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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS.

CONTRACTS—REQUISITES AND VALIDITY—WHETHER OR NOT CONTRACTS DESIGNED TO LIMIT VENUE IN PROCEEDINGS UNDER THE FEDERAL EMPLOYEES' ACT ARE VALID—The appeal taken in the recent case of *Akerly* v. *New York Central Railroad Company*[1] required the United States Circuit Court of Appeals for the Sixth Circuit to pass upon the validity of an agreement designed to limit venue in proceedings arising under the Federal Employers' Liability Act. Plaintiff therein, a resident of Penn-

[1] 168 F. (2d) 812 (1948), reversing 73 F. Supp. 903 (1947). Miller, C. J., wrote a dissenting opinion.

sylvania, was injured in that state while working on a locomotive owned by his employer, a New York railroad corporation. Subsequent to the injury, the railroad company made an advancement of a sum of money to plaintiff for living expenses, in consideration of which the plaintiff agreed in writing not to sue the railroad in any court outside the state where the injuries were sustained or outside the state where he resided at the time of the accident. Plaintiff did sue the railroad to recover damages for his injuries but brought the action in a federal district court located in Ohio, contrary to the terms of his contract. The defendant moved to dismiss on the ground of improper venue, supporting its motion by the agreement aforesaid, which motion was granted. On appeal by plaintiff, predicated on the argument that the agreement was void as a violation of Section 5 of the Federal Employers' Liability Act[2] and was also lacking in consideration, the majority of the higher court reversed the decision of the trial court and remanded the cause for further proceedings.[3] It found the agreement to be void on three grounds, to-wit: (1) that as the venue provision of the statute forms an inherent part of the employer's liability,[4] any attempt to limit venue by contract amounted to an attempt to exempt the railroad from liability; (2) that public policy prohibits the enforcement of contracts which purport to limit access to the courts; and (3) that there was no consideration for the contract since the amount advanced was to be deducted from the amount of any final settlement.[5]

It would appear that this is the first time that a federal court of the rank indicated has had occasion to pass on the validity of agreements of this character, although the issue has been raised heretofore and has been decided both ways, principally because of a difference of opinion as to the purpose intended by Congress when passing the statute in question. The problem arises over the meaning of the word "liability" as found in Section 5 of the statute. Was it designed to bear its usual

[2] 45 U. S. C. A. § 55 provides: "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to *exempt itself from any liability* created by this chapter, shall to that extent be void. . . ." Italics added.

[3] The dissent by Miller, C. J., was based on the idea that the consideration was sufficient and the contract was not illegal as it did not affect the liability of the defendant nor tend to exempt it from paying damages.

[4] 45 U. S. C. A. § 56, fixing venue, declares in part that "an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

[5] It is recognized that a contract lacking in consideration is unenforcible. For the purpose of this discussion, however, it is assumed that the contract in question was adequately supported by consideration. As to whether payment of a sum of money to be credited on an eventual recovery is sufficient consideration, see 13 C. J. S., Contracts, § 154, and cases there cited.

connotation of responsibility to respond in damages or to possess some esoteric meaning? On the surface, at least, there would appear to be no reason for going behind the language of the act, nor is there any glossary provided with the statute fixing a special definition, so unless considerable judicial legislation is indulged in only contracts granting exemption from liability would appear to be banned. The contract in the instant case granted no such absolute exemption, hence did not fall clearly within the statutory prohibition.

It has been decided that the prohibition against contracts designed to exempt from liability does not apply to releases,[6] but it is possible that Congress may have intended that Section 5 should apply to both contracts made before liability has accrued, that is to those designed to prevent it from ever arising,[7] and to those made after the occurrence of injury but not made to operate as releases.[8] The statute does not fix the time of making of the contract as the basis for testing validity, hence the prohibition should not be limited solely to invalidate contracts made before injury. But does it prohibit anything more than contracts designed to "exempt" from liability? Wherever there is liability the employer cannot escape by any contract short of a release, but is there warrant for giving strange meanings to the word "liability" so as to strike down agreements, whenever made, which leave liability to be determined?

A federal district court sitting in Illinois, in the case of *Sherman* v. *Pere Marquette Railway Company*,[9] by taking parts of Sections 5 and 6 of the statute in question and adding them together, came up with the idea that an agreement of the type in question was invalid on the theory that the comprehensive phraseology of Section 5 included contracts the purpose or intent of which was to enable the common carrier to exempt itself from liability to suit if not entirely then at least in the district in which the defendant was doing business at the time of commencing the action.[10]

Much the same idea was adopted by a majority of the judges of the Supreme Court of Utah in the case of *Petersen* v. *Ogden Union Railway*

6 Callen v. Pennsylvania R. R. Co., 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 235 (1947). The court indicated that a release is not a device "to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility."

7 See, for example, Chicago & Alton R. R. Co. v. Wagner, 239 U. S. 452, 36 S. Ct. 135, 60 L. Ed. 379 (1915).

8 Duncan v. Thompson, 315 U. S. 1, 62 S. Ct. 422, 86 L. Ed. 575 (1941). See also annotation in 166 A. L. R. 648.

9 62 F. Supp. 590 (1945).

10 This concoction seems to have appealed to the majority of the court deciding the instant case, for it followed much the same recipe.

& Depot Company,[11] only there the agreement was one not to sue in any court except the "District Court of the United States, Northern Division." That case presented a situation somewhat different from the one posed in the instant problem and also from that involved in the Pere Marquette case, in that the claimant was limited to suit in one federal court whereas the instant agreement allowed the claimant to sue in either a state or federal court anywhere in the state while the earlier federal case dealt with an agreement which named one state and one federal forum. Courts achieving the same result as that attained in the instant case, however, do not appear to have given much regard to such distinctions, being of the opinion that any restraint by agreement is improper.[12]

At this point, it should be noted that while Section 6 is commonly referred to as a "venue" statute it is, in reality, more complex. It fixes venue for federal courts, as a federal statute can properly do, at the same time that it makes federal jurisdiction concurrent with that of equivalent state courts. It does not purport to fix the venue of state tribunals for that is a matter of state regulation. But it is unnecessary to go to Section 5 of the statute to determine which provisions of Section 6 may be the subject of valid contract and which may not. It is elemental that while jurisdiction cannot be conferred or waived by litigants, venue may be a matter of personal choice unless otherwise specifically prohibited by statute.[13] Jurisdiction of state courts over proceedings under the Federal Employers' Liability Act may not be contracted away, any more than this is possible as to the federal courts. Venue provisions, however, whether in relation to state or federal courts may be made the subject of valid contract for there is no provision in the act to the contrary. Viewed in this light, the holding in the Utah case is correct even if the reasoning is unsound, but the same thing cannot be said of the other cases, including the instant one. If Congress wants to say that the venue provisions of Section 6 cannot be waived, it can do so. Until that time, courts should not interfere with private arrangements which violate no express legislative command nor undermine constitutional requirements.

Prior to the decision in *Sherman* v. *Pere Marquette Railway Company,*[14] courts were having little difficulty with the question. They understood that the term "liability" as used in the Federal Employers'

[11] 110 Utah 573, 175 P. (2d) 744 (1946). But see the concurring opinion of Larson, Ch. J., and the dissenting opinion of Pratt, J., which appear to be much better reasoned than the majority one.

[12] Compare Krenger v. Pennsylvania R. R. Co., 8 F. R. D. 65 (1947), and Fleming v. Husted, 68 F. Supp. 900 (1946).

[13] Neirbo Co. v. Bethlehem Corporation, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 (1939).

[14] 62 F. Supp. 590 (1945).

Liability Act meant one thing, while concepts such as "jurisdiction" and "venue" meant something else. As early as 1936, for example, the Supreme Court of Minnesota, in *Detwiler* v. *Lowden*,[15] held valid an agreement by an injured employee not to sue his employer except in the state of the employee's residence or in the state where the injury was inflicted. A federal district court sitting in the same state later came to the same conclusion,[16] as did another federal court in Missouri.[17] Even more remarkable, perhaps, is the fact that a different district court judge, sitting in the same federal District Court in Illinois, after the decision in the Pere Marquette case, held a similar contract to be valid[18] despite the influence of the earlier decision.

It is unfortunate, then, that the first and only higher federal court holding on the subject has followed not only the weaker line of reasoning with its predeliction for judicial legislation[19] but that it supports the earthy and unprincipled result that plaintiffs, with the approval of the judiciary, may now go "shopping for a judge or a jury believed to be more favorable"[20] despite the terms of contracts freely made.[21]

GRACE THOMAS STRIPLING

CORPORATIONS—CORPORATE EXISTENCE AND FRANCHISE—WHETHER AMENDMENT TO ARTICLES OF INCORPORATION DESIGNED TO CANCEL ACCRUED BUT UNDECLARED PREFERRED DIVIDENDS ON CUMULATIVE PREFERRED STOCK IS VOID AS TO OBJECTING STOCKHOLDERS—The transition in economic levels from depression to war-born prosperity brought with it a problem which was dealt with, for the first time in Illinois, in the

15 198 Minn. 185, 269 N. W. 367, 107 A. L. R. 1054 (1936).

16 Detwiler v. Chicago, R. I. & P. Ry. Co., 15 F. Supp. 541 (1936). See also, from the same court, the holding in Clark v. Lowden, 48 F. Supp. 261 (1942).

17 Herrington v. Thompson, 61 F. Supp. 903 (1945).

18 Roland v. Atchison, T. & S. F. Ry. Co., 65 F. Supp. 630 (1946).

19 The recognized judicial function of interpreting ambiguous statutes is far removed from writing laws to suit judicial beliefs: Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894).

20 Miles v. Illinois Central R. Co., 315 U. S. 698 at 706, 63 S. Ct. 827 at 831, 86 L. Ed. 1129 at 1135, 146 A. L. R. 1104 at 1109 (1941).

21 Editorial Note: Since the foregoing material was written, the plaintiff's choice of a forum has been lessened considerably by the adoption of Section 1404(a) of the new Judicial Code, 28 U. S. C. A. § 1404(a). As to the application thereof to suits arising under the Federal Employers Liability Act, see Ex parte Collett, — U. S. —, 69 S. Ct. 944, 93 L. Ed. (adv.) 901 (1949). In the event Congress should amend the Judicial Code in this respect, the foregoing material may possess prime significance. See also, on the specific point concerned, the decision in Kringer v. Pennsylvania R. Co., 174 F. (2d) 556 (1949), where the Court of Appeals for the Second Circuit, Swan, C.J., dissenting, reached a similar result to that attained in the instant case.

recent case of *The Western Foundry Company* v. *Wicker*.[1] The problem grew out of the burden of accrued dividends which have accumulated on the cumulative preferred stocks of many corporations, thereby preventing the resumption of dividends on the common shares. In that case, the defendant was a minority shareholder of both cumulative preferred and common stock in the plaintiff corporation. Substantial accumulations had accrued on the preferred stock when the plaintiff attempted to amend its articles of incorporation, with the consent of two-thirds of the shareholders of each class of shares, so as to cancel all right of the preferred shareholders to the accrued but undeclared dividends by making changes in the corporate capital structure.[2] Defendant neither attended the stockholders' meeting called to vote on the amendment nor voted in favor thereof, but frequently objected that the purported amendment was void. Plaintiff sought a declaratory judgment to establish the validity of the amendment, at which time the defendant counterclaimed for the payment of all dividends accumulated on the preferred stock prior to the amendment as well as for dividends declared subsequent thereto on both the preferred and common shares. The trial court found in plaintiff's favor but the judgment was reversed by the Appellate Court for the First District when it held the amendment to be void insofar as it sought to cancel the accumulated unpaid preferred dividends. Leave to appeal having been granted by the Illinois Supreme Court, that court reversed the holding of the intermediate court and reinstated the decision of the trial court to the extent that it held the amendment valid.

The fundamental question as to whether or not it is possible, by forced amendment of the articles of incorporation, to cancel the right to accrued cumulative dividends has never before been decided in Illinois, either under the present Business Corporation Act or any prior statute. For that matter, while many different phases of the problem have been made the subject of extensive treatment in legal publications,[3] there are

1 403 Ill. 260, 85 N. E. (2d) 722 (1949), reversing 335 Ill. App. 106, 80 N. E. (2d) 548 (1948).

2 The purpose of the amendment was to eliminate an operating deficit and to permit the resumption of the payment of dividends. It was to be made pursuant to authority allegedly contained in plaintiff's articles of incorporation to the effect that "the corporation shall not, without the consent of the holders of at least two-thirds (⅔) in amount of the preferred stock of the corporation at the time outstanding . . . alter or change the preferences hereby given to the preferred stock . . . [But] subject to the limitations hereinabove set forth, the authorized capital stock of the corporation may be changed, the rights and preferences of the preferred stock may be changed" etc. Although the corporation was organized under the 1919 Act, the holding in the instant case clearly reflects what the attitude of the court would be to a problem arising under the present Business Corporation Act.

3 Dodd, "Fair and Equitable Recapitalizations," 55 Harv. L. Rev. 780 (1942). See also discussions in 17 Bost. U. L. Rev. 733; 6 U. of Chi. L. Rev. 104; 12 U. of Cinn. L. Rev. 576; 40 Col. L. Rev. 633; 25 Corn. L. Q. 431; 9 Duke L. J. 76; 55

relatively few cases in the country where the attempt has been made to cancel such dividends outright,[4] most of the cases involving voluntary exchanges of stock with loss of accrued dividends occurring only as an incident.[5] Unlike its English counterpart, the Illinois corporation possesses only those powers which are clearly conferred upon it by statute,[6] any ambiguity being resolved against it,[7] hence the answer to the problem must be found, if at all, in statutory enactment[8] which would require resolution of the subordinate problem as to whether any existing statutory provision should be given retroactive or only prospective operation.

While the provisions of Section 52 of the Business Corporation Act,[9] dealing with amendment to the articles of incorporation, are generally quite broad, only one sub-section thereof is in any way germane. It permits the corporation, upon receiving sufficient approval from the shareholders, to change the "preferences, qualifications, limitations, restrictions, and the special or relative rights in respect of all or any part" of its shares.[10] Although the statute makes no specific reference to dividends, the authority to change "preferences" among shares might be considered adequate for this purpose since one common form of preference between groups of shareholders is with respect to dividend payments. But while the authority may be present to change preferential

Harv. L. Rev. 71; 54 Harv. L. Rev. 488; 33 Ill. L. Rev. 217; 59 Mich. L. Rev. 1201; 26 Minn. L. Rev. 387; 6 Ohio St. L. Rev. 313; 89 U. of Pa. L. Rev. 789; 7 U. of Pitts. L. Rev. 326; 19 St. Johns L. Rev. 139; 29 Va. L. Rev. 1; and 46 Yale L. J. 1055. The author of a comment on the case of Consolidated Film Industries, Inc. v. Johnson, 22 Del. Ch. 407, 197 A. 489 (1937), appearing in 16 CHICAGO-KENT REVIEW 286, points out what the probable holding would be under the Illinois statute.

[4] Keller v. Wilson & Co., 21 Del. Ch. 391, 190 A. 115 (1936), involved an exchange of stock and a cancellation of preferred dividends. Consolidated Film Industries, Inc., v. Johnson, 22 Del. Ch. 407, 197 A. 489 (1937), dealt with a compulsory exchange of shares as well as a cancellation of accrued preferred dividends. See also Harbine v. Dayton Malleable Iron Co., 61 Ohio App. 1, 22 N. E. (2d) 281 (1939); Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13 (1906); Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 A. 696 (1923).

[5] See, for example, Kreicker v. Naylor Pipe Co., 374 Ill. 364, 29 N. E. (2d) 502 (1940), where the corporation amended its charter to provide for the issuance of prior preferred stock with an option on the part of the existing preferred stockholders to exchange the preferred for the prior preferred. If exchange occurred, the stockholder waived the right to accrued dividends but the exchange was not compulsory and the shareholder who declined to exchange retained his right to the old stock with its accumulated dividends. The court held no vested rights were impaired, hence treated the amendment as being valid.

[6] City of Marion, Ill. v. Sneeden, 291 U. S. 262, 54 S. Ct. 421, 78 L. Ed. 787 (1934).

[7] People ex rel. Lydston v. Hoyne, 182 Ill. App. 42 (1913).

[8] Haberer v. Smerling, 225 Ill. App. 336 (1922).

[9] Ill. Rev. Stat. 1947, Ch. 32, § 157.52.

[10] Ibid., § 157.52(g).

dividend features as to the future, that is far different from saying there is authority to do so with respect to the past.

The Delaware Corporation Act, although not a verbal duplicate of the Illinois statute, not only contains a substantially similar amendatory provision but one which is likewise lacking in expression as to retroactive operation.[11] When passing upon the application of this statute to a situation much like that found in the instant case, the Delaware Supreme Court once said that it "authorizes nothing more than it purports to authorize, the amendment of charters. The cancellation of cumulative dividends already accrued through passage of time is not an amendment of a charter. It is the destruction of a right in the nature of a debt, a matter not within the purview of the section."[12] The court, as a consequence, held the statute to be without retroactive effect.

Much the same view was exhibited in the Ohio case of *Harbine* v. *Dayton Malleable Iron Company*[13] where the court, dealing with a statute permitting changes in shares,[14] also regarded as illegal an attempt to cancel cumulative dividends. The Ohio legislature, however, realizing the problem and the necessity for its solution, soon thereafter amended the statute to add further authority to make changes in the corporate structure to the point where the change might include the "discharge, adjustment or elimination of rights to accrued undeclared cumulative dividends" on any class of shares.[15] Under a New Jersey statute, the funding or satisfying of dividends in arrears may be accomplished by the "issuance of stock therefor or otherwise."[16] Statutes of this character not only recognize the problem, which is more than can be said for the one in Illinois, but they also prevent rise of the claim that the right to dividends can be called a vested one, at least prior to declaration. As these statutes become part of the contract between the shareholder and

11 Rev. Code Del. 1935, Ch. 65, § 26. The statute authorizes amendment, among other things, by "increasing or decreasing its authorized capital stock or reclassifying the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value." See also Del. Corp. Law Anno., The Corporation Trust Co., Chicago, 1947, p. 151.

12 Keller v. Wilson & Co., 21 Del. Ch. 391 at 413, 190 A. 115 at 125 (1936).

13 61 Ohio App. 1, 22 N. E. (2d) 281 (1939).

14 Page's Ohio Gen. Code Ann. 1938, § 8623-14, permits the corporation to amend the charter so as to change "issued or unissued shares of any class whether with or without par value into a different number of shares of the same class, or into the same or a different number of shares of any other class or classes with or without par value, theretofore or thereby created."

15 Ibid., § 8623-14(i), added by amendment in 1939, reads: ". . . which change, if desired, may include the discharge, adjustment or elimination of rights to accrued undeclared cumulative dividends on any such class."

16 N. J. Stat. Ann. 1939, § 14:11-1(n).

the corporation, the former cannot claim that to be vested which he has agreed shall be purely contingent.

Even if the Illinois act were broad enough to deal with the question, there is nothing in its terms to indicate any purpose to make it retrospective in operation. On that score, the Illinois Supreme Court once observed that no "rule of interpretation is better settled than that no statute will be allowed a retrospective operation unless the will of the General Assembly is declared in terms so plain and positive as to admit of no doubt that such was the intention. Retrospective laws, although they may be valid, are looked upon with disfavor, and an intention that laws shall have such operation will not be supposed unless manifested by the most clear and unequivocal expressions."[17] Despite this, the same court came to the conclusion in the instant case that what was essentially a retroactive charter amendment should be sustained. To accomplish that result, it had to reject the idea that shareholders' rights to accrued dividends could be said to be "vested" and, instead, was forced to treat the same as nothing more than a prospective "preference" subject to cancellation in the manner agreed upon.

It is true that no dividend or dividend right can be called "vested" prior to its declaration,[18] but is it true, as the court said, that non-declaration of cumulative preferred dividends merely enlarges the size or quantity but does not change the character of the contractual right of the shareholder? The average holder of cumulative preferred stock would think otherwise, regarding the passed dividend as his due but with its enjoyment temporarily postponed until more favorable times. It is at this point, then, that a clear break occurs between the instant case and other American holdings. One thing is certain, however, and that is that the Illinois Supreme Court has shown the way by which it will be possible to clear a backlog of arrearages on outstanding issues of cumulative preferred stock.

G. W. HEDMAN

FEDERAL CIVIL PROCEDURE—PARTIES—WHETHER CLASS SUIT MAY BE MAINTAINED AGAINST ONE DEFENDANT AS REPRESENTATIVE FOR GROUP OF NON-JOINED PARTIES DEFENDANT ON CLAIMS GROWING OUT OF LEGAL DEMANDS—A provocative challenge concerning the extent to which a fusion between law and equity has been produced by the Federal Rules of Civil Procedure grew out of the recent case of *Montgomery Ward &*

[17] People v. Deutsche Evangelisch Lutherische, etc., Confession, 249 Ill. 132 at 137, 94 N. E. 162 at 165 (1911).

[18] Beers v. Bridgeport Spring Co., 42 Conn. 17 (1875).

Company, Inc. v. *Langer.*[1] The plaintiff there sued Langer and some seventy-one others in the United States District Court sitting in Missouri[2] to recover damages for an alleged libel. The individual defendants were sued as individuals, as members of a national labor union and one of its locals, and also as representatives of the entire membership of the unincorporated associations.[3] The union organizations, not being *sui juris* in Missouri, were afterwards dropped as parties and the remaining defendants moved to dismiss the complaint on the principal ground that a complete diversity of citizenship did not exist. The District Court, when considering the motion, passed over the stated ground, proceeded to examine into the right of the plaintiff to bring a class suit, and concluded that Rule 23(a)(1) of the Federal Rules was not applicable to an action at law. When plaintiff chose not to amend the complaint to divest the case of its representative character, the action was dismissed. On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, that court, by a unanimous holding, reversed and remanded the cause, treating the class action device as being applicable to the entire field of civil litigation coming before the federal courts. It said, in part, that if "courts will disregard the ancient and often arbitrary distinctions between actions at law and suits in equity and will permit the Rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose."[4]

Although the device of the class or representative suit was developed by equity and was not, heretofore, available for use in law actions,[5] no serious issue can be taken with the interpretation given to Rule 23 by the court from the technical standpoint, however novel its effect may be. Not only did the enabling statute empower the United States Supreme Court to prescribe rules for the district courts so as to secure one form of action for law and equity,[6] but the rules so adopted were expressly declared to be applicable to all civil actions, with certain exceptions not

[1] 168 F. (2d) 182 (1948). Johnsen, J., wrote a specially concurring opinion.

[2] Jurisdiction was founded on diversity of citizenship.

[3] The basis for a class suit was said to be Rule 23(a)(1) of the Rules of Civ. Pro. for U. S. District Courts, 28 U. S. C. A. foll. § 723c, which provides: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it."

[4] 168 F. (2d) 182 at 187.

[5] Markt & Co., Ltd. v. Knight Steamship Co., Ltd., [1910] 2 K. B. 1021.

[6] 48 Stat. 1064; 28 U. S. C. A. §§ 723b and 723c.

here involved.[7] The letter of transmittal accompanying the rules indicated a deliberate purpose to provide but one form of action in the federal courts for suits heretofore designated as being in law or equity.[8] In addition, the advisory committee, in a note to Rule 23(a), observed that while the same was a substantial re-enactment of former Equity Rule 38, which also dealt with representative suits, the revision was intended to apply "to all actions, whether formerly denominated legal or equitable."[9] There is ample basis, therefore, at least on paper, for the instant holding. But declaring that a class suit can be maintained in a law action is one thing; making the principle work is another. The court has raised the cover of a legal Pandora's box from under which the "misery and evils" that confronted Epimethus will be deemed mere trifles compared to those that can harry a legal scholar as he considers the effect of a judgment *in personam* rendered as at law in a suit brought against a class of defendants.

Once the question of whether a class suit will lie on legal demands is answered affirmatively, the specially concurring opinion rendered by Judge Johnsen in the instant case becomes of greater interest than the main opinion, particularly because of his comments with respect to the usefulness of any judgment which may be rendered therein. He first notes that, as a matter of Missouri substantive law, members of non-profit associations are not liable for the tortious acts of their officers or of other members in the absence of proof of authorization, ratification, or participation. Second, he states that pecuniary liability cannot attach, as a result of the judgment, against those defendants not personally before the court. But he indicates the judgment might be helpful, third, in reaching the association's assets, and fourth, that it could probably serve to foreclose all questions against the membership as a group, leaving only the need to bring separate actions against the several members of the class wherein the issue could be limited simply to the question of their participation in, or authorization or ratification of, the conduct held actionable.

A seemingly fundamental defect in the plaintiff's case ought to be examined at the outset before considering the indicated consequences of a judgment, if one were rendered against the defendants. The plaintiff sued all of the members of the union as a class, presumably on the theory

[7] The exceptions referred to in Rule 1, 28 U. S. C. A. foll. § 723c, could not apply to class actions.

[8] See letter of the Chief Justice, U. S. Supreme Court, to the Attorney General set forth in Manual of Federal Procedure (West Pub. Co., St. Paul, 1940), p. vii.

[9] 28 U. S. C. A. foll. § 723c, note to Rule 23.

that the right sought to be enforced against the class was a joint one.[10] Yet it does not appear that a truly joint right actually exists among members of an association such as the one in the instant case. At most, the defendants there were no more than alleged joint tort-feasors for their association was not organized for profit and had no other legal status. Being no more than joint tort-feasors, no jural relationship was present among them which could be termed joint in the sense in which that term has been applied as a prerequisite to the bringing of a class suit.[11] Joint tort-feasors cannot be considered to be essential parties to an action brought against any one of them for they are, usually, severally liable and may not, in the absence of statute, get contribution from one another. Unless the doctrine has now been developed that any group of allegedly joint tort-feasors may be sued as a class, if sufficiently numerous and joinder would be difficult, it is hard to believe that the defendants in the instant case are members of a class as is contemplated by the rule in question.

Supposing for the purpose that they are, consideration must then be given to that which will follow in the wake of a judgment against the class. What, first, of pecuniary liability? Judge Johnsen remarks upon the fact that no jurisdiction to enter a personal judgment against the class defendants existed under former Equity Rule 38. If this be true, and in view of the fact that the new rules were not designed to "change previous jurisdictional concepts,"[12] the federal courts would not now possess the necessary jurisdiction to pronounce a binding judgment *in personam* against the represented defendants. There is a complete absence of case law on this precise point, either in support of, or in opposition to, the judge's contention. While some actions of legal character involving the doctrine of virtual representation have been maintained in code jurisdictions, not one of them was an action designed to recover money damages against the class defendants.[13] In addition, a reading of the textual authorities is no more profitable. At best, the comments are inconclusive;[14] at worst, the question is disregarded,[15]

[10] The principal opinion so regarded it: 168 F. (2d) 182 at 187.

[11] It is here assumed that the reference in Rule 23(a)(1) to a "joint" right is designed to follow the pattern established under former Equity Rule 38. There the joint factor was determined from the presence of jural relations among the members of the class: Moore, Federal Practice (Mathew Bender & Co., Inc., Albany, N. Y., 1938), Vol. 2, p. 2235. That author rejects the need for a joint proprietary interest or for the presence of a common fund, indicating rather that the true class suit should be one wherein, but for the class action device, the "joinder of all interested persons would be essential." Ibid., p. 2236.

[12] See 28 U. S. C. A. § 723b.

[13] The cases are collected in 39 Am. Jur., Parties, § 46, note 20.

[14] See, for example, Moore, op. cit., p. 2283 et seq.

[15] 39 Am. Jur., Parties, §§ 44 and 52.

probably because of a universally accepted attitude, prior to the codes, that representative suits against class defendants were only to be brought in equity concerning some res over which the court could extend its power and to which it was obliged to confine the decree.

There being no precedent on the particular question, it becomes necessary to examine into the general nature of judgments *in personam.* It is elementary, in fact it is a substantive right of every litigant, that no tribunal shall have the power to make a binding adjudication as to the rights *in personam* of the parties except where it has acquired jurisdiction over them by due process of law.[16] The due process required when the proceeding is strictly one *in personam,* that is one brought to determine personal rights and obligations, demands either valid personal service or a voluntary appearance in the cause.[17] Such being the case, it can hardly be said that pecuniary damages can be assessed against the class members in a representative suit, especially if they are present in the litigation only by virtue of a rule of procedure not designed to modify substantive rights. The class defendants in the instant case were not personally served nor did they voluntarily appear. Therefore, if the traditional elements of due process in personal actions are to remain unaffected, it would appear that the same have not been satisfied in a suit such as this one.

Professor Moore, working with the Advisory Committee who drafted the rules in question, sought to obviate uncertainty as to the efficacy of a judgment in a suit brought within the framework of Rule 23 by specifically declaring the several effects thereof. He proposed, under Rule 23(a)(1), that the judgment should be conclusive against and binding upon the entire class, but his proposal was rejected by the committee as amounting to a substantive change in the law.[18] The decision to reject such proposal was sound in the light of the enabling statute, but even if it had been the opposite way there would still be occasion to question the worth of such a judgment. As one learned authority has said, a judgment at law "disconnected from the right to issue execution, would be so idle and worthless a record that we can scarcely conceive that its creation would be encouraged, or its existence tolerated."[19]

If the judgment would not impose pecuniary liability on the members

16 National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1939).

17 McGehee, Due Process of Law under the Federal Constitution (Edw. Thompson Co., New York, 1906), p. 89.

18 Moore, op. cit., p. 2283 et seq.

19 Freeman, Executions, 3d Ed., Vol. 1, p. 30, § 10.

of the class, can it then truly be the "helpful step" which the specially concurring opinion suggests it would be to reach the association's assets? The judgment being a nullity as to the personal estates of those before the court merely as a class, it would seem to be a non sequitur to say that the assets of the association would be subject to execution on such a judgment, particularly where the association is not suable as an entity. At most, only so much of the assets as represents the interests of those personally before the court might be levied upon, and even this is doubtful. The interests of individuals who compose an unincorporated nonprofit association are peculiar in the law. It has been said that by becoming a member a person "ordinarily acquires, not a severable right to any of its property or funds, but merely a right to the joint use and enjoyment thereof so long as he continues to be a member."[20] Since the right of any individual is not severable, it is probably immune from execution although, comparable to the share of a partner, it might be subjected to equitable processes.[21]

Difficulties would likewise arise if the judgment were to be employed as the basis of a suit in attachment to reach funds in the hands of the association.[22] The tort claim has been reduced to a liquidated obligation only as to those members of the class personally under the court's jurisdiction. So far as the rest of the membership is concerned, the plaintiff has only a professed right to sue them in tort, a claim which would hardly support an attachment against their interests. The class judgment, then, would settle few problems as to pecuniary liability.

Would such a judgment serve to minimize future proof by foreclosing all questions except those relating to participation, authorization, or ratification by other members of the class when the latter are sued in separate actions? Here again, there is uncertainty of success. The orthodox view has been that a judgment in a law action is res judicata only as to the immediate parties and their privies.[23] The judgment being inadequate to impose pecuniary liability, it is difficult to see how other members, subsequently sued, would be estopped to deny facts established in the representative suit on any accepted theory of privity.[24] The almost inescapable conclusion, then, is that any judgment which might be

20 7 C. J. S., Associations, § 27.

21 See Sec. 28 of the Uniform Partnership Act; 7 Unif. Laws Anno. 162.

22 4 Am. Jur., Attachment and Garnishment, § 374; Waples, A Treatise on Attachment and Garnishment (Callaghan & Co., Chicago, 1895), § 250; Wade, A Treatise on Attachment and Garnishment (Bancroft-Whitney Co., San Francisco, 1887), § 36, note 6.

23 30 Am. Jur., Judgments, § 178.

24 Freeman, Judgments, 5th Ed., Vol. 1, p. 959, § 438.

rendered in favor of the plaintiff would be worthless for all practical purposes, except as it might be used against those defendants over whom jurisdiction was established without the aid of the class suit device.

It must, in candor, be admitted that none of the questions posed by the instant case is amenable to a conclusive answer at this stage of the development of the rule. The very novelty thereof causes any proffered solution to be no more than speculation. But it is doubtful if the matter should be left to be worked out, as was suggested by the court, through a "case by case demonstration of what [it] is possible for the rule to do in actual practice."[25] So many fundamentals of substantive principle are involved that nothing short of congressional action will serve. One commentator has suggested a revision which would make notice to all the members of the class a condition precedent to a class action, leaving the mechanics of the notice to be left to the discretion of the court concerned.[26] Such a revision, if authorized by statute, would amount to a declaration of what should be deemed due process in class actions *in personam* and might serve to bind all members of the case whether they elected to file an appearance or not. If the judgment then pronounced were also declared to be conclusive only as to facts actually litigated and established, the possibility of individual injustice, as where there was a failure by those representing the class to raise a meritorious personal defence, would be prevented. Without implementation by such a revision, the present rule might as well be returned to its original service in connection with truly equitable matters for it is not yet a mechanism fully adapted for use with all civil actions.

D. C. AHERN

TORTS—INVASION OF PERSONAL SAFETY, COMFORT OR PRIVACY—WHETHER PUBLICATION OF PHOTOGRAPH WITHOUT PERMISSION CONSTITUTES VIOLATION OF RIGHT OF PRIVACY—Two recent federal cases, one arising in the District of Columbia and the other in Minnesota, renew interest in the question of the existence of a right of privacy. In the first of them, that of *Peavy* v. *Curtis Publishing Company*,[1] the District Court for the District of Columbia had to rule on a case involving the unauthorized publication of plaintiff's photograph in conjunction with a satirical article appearing in a national magazine concerning taxicab drivers in the nation's capital where plaintiff was a woman taxicab driver.

[25] 168 F. (2d) 182 at 189.

[26] See an unsigned note entitled "Federal Class Actions: A Suggested Reform of Rule 23," in 46 Col. L. Rev. 818 (1946), particularly pp. 834-5.

[1] 78 F. Supp. 305 (1948).

The complaint contained two counts, one for libel and the other for damages flowing from the invasion of a claimed right of privacy. Defendant's motion to dismiss the complaint for insufficiency was readily overruled as to the libel count but, because the question of the existence of a right of privacy was an open one in the District,[2] the court went to some length to establish that such a right did exist. In reaching that decision, the court, at least by implication, joined the bolder or, as described by some, the more enlightened courts[3] which recognize a legal right of privacy independent of some property right, or implied contract, or breach of trust, a right which has been roughly described as the right to be let alone. The court stated that it is "time that fictions be abandoned and the real character of the injury be frankly avowed."[4] The second case, that of *Berg* v. *The Minneapolis Star and Tribune Company*,[5] was brought for an alleged wrongful publication of a news photograph taken of plaintiff during a recess in a court hearing between plaintiff and his wife over the custody of their children. It was alleged that plaintiff's right of privacy had been invaded to his humiliation and distress. The court there, however, denied recovery, quoting from the celebrated article on the subject by Warren and Brandeis to the effect that the "right of privacy does not prohibit any publication of matter which is of public interest."[6] Although recovery was denied, it is of interest to note that the court did not discuss the necessity of finding one of the usual bases for the right of privacy but seemed to assume its independent existence.

A reading of the decisions dealing with the subject leaves an impression of substantial lack of uniformity in the reasoning employed to

[2] But see Peed v. Washington Times Co., 55 Wash. L. Rep. 182 (1927), decided by the Supreme Court for the District of Columbia, wherein the defendant newspaper published a picture that had been stolen from plaintiff. A demurrer to a complaint predicated on an invasion of the right of privacy was overruled.

[3] Feinberg, "Recent Developments in the Law of Privacy," 48 Col. L. Rev. 713 (1948), discusses the growth of the law of privacy and notes a trend to recognize the existence of a right of privacy independent of either a property right, a contractual or a confidential relationship. See also Restatement, Torts, Vol. 4, § 867 and annotation in 138 A. L. R. 22.

[4] 78 F. Supp. 305 at 308.

[5] 79 F. Supp. 957 (1948).

[6] Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 at 214 (1890). It was not until the publication of this article that the right of privacy was introduced and defined as an independent right and the distinctive principles upon which it was based were formulated. The Supreme Court of Georgia, in Pavesich v. New England Mutual Life Ins. Co., 122 Ga. 190 at 193, 50 S. E. 68 at 69 (1905), noted that, prior to 1890, "every case in this country and in England which might be said to have involved a right of privacy was not based upon the existence of such right, but was founded upon a supposed right of property, or breach of trust, or confidence, or the like, and that therefore a claim independent of a property or contractual right or some right of a similar nature had, up to that time, never been recognized in terms of any decision."

support the right of privacy. Some recognize its existence only when property is involved, a contractual relationship can be implied, or when a relationship of trust can be established. A second group place recognition on a constitutional basis. Others say an independent legal right of privacy exists and seek no further for its support.

Indicative of the first view are decisions from England where the courts have long been hampered by the unfortunate dictum, pronounced by Lord Eldon in *Gee* v. *Pritchard*,[7] to the effect that equity acts to protect only property rights. In *Prince Albert* v. *Strange*,[8] for example, it was declared that the defendant could not be restrained from performing the acts he was doing simply on the ground that plaintiff's feelings would be injured thereby so long as no property right was being invaded. Still later, in *Pollard* v. *Photographic Company*,[9] the court had to search for an implied contract before it could say that defendant's conduct amounted to an actionable breach. Much the same sort of reasoning was relied upon in the early New York case of *Roberson* v. *Rochester Folding Box Company*.[10] There the court adverted to the fact that the law is not designed to remedy all evils so that if a right of privacy was to exist it would be a legislative function to create one.[11] But such uncritical reliance on dictum has been condemned both by writers[12] and courts[13]

[7] 2 Swanst. 402 at 413, 36 Eng. Rep. 670 at 674 (1818).

[8] 2 DeG. & S. 652, 64 Eng. Rep. 293 (1848).

[9] 40 Ch. Div. 345 (1888).

[10] 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902).

[11] The New York legislature was not slow to follow the hint. The present statute may be found in Cahill, Cons. Laws New York 1930, Civil Rights Law, Art 5, § 51.

[12] Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 Harv. L. Rev. 640 (1916); Chafee, "The Progress of the Law—1919-1920," 34 Harv. L. Rev. 388 (1921); Long, "Equitable Jurisdiction to Protect Personal Rights," 33 Yale L. J. 115 (1923); W. B. G., "A Re-interpretation of Gee v. Pritchard," 25 Mich. L. Rev. 889 (1927); Walsh, "Equitable Protection of Personal Rights," 7 N. Y. U. L. Q. 878 (1930); Leflar, "Equitable Prevention of Public Wrongs," 14 Tex. L. Rev. 427 (1936); Bennett, "Injunctive Protection of Personal Interests—A Factual Approach," 1 La. L. Rev. 665 (1939); Oberfell, "Jurisdiction of Equity to Protect Personal Rights," 20 Notre Dame Law. 56 (1944). Case comments on the decision in Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937), to be found in 51 Harv. L. Rev. 166 and 13 Ind. L. J. 416, are to the same effect, the latter one referring to the adherence to the dicta of Lord Eldon as "unintelligent." But see Simpson, "Fifty Years of American Equity," 50 Harv. L. Rev. 171 at 222 (1936), who states: "May not the repeated judicial statements that equity protects only rights of property involve something more than the uncritical acceptance of an old dictum of Lord Eldon? May not these statements be predicated on a deeper wisdom in the actual administration of justice through fallible human instruments than are the logically sound and humanly appealing arguments of modern legal scholarship?"

[13] See, for example, Henley v. Rockett, 243 Ala. 172, 8 So. (2d) 852 (1942); Stark v. Hamilton, 149 Ga. 227, 99 So. 861, 5 A. L. R. 1041 (1919); Foley v. Ham, 102 Kan. 66, 169 P. 183, L. R. A. 1918C 204 (1917); Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937); Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228, 116 Am.

who have attacked the fundamental premise, still followed by some tribunals,[14] that preventative relief is not available to secure interests in personality where no property right is concerned.[15]

Only two states have turned to constitutional provisions to find support for the right of privacy. The Missouri case of *Barber* v. *Time, Incorporated*[16] rests squarely on a provision in the bill of rights to the state constitution to the effect that all men have inalienable rights to life, liberty and the pursuit of happiness;[17] thereby obviating an earlier case which had striven to find a property right in a picture as justification for recovery.[18] The California case of *Melvin* v. *Reed,*[19] on the other hand, used two premises to support recovery, one founded on a similar constitutional guarantee,[20] the other treating the right as an incident to personality rather than arising from property. The infrequent reference in the cases to the constitutional right to pursue happiness is the more noteworthy as it has been passed over in all of the more recent decisions although the constitutional guarantee has been universally accepted in this country.

The third and more liberal attitude, recognizing an independent legal right attaching to every human being, whether property owner or not, is displayed in the decisions from the highest courts of eleven American jurisdictions[21] as well as in nisi prius decisions to be found

St. Rep. 215 (1906); Ex parte Badger, 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286 (1920); Hawkes v. Yancey, 265 S. W. 233 (Tex. Civ. App., 1924). Not all of these cases are "privacy" cases but all are critical of the so-called "property" concept of equity jurisdiction.

14 The insistence on "property" right is evident in the following cases: In re Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402 (1888); Smith v. Ham, 207 Ark. 507, 181 S. W. (2d) 475 (1944); Blanton v. Blanton, 163 Ga. 361, 136 So. 141 (1926); People v. Prouty, 262 Ill. 218, 104 N. E. 387, Ann. Cas. 1915B 155 (1914); White v. Pasfield, 212 Ill. App. 73 (1918); Chappell v. Stewart, 83 Md. 323, 33 A. 542, 37 L. R. A. 783, 51 Am. St. Rep. 476 (1896).

15 In Kenyon v. City of Chicoppee, 320 Mass. 528, 70 N. E. (2d) 241 (1946), the court pronounced Lord Eldon's dictum to be a "sweeping generalization" unsupported by any convincing reasons.

16 348 Mo. 1191, 159 S. W. (2d) 291 (1942).

17 Mo. Const. 1875, Art. II, § 4.

18 In Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911), the defendant had demurred on the ground that the invasion of the right of privacy was not actionable unless accompanied by some injury to property or interference therewith. The court observed that plaintiff had an exclusive right to his picture on the score of it being a property right of "material profit."

19 112 Cal. App. 285, 297 P. 91 (1931).

20 Cal. Const. 1879, Art. I, § 1.

21 Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945); Cason v. Baskin, 159 Fla. 31, 30 (2d) 635 (1947), and the companion case of Cason v.

in Ohio[22] and Pennsylvania.[23] In each instance, fictional bases for recovery have been repudiated and no reference has been made to any constitutional guarantee. An actionable invasion has been said to occur in those states whenever there has been an "unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."[24] The weight of authority, to say the least, is favorable to that view.

Whether courts of appellate rank in Illinois would recognize a right of privacy remains to be seen. Should they desire to do so, they now have the advantage of a substantial body of precedent on which to rely. They could summon to their aid the same type of constitutional provision utilized in other states.[25] They could conjure up property rights where none in fact exist. They might imply contracts in areas where the law of quasi-contracts would fear to trespass. They could, if they feared historical prejudices limiting common law writs, find a relationship of trust without a corpus, to meet the doctrine that equity acts only to protect property rights. They might insist that the problem is one for legislative cognizance only. But if they would stand with the growing majority, they would fearlessly proclaim that privacy is as natural a human right as is that of bodily security.

W. H. BREWSTER

Baskin, 155 Fla. 307, 20 So. (2d) 243 (1944); Pavesich v. New England Mutual Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1905); Patton v. Jacobs, — Ind. —, 78 N. E. (2d) 789 (1948); State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N. E. (2d) 755 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 166; Kunz v. Allen, 102 Kan. 883, 172 P. 532, L. R. A. 1918D 1151 (1918); Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S. W. (2d) 369 (1944); Dean v. Kirby Lumber Co., 162 La. 671, 111 So. 55, 52 A. L. R. 1023 (1927); Frey v. Dixon, 141 N. J. Eq. 481, 58 A. (2d) 86 (1948); McGovern v. Van Riper, 140 N. J. Eq. 341, 54 A. (2d) 469 (1946); Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938); Hinish v. Meyer & Frank Co., Inc., 166 Ore. 482, 113 P. (2d) 438, 138 A. L. R. 1 (1941); Holloman v. Life Ins. Co. of Va., 192 S. C. 454, 7 S. E. (2d) 169, 127 A. L. R. 110 (1940).

[22] Freedman v. Cincinnati Local Joint Ex. Board, 20 Ohio Op. 473 (1941). There is dictum to the same effect in Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (1938).

[23] Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940); Harlow v. Buno Co., 36 Pa. D. & C. 101 (1939). But see the earlier case of Owen v. Hinman, 1 Watts & S. 548 (Pa., 1841), wherein the court denied recovery because the plaintiff had no property that was being injured. The concurring opinion of Justice Maxey, in Waring v. W. D. A. S. Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937), is often cited as recognizing an independent right of privacy.

[24] 41 Am. Jur., Privacy, § 2.

[25] Ill. Const. 1870, Art. II, § 19.

WILLS—REQUISITES AND VALIDITY—WHETHER OR NOT CANCELLATION OF ONE OF TWO DUPLICATE ORIGINAL WILLS OPERATES TO REVOKE OTHER DUPLICATE ORIGINAL LEFT IN CUSTODY OF ANOTHER PERSON—The Illinois Supreme Court recently had occasion to determine a novel question in the law of wills when it reviewed the lower court holding in the case of *In re Holmberg's Estate.*[1] The decedent there concerned had executed a typewritten original of her will as well as a copy, the copy being a carbon impression of the original instrument. Both were executed in conformity with statutory requirements.[2] The decedent delivered the original to a friend for safekeeping but retained the executed carbon copy. Upon decedent's death, the friend filed the original instrument in the probate court and the person named to act as executrix filed a petition for probate. A few days later, the carbon copy was found in decedent's home and it, too, was filed. The carbon copy, however, had the word "void" written diagonally down the length of the first page so as to extend across each paragraph appearing thereon. The word "void," with the decedent's signature above and below it, was also written in large letters on the second page above the original attesting signatures. It was conceded that the superimposed writings were in the handwriting of the testatrix, and that the carbon impression also bore the legend "Copy." The Probate and Circuit Court, upon finding that both the original and the duplicate copy of the will and the inscriptions written thereon were executed by the decedent, declared the words so written on the carbon copy were effective to revoke the original instrument and therefore denied probate of the purported will. The proponents appealed from this order, thereby projecting the question as to whether an otherwise effective revocation of a will[3] is to be deemed nullified by the continued existence, in the possession of another, of a duplicate original bearing no mark or evidence of revocation. That question was answered, for the first time in this state, when the Supreme Court, affirming the decision below, held that the cancellation of one of two duplicate originals operated to revoke the other will also.

Because of the novelty of the issue in Illinois,[4] the court turned for

[1] 400 Ill. 366, 81 N. E. (2d) 188 (1948).

[2] Ill. Rev. Stat. 1947, Ch. 3, § 194.

[3] The court decided that the defacement appearing on the duplicate copy would have been sufficient to cause a revocation if it had been placed on a single instrument executed by the testator.

[4] A more complete discussion of other aspects concerning revocation and revival of wills, but exclusive of the question involved herein, may be found in Zacharias and Maschinot, "Revocation and Revival of Wills," 25 CHICAGO-KENT LAW REVIEW at pp. 185-215, 271-323, and in Vol. 26, pp. 107-55.

support to those states that had previously had occasion to decide the question and had reached the conclusion that the revocation of a duplicate executed copy of a will might serve to revoke the original[5] but that the destruction[6] or loss[7] of the duplicate original merely raises a presumption of revocation which is rebuttable and, therefore, becomes a fact issue.[8] In the case of *In re Martin's Will*,[9] for example, the testator executed duplicate copies of his will but destroyed the original which had been retained in his possession. Evidence introduced in the proceeding to probate the duplicate copy tended to show that the testator had destroyed the instrument in his possession because it was marred by ink spots. The court, admitting the copy to probate, said that the mere failure to produce the original of the testator's will did not serve to bar admission to probate of the carbon copy.

But the rule remains that when the testator can be shown to have had in his possession an executed copy of his will, and subsequently this copy is either found destroyed or cancelled or cannot be found at all, the presumption arises that the copy was destroyed *animo revocandi*.[10] For this purpose, it makes little difference whether it is the original or the duplicate impression that has become lost, destroyed or cancelled. Thus, in the case of *In re Wall's Will*[11] the testator kept the carbon

[5] In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1917); Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Lawrence's Will, 138 N. J. Eq. 134, 47 A. (2d) 322 (1946); Crossman v. Crossman, 95 N. Y. 145 (1884); In re Wall's Will, 223 N. C. 591, 27 S. E. (2d) 728 (1943); In re Estate of Bates, 286 Pa. St. 583, 134 A. 513 (1926); Combs v. Howard, 131 S. W. (2d) 206 (Tex. Civ. App., 1939); In re Wehr's Will, 247 Wis. 98, 18 N. W. (2d) 709 (1945).

[6] Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Moore's Estate, 137 Misc. 522, 244 N. Y. S. 612 (1930).

[7] In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1917); In re Breding's Estate, 161 Misc. 322, 291 N. Y. S. 750 (1936); In re Andriola's Will, 160 Misc. 775, 290 N. Y. S. 671 (1936).

[8] Combs v. Howard, 131 S. W. (2d) 206 (Tex. Civ. App., 1939).

[9] 40 N. Y. S. (2d) 685 (1943).

[10] Snider v. Burke, 84 Ala. 53, 4 So. 225 (1888); Stuart v. McWhorten, 238 Ky. 82, 36 S. W. (2d) 842 (1939); In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1912); Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Lawrence's Will, 138 N. J. Eq. 134, 47 A. (2d) 322 (1946); In re Beaney's Estate, 62 N. Y. S. (2d) 341 (1946); In re Flynn's Estate, 174 Misc. 565, 21 N. Y. S. (2d) 571 (1940); In re Robinson's Will, 168 Misc. 545, 5 N. Y. S. (2d) 671 (1938); In re Breding's Estate, 161 Misc. 322, 291 N. Y. S. 750 (1936); In re Andriola's Will, 160 Misc. 775, 290 N. Y. S. 671 (1936); In re Moore's Estate, 137 Misc. 522, 244 N. Y. S. 612 (1930); In re Vogelsang's Will, 133 Misc. 395 (1928); In re Field's Will, 109 Misc. 409, 178 N. Y. S. 778 (1919); In re Schofield's Will, 129 N. Y. S. 190 (1911); Crossman v. Crossman, 95 N. Y. 145 (1884); In re Wall's Will, 223 N. C. 591, 27 S. E. (2d) 728 (1943); In re Dawson's Estate, 277 Pa. St. 168, 120 A. 828 (1923); Combs v. Howard, 131 S. W. (2d) 206 (Tex. Civ. App., 1939); In re Wehr's Will, 247 Wis. 98, 18 N. W. (2d) 709 (1945).

[11] 223 N. C. 591, 27 S. E. (2d) 728 (1943). Accord: In re Robinson's Will, 257 App. Div. 405, 13 N. Y. S. (2d) 324 (1939).

copy and gave the original to the scrivener of the will. When the original was filed for probate and it was found that the carbon copy was unaccountably missing, the court held this was sufficient to raise the presumption of revocation and, absent evidence to the contrary, the instrument was revoked. Conversely, in the case of *In re Field's Will*,[12] the testator had kept possession of the original instrument and its unexplained absence at death served to effect a revocation of the duplicate.

For that matter, the one-time existence of a number of executed copies of the will has not served to influence the court into modifying this position. Thus, in the case of *In re Moore's Estate*,[13] the unexplained absence of the original copy of the testator's will, kept in his possession, was deemed sufficient to nullify two other duplicate originals left in the possession of others. The holding in *In re Andriola's Will*[14] would likewise indicate that all copies of the will, whether in duplicate or multiplicate, are to be looked upon as collectively one will and, while only one will is admitted to probate, all copies must be presented to the court for the duplicate or multiplicate copy is the alter ego of the original. The destruction or loss of a conformed copy of a will, on the other hand, does not raise the presumption of revocation[15] any more than should the destruction or loss of an unsigned copy.[16]

It has been said that the strength of the presumption that arises when the testator is known to have destroyed one copy of a will which has been executed in duplicate depends upon the fact situation. If he destroyed the only copy in his possession, the presumption of an intent to revoke would be strong. If he was possessed of both copies and destroyed but one, it would be weaker. If he altered one and then destroyed it, retaining the other entire, the presumption has been said to still hold although even more faintly.[17] In *Roberts* v. *Roberts*,[18] however, the testator first altered and then destroyed one copy of his will, both then being in his possession. The court held that, since the testator had both copies in his possession and could have revoked or

[12] 109 Misc. 409, 178 N. Y. S. 778 (1919). Accord: In re Estate of Bates, 286 Pa. St. 583, 134 A. 513 (1926).

[13] 137 Misc. 522, 244 N. Y. S. 612 (1930).

[14] 160 Misc. 775, 290 N. Y. S. 671 (1936). See also In re Flynn's Estate, 174 Misc. 565, 21 N. Y. S. (2d) 571 (1940).

[15] In re Wehr's Will, 247 Wis. 98, 18 N. W. (2d) 709 (1945).

[16] Search reveals no case actually involving this point but that result would seem to be dictated by principle. As the unsigned copy is not a "will" for lack of execution, its destruction could hardly amount to a nullification of something it does not purport to be.

[17] Greenleaf, Evidence, Vol. 2, § 681.

[18] 3 Hagg. Eccl. 548, 162 Eng. Rep. 1258 (1830).

destroyed both, the fact that he allowed one to stand was evidence of his intent to acknowledge the remaining copy as his will.

Upon precedent and principle, then, it appears that the instant case has been correctly decided. It may, however, be pertinent to observe that the questionable practice of executing duplicate wills might conceivably lead to results quite unintended by the testator. The design of such an individual is to achieve greater security thereby. In the event one copy is lost, he has another with which to replace it. But a testator who is ignorant of the legal effect to be given to the unexplained absence of a duplicate executed will which has been kept in his possession achieves not security but a result that may well be the opposite of his intended testamentary disposition. These possible results are not beyond the realm of probability; in fact, so possible do they become, that the careful attorney would do well to advise his client of the pitfalls that exist in executing duplicate wills. The suggestion is not made as a criticism of the principle of law involved nor of the presumption based thereon, for it is far more logical to presume that the testator intended to cause a revocation of his will when he destroys the only copy in his possession, or that he did destroy such copy with intent to revoke when its disappearance is unexplained by any act or word of his, than to believe the contrary. What is designed is a caution to the unwary testator to have greater respect for an executed duplicate copy of his will.

H. SILVERSTEIN