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## Discussion of Recent Decisions

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## DISCUSSION OF RECENT DECISIONS

RESCISSION OF CONTRACT FOR FRAUD OF VENDOR'S AGENT, WHERE PURCHASER KNEW THE AGENT'S REPRESENTATIONS WERE UNAUTHORIZED—RESTATEMENT OF THE LAW AS AUTHORITY.—The recent California case of *Speck v. Wylie*<sup>1</sup> holds that one induced to enter into a contract by material misrepresentations of the other party's agent may rescind and recover consideration paid from the principal, although the latter was innocent and the party deceived knew or had reason to know that the agent's statements were not authorized, but he cannot sue for fraud and deceit.

The action is to recover several sums paid under an instalment contract for the sale of land. The contract was in writing and contained an unequivocally worded clause in which the purchaser expressly agreed that the terms in the written contract should be exclusive, and expressly waived any claim for damages or for cancellation upon the ground of agent's misrepresentations.

The court states the question squarely and assumes that the purchaser knew that the agent was acting in excess of his authority in making the representations: "The appeal thus presents anew the vexing question as to what rights, if any,

<sup>1</sup> 36 P. (2d) 618 (1934).

should be accorded a purchaser who has been defrauded, against a seller who is innocent, where such purchaser knows that the negotiating agent of the seller has been acting in excess of his authority in making the representations complained of."

At the outset the court is confronted with its own decision in the case of *Gridley v. Tilson*,<sup>2</sup> where, after restating the general rule that fraud inducing the execution of a contract may be shown by parol testimony, it was further said: "A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further." This case undoubtedly represents the weight of authority and the sounder law. Since the responsibility of a principal for unauthorized statements of an agent rests solely upon apparent authority, and since notice excludes the appearance of authority, there is no logical foundation for responsibility of the principal in the presence of such notice.<sup>3</sup>

A review of the decisions and authorities upon this much controverted point is, of course, without the scope of this comment. The case is of particular interest in respect to the authority upon which it is based. In "relaxing" the rule of *Gridley v. Tilson*, the court feels "warranted in taking the step" for at least two reasons: "First, the principal, though innocent, should not be allowed to retain a consideration which the purchaser has parted with by reason of the fraud where such defrauded party rescinds promptly and the parties can be restored without substantial injury to their former status; second, because this subject has had thorough consideration by law collaborators as shown by the recent product of the American Law Institute, styled 'Restatement of the Law—Agency.'" The court states the two sections from the Restatement at length, and they fully sustain the decision of the court.<sup>4</sup>

<sup>2</sup> 202 Cal. 748, 262 P. 322 (1927).

<sup>3</sup> 2 C. J. 541, n. 51. For a recent case see *Barron C. Collier, Inc. v. Barnebey*, 65 F. (2d) 864. Rehearing denied July 3, 1933. See also cases there cited. This case was an action for breach of a contract whereby plaintiff was to furnish street car advertising to defendant. There was a clause in the contract to the effect that it contained all the agreements and representations of the parties, and that no representations or promises not set forth therein should affect the obligation of either party. Defense was the fraudulent representations of plaintiff's agent. In remanding the case, the court ordered judgment for plaintiff for the full contract price.

<sup>4</sup> Section 259. "A transaction into which one is induced to enter by reliance upon untrue and material representations as to the subject matter, made by an agent entrusted with its preliminary or final negotiations, is subject to rescis-

In order to bolster its present decision the court does enter upon some discussion of California decisions prior to *Gridley v. Tilson*, principally the case of *Mooney v. Cyriaks*.<sup>5</sup> That case was an action by the purchaser of an automobile to rescind because of misrepresentations of the vendor's agent. It is not in point with the instant case, since there the vendor did not rely upon lack of authority of the agent, but based his defense upon the truth of the representations complained of. However, the present decision, as the court so candidly admits, is based largely, if not primarily and principally, upon the authority of the Restatement.

The case offers another interesting citation of authority. This is a comment in the California Law Review,<sup>6</sup> attacking the doctrine of *Gridley v. Tilson* at the time that decision was rendered, and contending for the principle enunciated in the present case. It ingeniously fortifies a principle, drawn from California cases which do not support it, with dubious dicta and subtle implications drawn from other jurisdictions.<sup>7</sup>

Withal, the case presents the rather striking situation of a court overruling a recent decision of its own, clearly in point, and in accord with the general weight of authority, in order to follow a rule laid down in a comment in the Restatement of the Law, and bolstering this act with a comment of a law review attacking the precedent overruled. The case displays a truly liberal tendency in the application of the doctrine of *stare decisis*.

G. S. STANSELL

son at the election of the person deceived. . . . Comment: b . . . The rule stated in this section applies although the other party knows or has reason to know that the agent is not authorized to make the statement. By contract with the principal, however, he may agree that the principal is not to be liable because of unauthorized statements of an agent, as stated in section 260. . . . Section 260 . . . (1) A principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of an agent to such other. (2) A contract obtained by an agent through fraudulent misrepresentations of fact may be rescinded by the other party, although it provides that it shall not be affected by representations not contained therein."

<sup>5</sup> 185 Cal. 70, 195 P. 922 (1921).

<sup>6</sup> 16 Cal. L. Rev. 234.

<sup>7</sup> *Mooney v. Cyriak*, 185 Cal. 70, 195 P. 922, is principally relied upon. Of the cases from other jurisdictions greatest emphasis is laid upon the case of *Schuster et al. v. North American Hotel Co.*, 106 Neb. 672, 186 N. W. 87 (1921). The statement relied upon in this case is mere dicta. Judgment was given against the plaintiffs below, who were seeking to enforce an unauthorized collateral contract for the repurchase of stock. *Plate v. Detroit Fidelity & Surety Co. et al.*, 221 Mich. 482, 201 N. W. 457 (1924) and *Shepard v. Pabst*, 149 Wis. 35, 135 N. W. 158 (1912), quoted, support the rule contended for. These two cases tend to treat the fraud as fraud in the execution—hence vitiating the waiver of fraud along with the rest of the contract.

EFFECT OF DELAY IN ASSERTING RIGHT TO ABATE A PUBLIC NUISANCE.—A qualification is made by the recent decision of the Court of Appeals of New York, in the case of *Van Cortlandt et al, v. New York Central Railroad Co.*,<sup>1</sup> to the generally accepted doctrine that the right of a private individual to abate a public nuisance which causes him special damage is not barred by acquiescence of such individual in the maintenance of the nuisance, nor by delay in asserting his right to its abatement.

The plaintiffs' petition was for abatement, as an obstruction to navigation and therefore a public nuisance, of an immovable bridge which had been maintained for more than forty years over the Croton River. If the Croton was navigable at the *locus in quo*, the bridge was a violation of the special act of the legislature under which defendant's predecessor was organized,<sup>2</sup> because that act required maintenance of drawbridges across the navigable creeks and streams running into the Hudson River. The trial court dismissed the complaint on the ground that the Croton River was non-navigable, that the plaintiffs were guilty of laches in failing to make any move or objection for a period of over forty years, and that the railroad had acquired a prescriptive right to maintain the bridge. The Appellate Division<sup>3</sup> reversed the Special Term<sup>4</sup> on the law and the facts, holding that the river was navigable, the bridge a public nuisance, and the plaintiffs not barred by laches. Judgment was rendered for plaintiffs for nominal damages, with leave to apply at any time on the foot of the judgment, on showing substantial injury from any cause to them thereafter occurring, for damages or for an injunction.

Both sides appealed; the plaintiffs, because an immediate injunction was denied, and the defendant, because the court indicated that the plaintiffs would probably be entitled to relief later when conditions had changed. The Court of Appeals reversed the judgment of the Appellate Division, affirmed that of the Special Term, and dismissed the complaint.

*Held*, that a delay of more than forty years (before complaint was made of the railroad's failure to maintain the drawbridge) would not, of itself, bar the action of the riparian owners to enjoin continuance of the immovable bridge as a public nuisance, but that the delay was evidence bearing upon the materiality and extent of the plaintiffs' alleged injury, and the delay together with other facts, were sufficient evidence that plaintiffs did not sustain material injury.

Thus, it would appear that, while a plaintiff's delay in assert-

<sup>1</sup> 265 N. Y. 249, 192 N. E. 401 (1934).

<sup>2</sup> N. Y. Laws 1846, c. 216, sec. 15.

<sup>3</sup> 238 App. Div. 132, 263 N. Y. S. 842 (1933).

<sup>4</sup> 139 Misc. 892, 250 N. Y. S. 298 (1931).

ing his right to abate a public nuisance can not, as a matter of pleading, be set up as a defense to the action, it may, as a practical result, become a defense, by using the plaintiff's laches as an evidentiary fact to disprove an ultimate fact essential to the plaintiff's cause of action—the materiality of the plaintiff's injury.

The decisions which deny the defense of acquiescence or delay in an action by an individual to abate a public nuisance, or for damages to such individual caused thereby, appear to be predicated, not upon the doctrine that the plaintiff's laches, as such, is no defense, but upon the theory that there can be no such thing as a prescriptive right to maintain a public nuisance. New York has, hitherto, consistently followed this doctrine.

In *Mills v. Hall & Richards*,<sup>5</sup> the plaintiff, in an action on the case, sought damages for fever and ague suffered by him and his family because a mill-dam on the defendant's property had flooded the plaintiff's land. The court awarded damages on the ground that the continuance of the nuisance created by overflowing of the lands for 20 years and upwards, although it conferred a right to the use of the flooded land, was no defense to a proceeding on the part of the public to abate it, or to an action by an individual for specific peculiar injury sustained by him in consequence of it. In *Kelly v. Mayor, etc., of the City of New York*,<sup>6</sup> the court, after defining public, private, and mixed nuisances, says: "The nuisance created and continued by the plaintiff is either public or mixed, . . . The question is only important in reference to the right of the plaintiff to prescribe for the nuisance, for in this state no person can obtain a prescriptive right to maintain a public nuisance. (Wood, Nuis. 743). It is presumed the same rule applies to mixed nuisance as that is in one sense public." In *Weeks-Thorne Paper Co. v. Glenside Woolen Mills*,<sup>7</sup> the court decided that where the very act declared illegal by the Penal Code prohibiting discharge of any noxious, offensive, or poisonous substances into public waters or streams running into such waters, is the act which damages the plaintiff, no continuance thereof would create a prescriptive right. These cases, it is believed, fairly represent the current of New York authorities.

The decision in the principal case appears to be a departure—indirectly, perhaps, but still a departure—from this current of authority. The previous decisions appear to stand squarely upon the doctrine that nobody, by long continuance, can acquire the

<sup>5</sup> 9 Wend. (N. Y.) 315 (1832).

<sup>6</sup> 6 Misc. Rep. 516, 27 N. Y. S. 164 (1894); aff'd 89 Hun. 246, 35 N. Y. S. 1109 (1895).

<sup>7</sup> 64 Misc. 205, 118 N. Y. S. 1027, 140 App. Div. 878, 124 N. Y. S. 2, 204 N. Y. 563, 97 N. E. 1118 (1912).

right to maintain a public nuisance, either as against the public or as against an individual who suffers special damage thereby. It is the acquiescence of the public and the individual—the delay of either to assert the right to abate—which permits such long continuance. In the case of a private nuisance, such long continuance for the prescriptive period would extinguish the right to abate. But the courts in New York have said nobody can acquire a prescriptive right to maintain a public nuisance; in other words, that long continuance does not extinguish the right of abatement. To designate the acquiescence and delay which permits the long continuance by its technical term “laches,” and similarly to designate the right of the defendant which extinguishes the plaintiff’s right—in the case of private but not a public nuisance—as “prescription,” in no way alters the principle involved.

It would appear, therefore, that when the court in the principal case says that a delay of more than forty years does not bar the plaintiffs’ action, but that it can be introduced in evidence to defeat the action by showing that the plaintiffs are not materially damaged, the court is merely by an indirect method avoiding the effect of its previous decisions by doing what these decisions have said can not be done—extinguishing the plaintiffs’ right to abate a public nuisance by using the plaintiffs’ laches to permit the defendant to acquire, as against them, a prescriptive right to maintain it.

Other jurisdictions quite uniformly give relief where a private individual seeks to abate a public nuisance which causes him special injury. And their decisions uniformly apply as well the doctrine that no right to commit a public nuisance can be acquired by prescription to suits brought by private persons who have sustained special injuries from a public nuisance, as to suits brought by the attorney general or by some corporate portion of the public—a public nuisance is not unlawful as to the whole public and lawful as to its constituents, but it is absolutely and wholly unlawful. This is the doctrine as laid down in *Woodruff v. North Bloomfield Gravel Mining Co.*,<sup>8</sup> a Federal decision rendered in California in 1884, and a leading case often cited in all jurisdictions.

Cases in some jurisdictions which apparently announce a different viewpoint may usually be distinguished on the facts, as in the case of *Charnley v. Shawano Water-Power and River-Improvement Company*,<sup>9</sup> a Wisconsin case which apparently overrules the earlier Wisconsin case of *Meiners v. Frederick Miller Brewing Co.*<sup>10</sup> This case is distinguishable on the theory that

<sup>8</sup> (C. C.) 9 Sawy. 441, 18 F. 753 (1884).

<sup>9</sup> 109 Wis. 563, 85 N. W. 507, 53 L. R. A. 895 (1901).

<sup>10</sup> 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586 (1890).

in the Charnley case, the private injury complained of was not the same as that which made the obstruction to navigation a public offense, but was the invasion of the petitioner's private property interests by the overflowing of his lands. The same feature appears in the New York case of *Mills v. Hall & Richards*, already cited. If, in the Mills case, the plaintiff's action had been predicated upon the flooding of his lands instead of on the injury to the health of himself and family due to such flooding, relief would probably have been denied.

Only two Illinois authorities in point have been found: *City of Bloomington v. Costello*<sup>11</sup> and *City of Litchfield v. Betty Whitenack*.<sup>12</sup> Both were actions for damages brought by property owners against the city for damages caused by maintenance of city sewers. In the Costello case, it was urged that the sewer was established before the plaintiff bought the property and that the city acquired a prescriptive right to continue the nuisance. The court said: "There can be no such right to maintain a nuisance which is of public nature, as the evidence tended to show this was." In the Whitenack case, the facts were similar, and the Costello case was cited as authority for holding that a city can not acquire a prescriptive right to maintain a public nuisance.

Whether acquiescence or delay is admitted on the theory of laches of the plaintiff or of prescriptive right by defendant, the result would, in most cases, be the same. In applying the doctrine of laches, where a prescriptive right is involved, equity usually "follows the law" on the theory that plaintiff's laches in such case does not merely bar his remedy, but gives to the defendant a substantive right—a right which a court of equity will not permit the defendant to acquire in a period shorter than that provided by law. It is conceivable, however, that under the doctrine of the principal case, a court might find that the plaintiff had "slept on his rights" for a sufficient length of time to show that his damage was not material, and therefore, that his remedy was barred, even though the prescriptive period had not yet run.

In the principal case, there were other facts beside the laches of the plaintiffs which the court considered as evidence that the plaintiffs' damage was not so material as to entitle them to relief. Many of these facts could as well have been considered as evidence that there was, in fact, no public nuisance—the decision reached by the Special Term. As there had been a reversal below on the facts, the Court of Appeals had jurisdiction to review the facts and determine whether the evidence was such as to sustain the findings made by the Appellate Division. As to this, the court

<sup>11</sup> 65 Ill. App. 407 (1895).

<sup>12</sup> 78 Ill. App. 364 (1898).



said: "In the view which we have taken of the case we think it unnecessary to pass on many of these questions, as we are of the opinion that the plaintiffs cannot maintain this action."

There was evidence that the plaintiffs would have been compelled to spend large sums of money for dredging and improvements to their property in order to make possible commercial user of the river, and that the total length of channel above the bridge which could have been made so available was only 2,400 feet. The evidence tended to show that it would have cost the railroad about \$3,000,000 to reconstruct the bridge and that during the year 1929, the bridge carried 5,916,768 passengers and 5,404,644 net tons of freight. The decision of the court, therefore, may have been somewhat affected by "balancing the equities"—which equity, usually, will not do in nuisance cases.

Can it be said that the plaintiffs' damage was not material—that their laches was evidence that they had suffered no material damage? It may have been evidence of the fact that the plaintiffs, up to the time of bringing their action, did not desire to make use of the property right which existed before the bridge was made immovable—the right to have their property accessible to navigation, and therefore that they did not consider that the violation of the right caused them pecuniary loss. This is much different, however, from saying that the plaintiffs were not materially injured. If this property right still existed, it had been violated. Can it be that the court meant to find from the evidence an intentional abandonment of the property by the plaintiff? Of course, if the plaintiff intentionally abandoned his property interest, he could not claim damage for interference with it. But the court did not indicate that this was the ground of its decision.

Even conceding that the application of the doctrine that laches, as evidence of the materiality of the plaintiffs' damage, was not the sole ground for the decision in the principal case, it is conceivable that not much greater extension of the doctrine might have the practical result of raising a defense to the maintenance of a public nuisance where no defense has heretofore existed, and that acquiescence by the private individuals injured for even less than the prescriptive period might deprive them of their personal remedy and leave them only the right—sometimes of doubtful value—of an appeal to the public authorities.

H. N. OSGOOD

INTERPRETATION OF STATUTES—PROVISIONS FOR SELECTION OF GRAND JURIES AS DIRECTORY OR MANDATORY.—Jack Lieber was indicted, tried, and convicted in the Criminal Court of Cook County for robbery with a gun and sentenced to the penitentiary. From this conviction the defendant appealed on the ground that the grand jury which voted the indictment was illegally drawn and constituted. At the February term of the Illinois

Supreme Court, the conviction was reversed, but at the April term a rehearing was allowed and the former opinion, reversing the conviction, was then reversed and the conviction reinstated. The case has now been heard on a second rehearing and the judgment of the April term has been affirmed.<sup>1</sup> The sole issue raised is whether the trial judge erred in refusing to quash the indictment, because, as alleged, it was found by a grand jury not legally constituted.

The Jurors Act of this state expressly states that "if a grand jury is required by law or by the order of the judge for any court, the county board in each of the counties in this state wherein such court is directed to be held . . . shall select twenty-three persons possessing the qualifications provided in section 2 of this act, . . . to serve as grand jurors," etc. All through the Jurors Act and the Jury Commissioners Act, the wording is very clear that the panel to be called is to consist of twenty-three persons. Respondent insists that these provisions are mandatory while the People maintain that such provisions are merely directory and that the validity of the indictment is not to be destroyed unless some substantial rights of the accused person were thereby prejudiced. It is the opinion of the majority of the court that no substantial rights of the accused, Lieber, were prejudiced by the act of drawing sixty names, instead of twenty-three, and the action of the judge in drawing the twenty-three names out of a hat, when he really should have had nothing to do with the selection of the grand jurors. The statutes in question are held to be merely directory, and a substantial compliance therewith is all that is required.

"The irregularities shown by the record here cannot be regarded as of such transcendent importance when it is considered that the grand jury itself is not a mandatory institution under the constitution of 1870 but may be abolished by the legislature at any time. . . .

"We think it is well settled by our own decisions and by two different sections of our statutes that a substantial compliance with the law providing for the drawing and impaneling of a grand jury is all that is required unless the record shows improper influence, undue prejudice or other matters which might have caused a true bill to be improperly returned."<sup>2</sup> But the court wisely adds:

"We are not by this opinion to be understood as approving the disregard of statutory provisions shown by the record in this case. That such practice has been indulged in for many years by the courts of Cook County is no excuse for its continuance contrary to the plainly expressed purpose of the legislature."

<sup>1</sup> *People v. Lieber*, 357 Ill. 423, 192 N. E. 331 (1934).

<sup>2</sup> Citing *Henry v. People*, 198 Ill. 162, 65 N. E. 120 (1902).

The decision of the court was by a vote of four to three of the judges, the minority holding that the directions are mandatory and not merely directory. The majority opinion, however, is unanimous only in its ultimate conclusion that Lieber is guilty and that the conviction should stand. In the specially concurring opinion, submitted by two of the four majority justices, an entirely different reason is asserted. They admit that the statutes relating to the manner of selecting the grand jury are directory and not mandatory, though such admission is entirely unnecessary and obiter dictum as far as they are concerned, and then go on another step and say that there was a substantial compliance with the statute in the selection as made in this case. The statutes do not mean that exactly twenty-three names shall be called; they mean that not more than twenty-three shall be drawn. If, in the opinion of the judge, a larger number should be called because it would be more advantageous to the administration of justice to call more, it shall be in his discretion to require that a greater number shall be summoned; and "in a county such as Cook, with a large, shifting population, it is essential to the expeditious administration of justice that the court be permitted to summon more than twenty-three prospective grand jurors, else it may be that the grand jury cannot be impaneled on the first day of the term, as required by law." The only limitation is that the judge should consider the public expense and not call more than "experience shows necessary to insure the impaneling of a grand jury without delay."

And so, while justice may have been satisfied in the decision finally reached, as a precedent of legal reasoning, the case cannot be of much weight. In fact, the real majority, three justices, of one complete chain of reasoning is represented by the minority opinion in this case; and the majority opinion is but the summation of two minority opinions.

It is interesting to note, however, that the grand jury has been picked absolutely in conformity with the provisions of the statutes on the subject since the first opinion of the Supreme Court in this case.

#### G. E. HALL

JURISDICTION TO ENTERTAIN A BILL IN THE NATURE OF A BILL OF REVIEW TO IMPEACH A DECREE OF ANOTHER COURT ON GROUNDS OF FRAUD.—A bill in the nature of a bill of review brought to impeach a decree for fraud must be brought in the same court where the original decree was rendered. In *People v. Sterling*,<sup>1</sup> recently decided, the Illinois Supreme Court there restates that doctrine as adhered to by this court. In 1921, proceedings against Sterling were begun by Attorney General Brundage, alleging that the defendant Sterling, as state treas-

<sup>1</sup> 357 Ill. 354 (1934).

urer, with Len Small and Edward C. Curtis entered into a conspiracy, whereby state funds were to be used for the purpose of earning interest for their own profit. On November 19, 1932, Attorney General Carlstrom appeared on behalf of the People and moved that the suit be discontinued for want of equity. Also at this time Attorney General-elect Kerner appeared and objected to the motion, but the Circuit Court of Sangamon County entered a decree dismissing the suit on said motion.

Otto Kerner, as attorney general, brought the present suit as an independent bill in the Circuit Court of Cook County. He asked an accounting on the same facts as those alleged in 1921 by Attorney General Brundage. As to the decree of the Sangamon court, he contended that it was void for fraud. He alleged that Carlstrom, as an attorney general, occupied a fiduciary relationship, and that in this capacity he was charged with knowledge of the facts, which in this case the complainant claimed clearly indicated the defendant's liability, and that since he was charged with such knowledge, the motion to dismiss the suit was fraudulent to such an extent as to vitiate the decree for fraud.

The Supreme Court affirmed the Appellate Court's decision definitely refusing the right to bring an original bill in the nature of a bill of review to impeach for fraud arising during the trial. The court based its decision on the grounds, first, that no fraud which occurs after a court of competent jurisdiction has taken jurisdiction can be ground for an independent suit, and second, that such fraud is necessarily presented by a bill of review. The Illinois court limits fraud and its power to vitiate a decree, and divides it into two clearly defined kinds.<sup>2</sup> If there is fraud in the acquiring of jurisdiction by the court, the court has never had jurisdiction and its decision is necessarily a nullity. But if the fraud takes place during the trial, after jurisdiction has been acquired, the decree is one that the court then had it in its power to make, and such decree is entitled to full faith and credit<sup>3</sup> against a collateral attack. It is apparent that the alleged fraud in the present suit was of the latter nature, and the complainant therefore cannot bring this suit as an independent one in the Cook County court. The court, by following this arbitrary classification, need not have proceeded further. However, they further declared that a suit to impeach for fraud can only be brought by a bill of review. It was said that bills of review are brought in three cases<sup>4</sup>—for error of law

<sup>2</sup> Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342 (1887); Burton v. Perry, 146 Ill. 71, 34 N. E. 60 (1895); Evans v. Woodworth, 213 Ill. 404, 72 N. E. 1082 (1905); Beck v. Lash, 303 Ill. 549, 136 N. E. 475 (1922); Foutch v. Zempel, 332 Ill. 192, 163 N. E. 546 (1928).

<sup>3</sup> Spring v. Kane, 86 Ill. 580 (1877).

<sup>4</sup> Griggs v. Gear, 3 Gilm. 2 (1845); Harrigan v. County of Peoria, 262 Ill. 36, 104 N. E. 172 (1914); Moore v. Shook, 276 Ill. 47, 114 N. E. 592 (1916).

apparent upon the face of the decree, for newly discovered evidence, and for opening and reversing a decree in the same court for fraud. Turning to the present suit, the court states that a bill of review necessarily will have some new and independent matter as the plaintiff contends, but that the purpose of bills of this character is to procure a reversal, alteration, or explanation of the former decree, and that a bill of review always states the former bill, the proceedings thereon, the decree rendered by the court, and the new matter upon which the impeachment is sought; that since this is exactly what the complainant is attempting to do, regardless of what the complainant alleges, it would be considered a bill of review.<sup>5</sup> The court further says that *Mathias v. Mathias*<sup>6</sup> clearly states the principle involved. The court there, in determining the problem whether a bill of review may be brought in any but the original court, states, "Each judge of either of said courts may entertain a bill to review a decree entered by any other judge in the same court, but no judge in either court has power to revise or review a judgment or decree entered by the court of which he is not a member or by any other circuit court in the State. . . . A bill to review a decree in chancery can only be filed in the court wherein the decree sought to be reviewed was pronounced."

The Illinois decisions upon the right to bring an original bill in the nature of a bill of review to impeach a decree for fraud depart from the doctrine as established in England by Lord Bacon<sup>7</sup> and integrated into American law by Story<sup>8</sup> who clearly restates the general doctrine. The latter said, "There are but two cases in which a bill of review is permitted to be brought, and these two cases are settled and declared by the first ordinances in Chancery of Lord-Chancellor Bacon, respecting bills of review, which ordinances have never since been departed from. It is as follows: 'No decrees shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted, except it contains either error in law, appearing in the body of the decree, . . . or some new matter which hath arisen in time after the decree.' . . . So that, from this ordinance, a bill of review may be brought first, for error of law, secondly, upon discovery of new matter."<sup>9</sup> And discussing an original bill in the nature of a bill of review he said, "There is no doubt of the jurisdiction of courts of Equity

<sup>5</sup> *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 696 (1888); *Buffington v. Harvey*, 24 L. Ed. 381 (1877).

<sup>6</sup> 202 Ill. 125 (1903).

<sup>7</sup> For English cases following this doctrine see *Mussel v. Morgan*, 3 Bro. C. C. 74 (1790); *Kennedy v. Daly*, 1 Sch. & Lefr. 355, 375, 378; *Barnesly v. Powel*, 1 Ves., Sr. 120 (1748).

<sup>8</sup> Joseph Story, *Commentaries on Equity Pleading* (9th ed.).

<sup>9</sup> *Ibid.* p. 349.

to grant relief against a former decree, where the same has been by fraud and imposition; for these will infect judgments of law and decrees of all courts. . . . This must be done by an original bill; and there is no instance of it being done by petition. . . . Where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be. This kind of bill may be filed without leave of the court being first obtained for the purpose, the fraud used in obtaining the decree being the principle point in issue."<sup>10</sup> Illinois then has taken away the right to file an original bill of this nature and in place of it has added a third class to bills of review.

The Supreme Court in its decision included a reference to 21 Corpus Juris, page 726. On page 769 of the same volume under the heading "original bill," is a statement which fully substantiates the complainant's claim and shows the distinction between the two bills: "A bill to impeach a decree on account of matters not involved in, or covered by, the decree but which relate to its validity, or to a party's right to claim any benefits thereunder, is an original bill in the nature of a bill of review, and is thus distinguished from a bill of review which seeks to review a decree for error therein. . . . The distinction between these two classes of bills is somewhat nice, and the terms 'bill of review' and 'bill in the nature of a bill of review' are frequently used interchangeably, but the distinction exists, and considerable confusion might be avoided by close adherence to proper terminology. An original bill in the nature of a bill of review partakes of the character of a bill of review; and to a large extent the same principles apply to both kinds of bills. . . . A bill of review lies only in the court which rendered the decree, while an original bill to vacate a decree lies in any court of general equity jurisdiction."

R. L. HUFF

REVERSAL OF CONVICTION UPON GROUNDS OF RELATIONSHIP BETWEEN JUROR AND INJURED PARTY.—The recent Kentucky case of *Cox v. Commonwealth*<sup>1</sup> holds that a conviction for manslaughter cannot be reversed because one juror was a second cousin of the wife of the brother of the deceased and an uncle of the wife of such juror had married a niece of the deceased, since the juror was not related to the deceased by blood or affinity. While the problem may appear, at first glance, more appropriate to genealogy than to law, it does raise the very interesting question: Will relationship of a juror to the injured party by either blood or affinity justify a reversal in a criminal action in the absence of a challenge?

<sup>10</sup> *Ibid.*, p. 369.

<sup>1</sup> 74 S. W. (2d) 346. Rehearing denied Sept. 28, 1934.

Propounding the question is simpler than answering it. A reasonable search fails to disclose a single Illinois or English case directly in point; nor is there an Illinois statute touching the particular question. With the exception of one Pennsylvania decision, the cases raising the question appear confined to southern jurisdictions, possibly because of the greater fixity of the population and the greater regard there for comparatively remote family relationships.

In the Alabama case of *Kirby v. State*,<sup>2</sup> the court refused to hold incompetent a juror who was a cousin of the deceased's stepfather. The court based its decision upon absence of relationship. There was no challenge in this case, and the court implied in its opinion that it might have been reversed, even in the absence of a challenge, had the necessary relationship existed.

The Tennessee case of *Moses v. State*,<sup>3</sup> in which a negro slave had been convicted of murdering his master, holds that the fact that a juror's stepsons were cousins of the deceased is not sufficient to justify reversal, even in the presence of a challenge and the additional factor of the defendant's having exhausted all his peremptory challenges.<sup>4</sup> While the court does not state the ground for its holding, it doubtless bases it upon absence of relationship.

The Virginia court in the case of *Jaques v. Commonwealth*,<sup>5</sup> a trial for arson, held the trial court in error for refusing to allow a challenge of a juror who was a nephew of the deceased wife of the person whose house was burned, the wife leaving children who were living at the time of the trial.<sup>6</sup>

None of these three cases directly answers the question, the first two, because no relationship existed, the third, because there was a challenge. In two other decisions, apparently in point, the principle under discussion is actually precluded by a differentiation of the facts. In the case of *Johnson v. State*,<sup>7</sup> a murder case, there was notice of possible relationship between two jurors and deceased by reason of the name Jernigan, common to all three. The court stresses the fact that defendant awaited a verdict before making inquiry. Here it cannot be said that defendant was ignorant of the relationship. The other case, *Travis v. Common-*

<sup>2</sup> 89 Ala. 62, 8 So. 110 (1890).

<sup>3</sup> 30 Tenn. (11 Humph.) 232 (1850).

<sup>4</sup> The Illinois courts hold that the overruling of a challenge for cause is not prejudicial where the complaining party did not exhaust his peremptory challenges. *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533 (1907).

<sup>5</sup> 51 Va. (10 Grat.) 690 (1853).

<sup>6</sup> "But to make this a good challenge, this wife ought to be alive, or to have left issue; for if she be dead without issue, the alliance or consanguinity between them is ended, and the presumption of favour vanishes." Anon. (1429) Jenk. 96; 145 Eng. Rep. 69.

<sup>7</sup> 64 Fla. 321, 59 So. 894 (1912).

*wealth*,<sup>8</sup> is also peculiar on the facts in that there the juror himself was ignorant of the relationship; so no possible prejudice could have resulted.

There are two Texas decisions, *Page v. State*<sup>9</sup> and *Powers v. State*,<sup>10</sup> directly in point. Both are larceny cases. In each case the juror stated upon inquiry that he was not related to the injured party. In the first case the juror was a second cousin, and in the second case the brother-in-law, of the parties from whom the property was stolen. New trials were granted in each case. The courts based the decisions squarely upon a provision of the criminal statute,<sup>11</sup> which disqualified as jurors those related within the third degree to the person injured by the commission of the offense.

It seems unlikely that the point will be raised in the Illinois courts, both because of the improbability of the factual situation occurring and because of the lack of authority to sustain such contention on the part of defendant. However, should such contention be pressed, one may venture, because of the general reluctance of the Illinois courts to reverse for possible prejudice of jurors, that the court will not lay down a more liberal rule than that enunciated by the Pennsylvania court: "The time to challenge is before the juror is sworn; if not exercised then, the right is waived. That waiver may be relieved against when the party affected has been intentionally misled or deceived by the juror or by the opposite party."<sup>12</sup>

G. S. STANSELL.

RIGHT TO TAKE AN APPEAL FROM AN ORDER GRANTING A MOTION FOR A NEW TRIAL.—In the recent case of *James G. Mastin v. National Tea Company and Joseph Wych*,<sup>1</sup> the petitioner, plaintiff below, filed a petition in the Appellate Court for leave to appeal from the order entered by the trial court granting a new trial to the defendants, which request was allowed. In brief, the facts are these: The plaintiff was injured by a truck owned by the defendant Tea Company and driven by the defendant Joseph Wych. The plaintiff instituted suit, and after trial, the jury returned a verdict which found the defendants guilty and assessed the plaintiff's damages at \$7500. The trial court ordered the verdict set aside and granted the defendants a new trial. The principal ground for granting the new trial was the failure of the witness Dr. N. R. Snell, who testified for the plaintiff, to return and give further testimony and to produce certain X-ray

<sup>8</sup> 106 Pa. St. 597 (1884).

<sup>9</sup> 22 Tex. App. 551, 3 S. W. 745 (1886).

<sup>10</sup> 27 Tex. App. 700, 11 S. W. 646 (1889).

<sup>11</sup> Code. Cr. Proc., Art. 636, subd. 10.

<sup>12</sup> *Traviss v. Commonwealth*, 106 Pa. St. 597 (1884).

<sup>1</sup> 278 Ill. App. 60.



pictures. From this order the plaintiff petitioned for leave to appeal, as provided for by Article VIII, section 77 of the Illinois Civil Practice Act, Rule 20 of the Appellate Court, and Rule 30 of the Supreme Court. The Illinois Appellate Court for the Third District considered all the evidence and held that it was sufficient to sustain the verdict and the trial court erred in granting the motion for a new trial.

An immediate appeal to review the wisdom of the trial court in granting a motion for a new trial is new in this state. Prior to the passage of the Civil Practice Act, the courts had held, in the few Illinois cases found on the point, that an order granting a new trial,<sup>2</sup> as well as an order overruling a motion for a new trial,<sup>3</sup> was not a final order and hence could not be the basis of an appeal. Then the Civil Practice Act was passed. It provided:

“(1) Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees of the circuit courts, the superior court of Cook County, the county courts, the city courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to such rules of court as may be established and promulgated under this chapter. An order granting a new trial shall be deemed to be a final

<sup>2</sup> *Williams v. LaValle*, 64 Ill. 110 (1872). Action of ejectment. At the March term, 1868, a trial was had, resulting in a judgment in favor of the plaintiff, from which the defendants prayed an appeal. At the October term following, the judgment was vacated and a new trial granted upon payment of costs, the defendants withdrawing their appeal. At the October term, 1870, a second trial was had, resulting in a judgment in favor of the defendants. The plaintiff thereupon moved for a new trial, which the court at the March term, 1871, denied. The plaintiff thereupon moved for a new trial under the statute, which was allowed upon the payment of costs within one year. Upon this application of the plaintiff it was proven that he had paid the costs of the second trial, but had not paid the costs of the first trial. At the October term, 1871, the plaintiff dismissed his suit. The defendants sued out a writ of error, and insisted the court below erred in granting to the plaintiff a new trial without the payment of all the costs incurred in the suit. “Per Curiam: The order granting a new trial in this case, is not a final judgment. Hence no appeal can be taken on writ of error prosecuted for its reversal. The writ of error must therefore be dismissed.”

And in other states also: *Central of Georgia Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970 (1901); *Stern v. Bennington*, 100 Md. 344, 60 A. 17 (1905); *First National Bank of Pomeroy, Iowa v. McCullough*, 50 Or. 508, 93 P. 366 (1908); *Parsons v. Trowbridge*, 226 F. 15 (1915); *Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721 (Del., 1913).

<sup>3</sup> *Atkins v. Huston*, 5 Ill. App. 326; *The J. W. Reedy Elevator Mfg. Co. v. Pitowsky*, 35 Ill. App. 364 (1890), where the court said, “The order overruling a motion for a new trial is not final, and no appeal lies therefrom;” and *Peirce v. Ott*, 201 Ill. App. 46 (1915).

order, but no appeal may be taken therefrom, except on leave granted by the reviewing court, or by a judge thereof in vacation within thirty days after the entry of the order, on motion and notice to adverse parties.'<sup>4</sup>

As the cited cases show, it had previously been held that both orders granting, and orders denying, new trials were interlocutory and not final, and hence no appeal could be taken from either. It should be noted, therefore, that section 77 of the Practice Act refers only to orders granting a new trial and says nothing about orders denying a new trial. In Oregon it has been held that under a statute very much like our own where mention is only made of the finality of orders granting a new trial the inference must be that an order overruling a motion for a new trial is not to be considered a final order and cannot be a ground for appeal,<sup>5</sup> and McCaskill's annotation to the Civil Practice Act of this state is to the same effect.<sup>6</sup>

Therefore, it appears that under the present statute the appellate court may consider evidence for the purpose of determining whether or not the trial court was right in entering an order granting a new trial, but that no appeal may be taken from an order overruling a motion for a new trial.

G. E. HALL

CAN THE SUPREME COURT RAISE THE QUESTION OF THE CONSTITUTIONALITY OF A STATUTE ON ITS OWN MOTION?—In *People ex rel. Carr v. Murray*,<sup>1</sup> the Supreme Court of Illinois held that specification 5 of section 2 of the Fugitive From Justice Act was unconstitutional. This point had not been raised by either of the parties, had not been passed on by the trial court, and neither of the parties in his appeal brief and argument had raised the question; so that, as far as the issues presented by the parties were concerned, the point was never before the court. Did the Supreme Court have a right to pass upon this question under such circumstances?

In the first place, the cases which hold that a statute is presumed constitutional are too numerous and too well established, both in Illinois and in other states of the Union, to require citation here. That this is clearly a well settled policy in this state cannot be questioned. In fact, the Illinois courts have gone farther than this and have held that even in those cases where a constitutional question is involved, the court will not pass upon

<sup>4</sup> Art. VIII, sec. 77.

<sup>5</sup> *Macartney v. Shipherd*, 60 Or. 133, 117 P. 814 (1911).

<sup>6</sup> Illinois Civil Practice Act Annotated (Chicago: The Foundation Press, 1933, O. L. McCaskill, Editor-in-Chief), p. 292.

<sup>1</sup> 357 Ill. 326, 192 N. E. 198 (1934).

it unless it is absolutely necessary;<sup>2</sup> and the same rule has been adhered to in other states. In New York it has been held that the Court of Appeals will not determine the power of the legislature to enact a law which is attacked as unconstitutional unless it is necessary so to do in order to determine questions appearing on the record.<sup>3</sup> The Supreme Court of Michigan held that the constitutionality of statutes will not be passed upon on appeal where the case can be determined without doing so,<sup>4</sup> and that of Iowa has gone so far as to say that constitutional questions will not be determined on appeal where there are other questions decisive of the case, even though the parties agree to waive the other questions.<sup>5</sup> Likewise the United States Supreme Court has frowned on the idea of raising constitutional questions in an agreed case.<sup>6</sup> It would thus appear that there is a distinct policy not to determine such a question unless it is absolutely necessary to do so, and this is true even where the question is adequately raised by the briefs and arguments of counsel.<sup>7</sup>

As to the point that it is necessary that the question be raised at the trial of the case and argued by counsel, the decisions are just as certain. The Supreme Court of the United States has stated that the particular clause of the Constitution must be specified;<sup>8</sup> the point must be passed on by the intermediate courts;<sup>9</sup> and that it will be too late to urge the point for the first time in the appellate court.<sup>10</sup> The Indiana Supreme Court, in a suit on a contract which could be appealed under a certain statute if the contract was not in writing, held that where there was no showing in the lower court of the absence of a written contract and no finding was made thereon, the question of the constitutionality of the statute could not be raised on appeal.<sup>11</sup> So, too, it has been held in Michigan that the constitutionality

<sup>2</sup> In *The Rittenhouse and Embree Co. v. F. E. Brown and Co.*, 254 Ill. 549, 98 N. E. 971 (1912), the court said: ". . . we will not consider a constitutional question in a case in which its decision can have no effect upon the decree which is the subject of review." *Barrett Mfg. Co. v. City of Chicago*, 259 Ill. 578, 102 N. E. 1017 (1913).

<sup>3</sup> *Curtin v. Barton*, 139 N. Y. 505, 34 N. E. 1093 (1893).

<sup>4</sup> *Powell v. Eldred*, 39 Mich. 552 (1878).

<sup>5</sup> In *Dubuque & D. Ry. Co. v. Diehl*, 64 Iowa 635, 21 N. W. 117 (1884), the court said: "Courts are slow in approaching, and hesitate to decide, constitutional questions . . . Parties, by waiving other questions, cannot form an agreed case upon which the courts will decide constitutional questions."

<sup>6</sup> *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176 (1892).

<sup>7</sup> *Chandler v. Nash*, 5 Mich. 409 (1858); *Nelson v. C. B. & Q. R. Co.*, 47 S. D. 228, 197 N. W. 288 (1924); *Alabama Warehouse Co. v. State*, 227 Ala. 258, 149 So. 843 (1933); *First Nat. Stores v. Lewis*, 51 R. I., 448, 155 A. 534 (1931).

<sup>8</sup> *Pine Grove Township v. Talcott*, 86 U. S. 666, 22 L. Ed. 227 (1874).

<sup>9</sup> *Cox v. Texas*, 202 U. S. 446, 50 L. Ed. 1099 (1906).

<sup>10</sup> *Wabash Ry. Co. v. City of St. Louis*, 64 F. (2d) 921 (1933).

<sup>11</sup> *Baltimore & O. S. W. R. Co. v. Harmon*, 161 Ind. 358, 68 N. E. 589 (1903).

of one of its moratorium acts was not to be considered on appeal where it was not passed upon by the trial court and was not discussed in appellant's brief.<sup>12</sup> Likewise the Iowa Supreme Court has held that it would not consider the question of the constitutionality of a statute upon the mere expression of a doubt by counsel, without argument or citation of authorities, and that the reviewing court cannot presume that the statute is unconstitutional, but the burden of showing this is on the person asserting it.<sup>13</sup> Even our own Illinois Supreme Court has said on this point, "Where a law is found on the statute books, the presumption is that it conforms to the constitution. . . . we must presume they [governor and legislators] acted in view of the constitution and all its limitations. For these reasons the courts never interfere to declare a law unconstitutional in case of doubt."<sup>14</sup>

The Illinois Supreme Court, in *Kinsey v. Zimmerman*,<sup>15</sup> decided that it could not consider questions not considered by the appellate court. In addition to the *Kinsey* case there are many decisions in this state which affirm that one of the parties cannot raise the question of the constitutionality of a statute for the first time in the Supreme Court;<sup>16</sup> and in all of these cases it could more easily have been decided that it could be raised than in the principal case, because in each of them the counsel raised the question voluntarily, though inappropriately, by their own briefs and arguments, while in the present case neither of the parties ever mentioned the point.

<sup>12</sup> *Wilson v. Boyer*, 256 N. W. 854 (Mich., 1934).

<sup>13</sup> "We will not, without invitation by argument . . . enter upon inquiry as to the constitutionality of a statute." *Henderson v. Robinson*, 76 Iowa 603, 41 N. W. 371 (1889).

<sup>14</sup> *Hawthorne v. People*, 109 Ill. 302 (1883).

<sup>15</sup> 329 Ill. 75, 160 N. E. 155 (1926); *Hoffman v. Sears Community State Bank*, 356 Ill. 598, 191 N. E. 280 (1934). In the latter case it was claimed in the Supreme Court that Sec. 4 of the Banking Act of 1879 was unconstitutional. The question was not raised in the trial court by pleadings or instructions. The issue was not made in the appellate court. Held, that by appealing under such circumstances the parties waived the constitutional question, and hence it could not be raised in the Supreme Court for the first time. The court said, that "the constitutionality of such statute cannot be questioned in this court unless there is an assignment of error raising such question."

<sup>16</sup> *Haas Electric Co. v. Springfield Amusement Park Co.*, 236 Ill. 452, 86 N. E. 248 (1908); *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. 66 (1908); *Wennerstein v. Sanitary Dist.*, 274 Ill. 189, 113 N. E. 148 (1916); *Armour and Co. v. Industrial Board*, 275 Ill. 328, 114 N. E. 173 (1916); *Moses v. Royal Indemnity Co.*, 276 Ill. 177, 114 N. E. 554 (1916); *People v. Rawson*, 278 Ill. 654, 116 N. E. 123 (1917); *Davis v. Industrial Commission*, 297 Ill. 29, 130 N. E. 333 (1921). "A constitutional question cannot be presented in this court for review unless it was presented to the lower court for its determination." *Odin Coal Co. v. Industrial Commission*, 297 Ill. 392, 130 N. E. 704 (1921). The court also said that it made no difference that the question might have been raised in the pleadings or during the trial.

The reasons of the Illinois Supreme Court in determining the section of the statute in question to be unconstitutional are undoubtedly correct, as it has been held many times that the action of a state in imposing burdensome restrictions on the extradition of fugitives from justice—particularly those authorizing an inquiry into the motives underlying the proceeding—are an unwarranted interference with rights founded on the Federal Constitution and the Federal statute enacted thereunder.<sup>17</sup>

The unusual action taken by the court, however, in reviewing a question of the constitutionality of the statute when it was not properly raised leads to speculation as to whether or not the court has overthrown a long established and well recognized practice of refusing to do so except in a proper case, and has opened the door to frequent, though expeditious, review of such questions. That the latter action may be a beneficial departure from previous standards is a matter not open to comment, but it is doubtful if the Illinois Supreme Court in the case under consideration has so far overthrown the previous practice as to warrant the assumption that hereafter such questions will be indiscriminately considered.

G. E. HALL

<sup>17</sup> *In re Bloch*, 87 F. 981 (1898); *Commonwealth v. Superintendent of Phila. County Prison*, 220 Pa. 401, 69 A. 916 (1908); *Worth v. Wheatley*, 183 Ind. 598, 108 N. E. 958 (1915); *State ex rel. Nemeck v. Sheriff*, 48 Minn. 448, 181 N. W. 640 (1921); *Chase v. State*, 93 Fla. 964, 113 So. 103 (1927); *Barranger v. Baum*, 103 Ga. 465, 30 S. E. 524 (1898); *In re Sultan*, 115 N. C. 57, 20 S. E. 375 (1894); *Ex parte Hatfield*, 90 Tex. Crim. 293, 235 S. W. 591 (1921).