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Notes and Comments

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NOTES AND COMMENTS

Admissibility of Evidence Obtained by Lie-Detector

In *People* v. *Kenny*,[1] a case of first impression, a New York *nisi prius* court permitted a defendant charged with a crime to offer in evidence, over objection, the testimony of an expert operator of a "lie-detector" machine to prove his innocence. The defendant had been previously tried and convicted, but he had procured a new trial. In the interim he had voluntarily submitted to a lie-detector test at Fordham University conducted by an expert operator of a pathometer or psychogalvanometer instrument,[2] which test convinced the operator that defendant was innocent of the crime.

On hearing of the objection to the introduction of the results of such test the State relied on the ground that such tests had not yet gone beyond the experimental stage and had not yet received general scientific acceptance. The operator, to prove the accuracy of the device used, testified to laboratory experiments conducted with the type of machine used by him therein covering more than six thousand individual tests. Other laboratory tests of 271 persons were referred to in which 49 out of 50 guilty persons were detected, 100 out of 102 alleged accomplices were found, and of the remainder all 119 persons accused but actually innocent were picked out.

On this testimony the trial court allowed the expert to testify to the results of the test, and in its opinion, after referring to the disagreements which have existed between handwriting experts, psychiatrists, etc., who draw conflicting inferences from their examinations but whose testimony is presented to the jury nevertheless, the court states: "In this case we are dealing with a science from which varying inferences may not be drawn. According to

[1] 3 N. Y. S. (2d) 348 (1938).

[2] There are three general types of "lie-detectors" used for detection of deception: (a) "The blood-pressure method, originally proposed on the Continent, has been developed in the United States principally by Marston, Larson, and Keeler." Wigmore, Evidence (2d ed.) 1923-33 Supplement, 439, § 999. "The instrument merely records the reactions in a subject's blood pressure and respiration when asked questions pertinent to the crime under investigation." 24 Jour. of Crim. Law and Criminology 442 (1933-34). (b) "The respiration method measures and records the time of respiration between question and answer, and the interpretation detects a lie. This method has not been developed as an independent one, and is now usually combined with the blood-pressure method. [c] The galvanometer method measures the variation in resistance of the skin to electric-currents administered during emotional disturbances, the variations being attributable to changes in the activity of the sweat glands. But this method also has not yet been developed." Wigmore on Evidence (2d ed.) 1923-33 Supplement, 443, § 999.

the testimony of the witness the deductions and the accuracy of the conclusions to be drawn from the examination are undebatable. Both upon legal principle and sound reasoning, it would seem that the courts, if willing to accept and receive handwriting testimony, psychiatric testimony and other such expert opinion, should also admit in evidence testimony of the pathometer test and the results disclosed when a proper foundation has been laid therefor.

"For hundreds of years courts have deemed the examination and cross-examination of witnesses in open court to be the best method so far devised for the ascertainment of the truth and have used that method for the lack of any better approach. It seems to me that this pathometer and the technique by which it is used indicate a new and more scientific approach to the ascertainment of truth in legal investigations."

While only a *nisi prius* decision, the case presents a definite departure from the criminal cases in which the results of the lie-detector tests were presented and rejected.[3] In the Frye case the defendant, on trial for murder, offered an expert who conducted a test on defendant with a systolic blood-pressure type of machine. The trial court's refusal to admit such proof was upheld in the Court of Appeals for the District of Columbia, that court stating: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

"We think the systolic blood-pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

Ten years later in the Bohner case the defendant, on trial for bank robbery, offered to prove by such a test[4] that he was not in

[3] Frye v. U. S., 293 F. 1013, 34 A. L. R. 145 (1923). See also 24 Col. L. Rev. 429; 37 Harv. L. Rev. 1138, 33 Yale L. Jour. 771; State v. Bohner, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611 (1933).

[4] The defendant's offer was not strictly correct. Professor Keeler did not test the defendant, merely consenting to examine the defendant and requesting "that no attempt be made to introduce evidence as to his willingness to conduct the test or as to any report he might render upon the result of the

desired in courts of law but so hard to achieve because of the frailties of the common law jury and the older methods of proof.

It must be noted that the ruling in the Kenny case did not constitute an appealable order, and hence probably will never be reviewed. However, in a still more recent case,[12] decided by *nisi prius* Judge Fitzgerald in another New York county, a request for permission to secure evidence by the use of the same lie detector was refused on the ground that the apparatus had not yet been proven to be scientifically accurate. This latter adverse decision provides a foundation for appellate review so that it may be possible to secure a definite ruling on this question, at least in the State of New York.

E. B. NICKEL

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—CO-PARTIES—WHETHER OR NOT, UNDER THE CIVIL PRACTICE ACT, NOTICE OF APPEAL MUST BE SERVED ON DEFAULTED PARTIES.—The Appellate Court of Illinois, First District, in *People, ex rel. Wilmette State Bank* v. *Village of Wilmette*[1] has refused to follow the rule laid down by the Appellate Court of Illinois, Fourth District, in *Lewis* v. *Renfro*,[2] which held that notice of appeal must be served on all parties to the proceeding, whether in default or not, on the ground that the latter decision resulted in too strict and too technical an interpretation of Rule 34 of the Illinois Supreme Court.[3] This conflict of authority between the local appellate courts arises from attempts to harmonize Sections 4 and 74(1) of the Illinois Civil Practice Act and Rule 34 of the Illinois Supreme Court.[4] Sec-

[12] People v. Forte, 4 N. Y. S. (2d) 913 (May 28, 1938). The factual situation practically duplicates the Kenny case, though here the defendant requested permission to be transferred while in custody to an adjacent county, there to be subjected to the test. The court held (1) that it had no authority to remove the defendant from county to county and (2) that the results of the test, even if procured, would be inadmissible.

[1] 294 Ill. App. 362, 13 N. E. (2d) 990 (1938).

[2] 291 Ill. App. 396, 9 N. E. (2d) 652 (1937); see comment in 16 CHICAGO-KENT REVIEW 52.

[3] Ill. Rev. Stat. 1937, Ch. 110, § 259.34: "A copy of the notice by which the appeal is perfected shall be served upon each appellee and upon any co-party who does not appear as appellant. . . ."

[4] Ill. Rev. Stat. 1937, Ch. 110, § 128: "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. . . .";

Ill. Rev. Stat. 1937, Ch. 110, § 198: "Every order, determination, decision, judgment or decree, rendered in any civil proceeding . . . shall hereafter be subject to review by notice of appeal, and such review shall be designated an appeal and shall constitute a continuation of the proceedings in the court below."

tion 4 states the purpose of the Act, requires liberality in its construction, and provides for rules to aid in carrying out that purpose. Section 74(1) provides that review shall be by notice of appeal and shall constitute a continuation of the proceedings below. And Rule 34 states that notice of appeal shall be served on each appellee and upon any co-party who does not appear as appellant, and further makes provision for the time within which such notice must be given, and the method of service.

In the Wilmette case the appellee filed a motion to dismiss the appeal on the ground that the notice of appeal required by Section 74(1) of the Illinois Civil Practice Act had not been served on all the parties, particularly by omitting to serve certain defendants defaulted in the trial court, as appears to be required by Rule 34 of the Illinois Supreme Court. The purpose of the motion so made seems to have been intended solely to prevent a review of the trial court's decision, which review would, if granted, in no way affect the rights of the defaulted parties. The court refused to dismiss the appeal, holding that the interpretation sought to be placed on the pertinent sections by the movant was unduly technical and without merit. In the case of *Lewis* v. *Renfro*,[5] a similar motion was presented on identical grounds, though by the appellee and one of the defaulted parties, a defendant, and was there granted.

The two cases split squarely on the question of the interpretation to be given to the text of Rule 34 of the Illinois Supreme Court, which in part provides that: "A copy of the notice by which the appeal is perfected shall be served upon each appellee and upon any co-party who does not appear as appellant . . . ." If this language requires notice to every person named in the suit who is not an appellant, then the Renfro case is a correct decision. On the other hand, if the rule applies only to persons interested in the outcome of the appeal, then the Wilmette case should be followed.

No real assistance can be gleaned from the former Illinois practice, since Section 74 of the Illinois Civil Practice Act provides for a new method of procuring appellate review;[6] nor are the

[5] See note 2, supra.

[6] Lanquist v. Grossman, 282 Ill. App. 181 (1935); Ill. Cent. R. R. Co. v. Illinois Commerce Commission, 359 Ill. 563, 195 N. E. 32 (1935); Veach v. Hendricks, 278 Ill. App. 376 (1935); Ward v. Williams, 270 Ill. 547, 110 N. E. 821 (1915); Hartman v. Pistorius, 248 Ill. 568, 94 N. E. 131 (1911), holding that the mere act of appealing by one of the parties operates as a severance of parties who do not join in the appeal, leaving the original judgment or decree stand as to them; and former Illinois practice holding that if review is sought by writ of error all parties had to be served with scire facias before a severance or default could be granted.

the city where the crime occurred on the day in question and hence was not guilty. The Supreme Court of Wisconsin affirmed the trial court's refusal to admit such proof, saying "We are not satisfied that this instrument, during the ten years which have elapsed since the decision in the Frye case, has progressed from the experimental to the demonstrable stage."[5]

The experimental machine of fifteen years ago rejected in the Frye and Bohner cases has since been subjected to extensive tests, has been utilized hundreds of times in every-day affairs,[6] and, used by expert operators, should produce results as accurate as any reached by psychiatrists, ballistics experts, etc. It would seem, therefore, that such tests, if based on proper foundation, have crossed the mythical line between the experimental and demonstrable stages and should be entitled to recognition in the courts of law.

Over a period of time many different kinds of scientific proof, tests, and opinions have been offered in criminal cases, although usually such an offer originates on the side of the prosecution seeking to reconstruct the crime or fix the guilt therefor. No reason appears why such methods ought not likewise be available to a defendant to avoid a charge of crime and, logically, he has been permitted so to do.[7] If the lie-detector, or some variety thereof, has now reached the stage where its results can be accepted as reasonably and scientifically accurate, then no reason can exist why its use by the defendant to disprove guilt should be denied by the courts.

It must be recognized, of course, that such proof in criminal cases will usually be offered only by the defendant to disprove guilt, for the state's ability is usually bounded by constitutional restrictions against compelling the defendant to incriminate him-

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test—it being thought advisable to await a more favorable opportunity to seek judicial recognition of such evidence, and at a time when more complete data and information could be presented for the court's consideration." 24 Jour. of Crim. Law and Criminology 1150 (1933-34).

[5] It should be noted that the type of test used in the Frye and Bohner cases was not of the type used in the Kenny case (supra note 2).

[6] Bank employees and prospective employees were examined by means of the lie-detector for the purpose of ascertaining if any had been guilty of embezzlement. The findings were enlightening. 24 Journal of Criminal Law and Criminology 1144 (1933-34).

[7] *Handwriting*: Cone v. State, 89 Tex. Cr. R. 587, 232 S. W. 816 (1921); Mattingly v. Commonwealth, 221 Ky. 360, 298 S. W. 950 (1927). *Insanity*: State v. Liolios, 285 Mo. 1, 225 S. W. 941 (1920); Burns v. State, 226 Ala. 117, 145 So. 436 (1933); Davis v. State, 107 Tex. Cr. R. 444, 296 S. W. 897 (1927). *Ballistics*: People v. Farrington, 213 Cal. 459, 2 P. (2d) 814; certiorari denied, Farrington v. People, 285 U. S. 530, 52 S. Ct. 456, 76 L. Ed. 926 (1931).

self.[8] Such privileges, though guaranteed, may be waived by the defendant,[9] and if he submits to such a test voluntarily the results of the examination would be available to both sides of the case.[10] The Wisconsin court in the Bohner case raises this question by stating, "If the defendant in a criminal case is to be permitted to have tests taken outside of court and then to produce expert testimony as to the results of the tests when these are favorable to him, without the necessity of taking the stand or submitting to tests by the prosecution, the way would seem to be open to abuses that would not promote the cause of justice." The suggestion implicit therein that such self-serving testimony should not be received has been answered by the proposals of F. E. Inbau, now Assistant Professor of Law, Scientific Crime Detection Laboratory, Northwestern University School of Law, in the following manner: "Whenever a defendant seeks to introduce testimony of this nature he will be considered as having waived his privilege of refraining from taking the witness stand. Another way to handle the solution, where the accused wants to subject himself to the test, and perhaps one more desirable, is (1) to require defense counsel to make an application to the court for an order that the test be made in the presence of attorneys for both prosecution and defense, and (2) for the court to attach a condition that the report of the expert conducting the test be admitted in its entirety, whether favorable or unfavorable—thus constituting a complete waiver of the defendant's privilege against self-incrimination."[11]

The decision in the Kenny case has opened the door to the introduction, in criminal cases, of still another type of scientific proof, which, if properly regulated in the fashion suggested, should be helpful in attaining that degree of accuracy so long

[8] Constitution of United States, Amendment V; Ill. Const. 1870, Art. II, § 10.

[9] U. S. v. Murdock, 51 F. (2d) 389, reversed on other grounds, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210, 82 A. L. R. 1376 (1931); Bolen v. People, 184 Ill. 338, 56 N. E. 408 (1900); People v. Minsky, 227 N. Y. 94, 124 N. E. 126 (1919).

[10] Shoe measurements made from shoes given sheriff by defendant admitted in evidence, State v. Arthur, 129 Iowa 235, 105 N. W. 422 (1905); fingerprints of the accused taken by defendant's voluntary action, Moon v. State, 22 Ariz. 418, 198 P. 288 (1921); voluntary submission and an answering to a medical examination by an accused while in jail, People v. Bundy, 168 Cal. 777, 145 P. 537 (1915); People v. Glover, 71 Mich. 303 at 307, 38 N. W. 374 (1888); State v. Church, 199 Mo. 605, 98 S. W. 16 (1906); State v. Petty, 32 Nev. 384, 108 P. 934 (1879); People v. Truck, 170 N. Y. 203, 63 N. E. 281 (1902); State v. Miller, 71 N. J. L. 527, 60 A. 202 (1905).

[11] 24 Jour. of Crim. Law and Criminology 1151 (1933-34).

decisions of other states helpful. It has elsewhere been generally held that parties who have suffered default or allowed a decree pro confesso to be entered need not ordinarily be made parties to an appeal,[7] but if a statute or special circumstance requires it then all persons become indispensable to the appeal which cannot proceed without them.[8]

The problem must, therefore, be approached with the thought in mind that the new procedure should be liberally construed to promote the substantive rights of the parties and with recognition of the fact that the rule which requires that statutes in derogation of the common law must be strictly construed does not apply to the reformed Illinois procedure.[9] The new appeal is said to be "a continuation of the proceeding in the court below," hence, logically, should require no more notice than would be necessary to the proper conduct of that suit in the trial court after default had been entered,[10] and any rule of the Illinois Supreme Court made by virtue of the authority of the Civil Practice Act, given in Section 2 of the Act, to regulate appellate procedure should require no more than does the Act itself.[11] It is true that rules of court should usually have the force of law, but unswerving obedience thereto which precludes reasonable action thereunder is not within the spirit of the reformed procedure, and the slavish submission to the text of such rule in the Renfro case is rejected in the Wilmette case with the comment that to follow the former decision would be to "construe the act liberally but the rules strictly."

[7] Rabinowitz v. Houk, 100 Fla. 44, 129 So. 501 (1930); Hodgen's Ex'rs v. Sproul, 221 Iowa 995, 267 N. W. 692 (1936); Fearon v. Fodera, 169 Cal. 370, 148 P. 200 (1915); most states provide that notice of appeal need be served only on adverse parties and that a defaulted party is not an adverse party.

[8] Rabinowitz v. Houk, 100 Fla. 44, 129 So. 501 (1930); In re Myhren's Estate, 95 Wash. 101, 163 P. 388 (1917); Michigan Mut. Life Ins. Co. v. Frankel, 151 Ind. 534, 50 N. E. 304 (1898). In Lewis v. Renfro, note 2, supra, it would seem as though such "special circumstance" required notice, for the decision sought to be reversed was favorable to the unserved defaulted party who would, except for such notice, be unable to protect his rights.

[9] Ill. Rev. Stat. 1937, Ch. 110, § 128; Schornick v. Prudential Ins. Co., 277 Ill. App. 36 (1934); although the annotators of the Act seem to think otherwise, Ill. Civil Practice Act Annotated, p. 202, citing People v. Franklin Co. Bldg. Ass'n, 329 Ill. 582, 161 N. E. 56 (1928).

[10] Puterbaugh, Common Law Pleading and Practice, pp. 1286-1293, and Puterbaugh, Chancery Pleading and Practice, I, 159-163; Frow v. De La Vega, 15 Wall. 552, 82 U. S. 552, 21 L. Ed. 60 (1872).

[11] Chicago Title & Trust Co. v. Central Republic Trust Co., 289 Ill. App. 21 at 25, 6 N. E. (2d) 515 (1937), denied a motion to dismiss appeal for failure to serve notice of appeal upon a successor trustee therein appointed, on the ground that he was not a "party" to the proceeding, inasmuch as he had not appeared in the cause and submitted himself to the jurisdiction of the court, and hence was not entitled to notice of appeal.

The conflict between the two views leads to another problem—that of the effect of the denial by the Supreme Court of Illinois of leave to appeal from the decision of the Appellate Court. The unsuccessful appellant in the Renfro case petitioned for leave to appeal, but it was denied.[12] Under the former practice it would appear that denial of certiorari did not operate to establish the decision of the Appellate Court as a correct exposition of the law, but merely affirmed the judgment of that tribunal.[13] The Wilmette case, following the former practice, treats the refusal to grant leave to appeal as having no binding effect on the other Appellate Courts. Since the amendment of 1935 to the Appellate Court Act,[14] however, an opinion of the Appellate Court is said to have binding authority not only upon inferior courts but also on the Appellate Court itself.[15] The present conflict has, therefore, reached such a point that only the Supreme Court of Illinois can untangle it.[16]

A. A. KREUTER

CORPORATIONS—SERVICE OF PROCESS UPON AN AGENT—CONSTRUCTION OF CIVIL PRACTICE ACT AUTHORIZING SERVICE ON ANY AGENT.—Section 17 of the Illinois Civil Practice Act combines provision for personal service upon domestic and foreign corporations into one section.[1] It differs from most statutes and from the Practice Act of 1907 in that it eliminates a recital of corporate

[12] Supreme Court of Illinois, in docket Nos. 24445 and 24446.

[13] Soden v. Claney, 269 Ill. 98, 109 N. E. 661 (1915); Bartosik v. Chicago R. & I. Co., 266 Ill. App. 28 (1932); Marks v. Pope, 289 Ill. App. 558, 7 N. E. (2d) 481 (1937).

[14] Ill. Rev. Stat. 1937, Ch. 37, § 41.

[15] Hughes v. Medendorp, 294 Ill. App. 424, 13 N. E. (2d) 1015 (1938), in which the Appellate Court for the Third District refused to consider again a legal point covered by In re Estate of Teehan, 287 Ill. App. 58, 4 N. E. (2d) 513 (1936), decided by the first district; Blair v. Commissioner of Internal Revenue, 83 F. (2d) 655, cert. granted, 299 U. S. 527, 57 S. Ct. 33, 81 L. Ed. 388 (1936), stating that final determination of the question whether repeal of proviso of section 41, that Appellate Court opinions shall not be of binding authority in other causes than those in which filed, extended scope and effect of such decisions is for Illinois courts to determine.

[16] Since the text of this article was written, the Supreme Court has amended Rule 34 to read: "(1) A copy of the notice by which the appeal is perfected shall be served upon each party whether appellee or co-party who would be adversely affected by any reversal or modification of the order, judgment or decree. . . ." This amendment becomes effective August 1, 1938. Note that this raises in its own wording the question as to who would be adversely affected. See annotation in 88 A. L. R. 428.

[1] Smith-Hurd Ill. Rev. Stat. (1935), Ch. 110, § 141: "An incorporated company may be served with process by leaving a copy thereof with any officer or agent of said company found in the county. . . ."

officers and agents to whom service of process must first be directed.[2]

The Illinois Appellate Court of the Fourth District was recently called upon to construe this section of the Act in the case of *Gray* v. *Kroger Grocery and Baking Company*.[3] The defendant corporation had been served with process through the manager of one of its chain grocery stores. On return day the corporation defaulted, and judgment was rendered against it. Defendant sought to set the default aside, contending that it had shown due diligence in making the motion, and had a meritorious defense. Disregarding these contentions the court said that an agent of the corporation had been served within the meaning of the statute, and that failure of the corporation to heed such notice did not show diligence.

This raises an interesting question as to the construction of the words "any officer or agent" as used in the Act. Although the holding in the instant case is sustainable under cases decided prior to the Civil Practice Act,[4] it would seem to justify a service of summons upon an agent of lesser capacity than one managing business for the corporation upon its authority and for its account.[5]

In cases discussing the sufficiency of service of process on a person in the employment of the party named in the writ the courts have generally taken the view that the agent must be one whose connection with the company is such, or whose employment is of such character that he impliedly had authority to receive process, and would be likely to inform the party of service of summons.[6] The test of sufficiency is whether a notice is provided for which is reasonably certain to reach the defendant and ap-

[2] Smith-Hurd Ill. Rev. Stat. (1935), Ch. 110, Appendix, § 8: "An incorporated company may be served with process by leaving a copy thereof with its president. . . . If he shall not be found in the county . . . then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county. . . ."

[3] 294 Ill. App. 151, 13 N. E. (2d) 672 (1938).

[4] Barnard v. Springfield & N. E. Traction Co., 274 Ill. 148, 113 N. E. 89 (1916); Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368 (1895); Gilchrist Trans. Co. v. Northern Grain Co., 204 Ill. 510, 68 N. E. 558 (1903); Fahrig v. Milwaukee & Chicago Breweries, 113 Ill. App. 525 (1904).

[5] Corporations may be served under the present act by leaving a copy with any agent or servant of defendant.

[6] Pinney v. Providence Loan & Investment Co., 106 Wis. 396, 82 N. W. 308 (1900); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569 (1899); Central of Ga. R. Co. v. Eichberg, 107 Md. 363, 68 A. 690 (1908).

prise it of the proceedings.[7]

The instant case comes within this established standard. It should be noted that the wording of the statute is broad enough to include service upon any employee, whether in an advisory, managing, or merely laboring capacity. However, it is doubted that the courts of Illinois would go so far as to hold a service upon a day laborer or factory worker sufficient.[8] Decisions limiting the type of agent upon whom service is effective seem to set a guide to limit and define "agent" as used in the Illinois Act.[9]

In most jurisdictions where service upon some agent is authorized there is a qualification of the term, such as managing agent,[10] local agent,[11] or resident agent,[12] and one jurisdiction, providing for service on any agent, goes further to state that after return of summons the clerk shall mail a copy of the process to the home office of the corporation.[13] Section 8 of the Practice Act of 1907 provided for a cumbersome method of service. Section 17, in the words of the court, has "attempted to simplify that to the largest possible degree." Although the instant case is authority only for the proposition that service upon a managing

[7] Brooke County Court v. U. S. Fidelity & Guaranty Co., 87 W. Va. 504, 105 S. E. 787 (1921); Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967 (1891).

[8] Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899). A Tennessee statute provided "that process may be served upon any agent of said corporation . . . , no matter what character of agent such person may be; and, in the absence of such an agent, upon any person . . . who represented the company at the time the transaction out of which the suit arises took place." The court construed this statute to contemplate only agents or persons reasonably deemed to represent the company in the transaction in question.

[9] Equitable Produce & Stock Exchange v. Keyes, 67 Ill. App. 460 (1896), "agent" within meaning of statute held to mean one who manages business for the corporation upon its authority and for its account; Mikolas v. Hiram Walker & Sons, 73 Minn. 305, 76 N. W. 36 (1898), the agent must be one having in fact a representative capacity and derivative authority; Doe v. Springfield Boiler & Mfg. Co., 104 F. 684 (1900), in which the court said, "It may be said that every employee of a railroad corporation is in a certain sense an agent of the corporation. But it would be absurd to say . . . that an expressman . . . is an agent upon whom service could be made. . . ."; Coerver v. Crescent Lead & Zinc Corp., 315 Mo. 276, 286 S. W. 3 (1926), service upon a watchman held bad; Taylor v. News & Courier Co., 156 S. C. 537, 153 S. E. 571 (1930), newspaper correspondent held not agent upon whom service in libel action could bind corporation; J. B. Blades Lumber Co. v. Finance Co. of America at Baltimore, 204 N. C. 285, 168 S. E. 219 (1933), to be an agent within the statute there must be regular employment and measure of control over business or some feature of the business entrusted.

[10] Wisconsin Stat. 1929, § 262.09 (10); New York Civil Practice Act, § 228, Subd. 3.

[11] Texas Rev. St. 1925, Art. 2029.

[12] 28 Del. Laws, Ch. 102, § 5.

[13] Eminent Household of Columbian Woodmen v. Lundy, 110 Miss. 881, 71 So. 16 (1916).

agent is sufficient, it does furnish some evidence of the length to which the court may be expected to go in construing the words "any officer or agent."

A. A. KREUTER

MORTGAGES—FORECLOSURES—LITIGATION OF ADVERSE TITLES IN FORECLOSURE PROCEEDINGS UNDER THE ILLINOIS CIVIL PRACTICE ACT.—In *Kronan Building and Loan Association* v. *Medeck*,[1] a case of recent date, the Illinois Supreme Court for the first time held that under sections 38, 43, and 44 of the Illinois Civil Practice Act[2] questions concerning the legal title to the property involved in a foreclosure suit may be put in issue and litigated under a counterclaim, there being at present no rule of court preventing the joinder of issues of title with those arising on a bill to foreclose, and consequently, inasmuch as a freehold is thus put in issue, a direct appeal to that court will lie.

It should be noted that prior to the enactment of the present Civil Practice Act earlier decisions confined the scope of the mortgage foreclosure strictly to a foreclosure of the right or title of the mortgagor and rejected any authority to determine adverse claims of title in such proceedings.[3] It appears, however, that where the adverse claim arose prior to the execution of the mortgage and the adverse claimant was joined as party defendant but defaulted the court would not hesitate in entering a default judgment, thereby cutting off his rights in the property.[4]

Under a statute similar to the present Civil Practice Act the Wyoming Supreme Court[5] held that the holder of an adverse claim arising subsequent to the execution of the mortgage, there being no privity between the mortgagor and the adverse claimant, could be made a party to the foreclosure, and all questions of title could be litigated at one time. Under the code of that state both law and equity are administered in one court of general

[1] 368 Ill. 118, 13 N. E. (2d) 66 (1937).
[2] Ill. Rev. Stat. 1937, Ch. 110, §§ 162, 167, 168.
[3] Jones v. Horrom, 363 Ill. 193, 1 N. E. (2d) 694 (1936); Lithuanian Alliance v. Home Bank and Trust Co., 362 Ill. 439, 200 N. E. 167 (1936); National Bank of Republic v. Adams Building Corp., 359 Ill. 27, 193 N. E. 511 (1934); Prudential Insurance Co. v. Hoge, 359 Ill. 36, 193 N. E. 660 (1934). See 15 CHICAGO-KENT REVIEW 303. And see Leonard A. Jones, A Treatise on the Law of Mortgages of Real Property, § 1831, where the following appears: "Adverse claimants can not be made parties to a foreclosure suit for the purpose of litigating their titles. . . . There being no privity between him and the mortgagee, the latter can not make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit."
[4] Sielbeck v. Grothman, 248 Ill. 435 at 439, 94 N. E. 67 (1911).
[5] Upjohn v. Moore, 45 Wyo. 96, 16 P. (2d) 40, 85 A. L. R. 1063 (1932).

jurisdiction, the forms of action having been abolished. There are Kansas cases in accord with this principle.[6]

In a recent Illinois Appellate Court case[7] an adverse claimant under a tax title sought to intervene in the foreclosure proceeding, but was denied that right by the chancellor. Upon appeal the Appellate Court in reversing the action of the Chancellor stated: "When it came to the notice of the court that other parties were claiming a lien on the said premises and an interest therein, it was the duty of the court to stop the foreclosure suit and direct that such claimants be made parties." This language is particularly important in view of the earlier holdings of the Illinois Courts and the statements appearing in Jones's text on mortgages.[8]

The decision in the instant case in effect affirms the action taken by the Illinois Appellate Court in *Bobzien* v. *Schwartz*,[9] thereby according the same liberal view to the sections in question of the present Civil Practice Act that was adopted by the Appellate Court in that case.

The pertinent sections of the Illinois Civil Practice Act as thus construed now make it possible to liberalize proceedings so that related matters may be litigated at one time and disposed of swiftly, efficiently, and more effectively. It is hoped that the Illinois Supreme Court under its rule making power will do nothing to change or alter the situation as it now exists under the present construction given to sections 38, 43, and 44 of the present Civil Practice Act.

F. J. NOVOTNY

[6] Fisher v. Cowles, 41 Kan. 418, 21 P. 228 (1889); Broquet v. Warner, 43 Kan. 48, 22 P. 1004 (1890).

"To conclude upon this question, it seems to us, that the foreclosure suit is, as to one branch, in the nature of a proceeding in rem; that the aim and scope of such a proceeding is to seize the rem and convey it, discharged of all claims and liens; that the objections formerly existing to the adjudication of adverse titles, on account of the jurisdiction of the court, and the form of action, have been done away with; that the litigation of adverse title, is as truly and closely connected with the right to subject the real estate to the payment of the plaintiff's mortgage, as the determination of the validity and extent of other liens, and that the joinder of the two is therefore authorized by the statute. We come to this conclusion with hesitation, because of the course of decision elsewhere; but it seems to us justified by the statute, and it upholds a practice which has become common in this state." Bradley v. Parkhurst, 20 Kan. 462 (1878).

[7] Bobzien v. Schwartz, 289 Ill. App. 299, 7 N. E. (2d) 362 (1937), noted in 15 CHICAGO-KENT REVIEW 303.

[8] Jones, Mortgages, § 1842.

[9] See note 7, supra.