permitting its issuance in other causes besides purely equitable matters.

can only be regarded as evidence of legislative intention to make such requirements mandatory.¹¹ In contrast, the statute permitting the issuance of injunctions permits the court to dispense with plaintiff's bond in such cases, by using the significant phrase ". . . with such security as may be required by the court. . .granting. . .the injunction. . . ." ¹²

In the light of these considerations, the decision in the instant case can only be commended as a proper appreciation of well-understood principles. It should serve to discourage any tendency to abuse the use of the writ of ne exeat.

J. F. MIRABELLA

¹¹ See *Kettles v. People*, 221 Ill. 221, 77 N.E. 472 (1906), and 57 C.J. p. 547.

¹² Ill. Rev. Stat. 1941, Ch. 69, § 9.