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DEPOSITIONS AND PRETRIAL DISCOVERY UNDER THE ILLINOIS CIVIL PRACTICE ACT*

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SINCE the adoption of the new practice act, the subject of discovery of facts prior to trial has received perhaps more interest than any other phase of practice. The scope of the discovery possible under the act and rules is exceeded only by the number and complexity of the problems created and left unanswered. For the most part the origin of these problems may be ascribed to three characteristics of our statutes and rules: (1) the blending of the discovery and deposition functions; (2) sweeping machinery for the taking of depositions and virtual absence of provision for or limitations upon their use when taken; and (3) the cumbersome device of delegating to the Supreme Court the regulation of the taking of depositions, and the reference in turn by that court back to the conflicting and unrepealed provisions of the Depositions Act dealing with the manner of taking depositions.

Section 58 of the Civil Practice Act,[2] which is the basis of our provisions both for discovery and depositions, is as follows:

(1) Wherever a bill for discovery, or interrogatories in a bill for

* The writer wishes to acknowledge the assistance of Joseph D. Hinshaw, of the firm of Hinshaw & Culbertson, and of Richard J. Finn of the firm of Finn & Miller. The writer's indebtedness to G. Ragland's Discovery before Trial and to O. L. McCaskill's Illinois Civil Practice Act Annotated is evidenced by frequent reference to those works.

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2 Ill. Rev. Stat. 1937, Ch. 110, § 182.

relief, would heretofore have been available, the same discovery may hereafter be had by motion filed in the cause wherein the matters sought to be discovered would be used.

(2) Discovery of documents which are or have been in the possession of any other party to the action may be had, admissions as to any fact may be requested of any other party, and the deposition of any other party or of any person may be taken, at such times and under such terms and conditions as may be prescribed by rules.

Our present consideration involves four major methods of procedure, which it is proposed to discuss in the following general order: first, compelling answers to written interrogatories; second, the discovery of documents by compelling inspection and listing of said documents by motion; third, forcing the opposing party to admit facts, or to admit the genuineness of documents and public records; and fourth, taking depositions, both of parties and witnesses.

Compelling Answers to Written Interrogatories

The first method of obtaining discovery before trial is provided by the first paragraph of Section 58, quoted above, which provides that "wherever a bill for discovery or interrogatories in a bill for relief would heretofore have been available, the same discovery may hereafter be had by motion filed in the cause wherein the matter sought to be discovered would be used." The right to procure information in this manner is in no way dependent upon the specific provisions contained in the second paragraph of Section 58 but is an additional method by which discovery may be enforced.

Prior to the enactment of discovery statutes, the only method by which a litigant could procure information relative to the prosecution or defense of his case was by filing a separate suit or bill for discovery against his opponent for the purpose of forcing him to reveal the necessary information. This was the rule in all actions at law. In chancery, however, because of the fact that most of the evidence was adduced before a master, it was possible by interrogatories to procure a measure of discovery. The early cases upon the subject disclosed that, before the court of equity would entertain a bill for discovery supplementary to an action at law, it was necessary to show that the evidence requested

rested exclusively with the party called upon to disclose it and that there was no other method by which this information could be obtained.[3]

Gradually, however, there developed the right to file a bill for discovery in aid of actions at law, not only when the complainant was without other means of proof but also in support of his other evidence and even to dispense with the necessity of other evidence; and the objection that the interrogatories might seek proof of facts well known to the complainant or capable of proof by obtainable witnesses was no longer a defense to such a bill.[4] Under the first paragraph of Section 58 this right to obtain information heretofore available by a bill for discovery may be had now upon a simple motion.

Under the former practice it was not necessary in actions of chancery that applications for discovery be under oath, since the necessity for the discovery could be determined by the pleadings themselves. However, where discovery was sought in actions at law, it was necessary that the bill for discovery be under oath so that the court could be apprised of the legal pleadings to determine the necessity for such discovery. Under Section 58 it is not necessary that the motion by which the moving party asks for discovery be under oath.

As a practical matter, however, many lawyers accompany their motions with affidavits setting out briefly the sub-

[3] Vennum v. Davis, 35 Ill. 568 (1864); Rickly v. Parlin & Orendorff Co., 206 Ill. App. 599 (1917).

[4] Brandenburg v. Buda Co., 299 Ill. 133, 132 N.E. 514 (1921). The development of such a bill is well set out in Hill v. Thomas V. Jeffery Co., 292 Ill. 490, 127 N.E. 124 (1920), wherein the court, after indicating the background of the practice, says: "It is true that at common law the witnesses were produced and examined orally in the trial of the cause, and if their personal attendance could not be secured they could be examined under a commission only by the consent of the parties. This was changed by the first legislature in Illinois, which enacted a statute providing for the taking of depositions in courts of law as well as equity. By that statute, and other statutes enacted since that time, the same power of taking depositions has been conferred upon courts of law as upon courts of equity and the same method of taking depositions has been pursued, though the ordinary method of taking testimony before a master which has always prevailed in courts of equity does not obtain in courts of law. Courts of law had not the power at common law to compel a witness to give his deposition or to attend for that purpose, because depositions were not recognized as instruments of evidence except by consent. Courts of equity had that power because depositions were a means by which testimony was adduced in those courts, and the power was necessary to enable them to perform their functions."

stance of the case and showing to the court the necessity for an answer to the interrogatories.

This method of discovery is especially useful where the opposing parties are corporations, inasmuch as the moving party may have no notion as to which of the officers of the corporation may have the requisite information; also where the transactions are involved and complicated and the documents pertaining to the transaction might be long and voluminous.

This method of discovery was employed to great advantage in a recent case under the following circumstances: The plaintiff, a tavern keeper, was injured as a result of the escape of poisonous gases from certain bar fixtures which he had purchased from the defendant, A Corporation. The bar fixtures in question were installed by the B Corporation. The C Corporation had, since the installation thereof, regularly serviced the bar fixtures by one of their servants. The plaintiff's counsel believed that the B Corporation had a contract with the A Corporation for the installation and servicing of the bar fixtures. There was also some evidence that the B Corporation and the C Corporation were one and the same and that the employee who serviced the bar fixtures was in reality the employee of the B Corporation. To inspect the documents pertaining to these several corporations would be a long and tedious job. Moreover, it was impossible to determine which officers of the various corporations would be familiar with the real situation. It would be desirous therefore to obtain direct answers to certain questions concerning their relations. For that purpose, written interrogatories, set out below,[5] were directed to all three of the defendant

[5] MOTION

Now comes the plaintiff in the above entitled cause, by _____, his attorneys, and moves for a rule on the defendant, the A Corporation, to answer under oath the following interrogatories:

1. Did the A Corporation prior to the_____day of_____19__, enter into a contract with the B Corporation for the servicing, repairing, or inspecting of all or any of the bar fixtures sold to its customers, any or all parts of which were purchased from the defendant, the A Corporation?

2. Was such contract, if any, in writing?

3. Was the said contract in force on the_____day of_____19__?

4. Did the B Corporation at any time prior to the_____day of_____19__, purchase from the A Corporation any of the bar fixtures with which the restaurant and tavern operated by John Doe at 336 X Street, was equipped

corporations. By their answers the complex situation was quickly cleared up.

This method of discovery has proved highly advantageous in automobile accident cases, where the defendant has pleaded that he did not own the automobile in question or that the driver was not the agent of the defendant corporation. It can be used advantageously by both sides in numerous instances. Since both under the law as it was prior to the Civil Practice Act and under Section 58 the opposing party must answer under oath, he will be very careful in the preparation of his reply. Resort may be had both to this section and other methods of procedure to obtain a full discovery of an opponent's case.

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prior to the day aforesaid, including a cooler for the purpose of keeping beer cold and fresh for consumption?

5. Did the B Corporation operate its inspection, service and repair department under the name of the C Corporation?

6. What was the relationship, if any, between the aforesaid B Corporation and the C Corporation?

7. Did the B Corporation by any of its employees, inspect, service, and make repairs on a certain cooler machine in the tavern aforesaid on the_____day of_____19__, and at any other time between that date and the_____day of_____19__?

8. Were the B Corporation and the C Corporation both located at 224 Y Street on the said_____day of_____19__?

_____

Attorneys for plaintiff

AFFIDAVIT

_____, being first duly sworn, on oath deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause; that said cause of action arises out of the escape of certain dangerous gases from certain bar fixtures sold to the plaintiff by the defendant, the A Corporation.

Affiant is informed and believes that the said bar fixtures were inspected, altered, and repairs attempted to be made by one of the servants and agents of the defendant, B Corporation, and that said work was done by said B Corporation, by virtue of a certain contract with the A Corporation; that the said defendant in its answer has denied that it had any such contract with the defendant, the B Corporation, and that the said fixtures were inspected, altered, or repaired by its servant or agent; that a same denial has also been made in the answer of the defendant, the B Corporation.

Affiant further says that the evidence required by the answers of the interrogatories herewith presented, and the list of sworn documents, are necessary and material in the trial of said cause.

_____

Subscribed and sworn to
before me this_____day
of_____
A.D. 1938.

_____

NOTARY PUBLIC

THE DISCOVERY OF DOCUMENTS BY COMPELLING INSPECTION AND LISTING

X, an attorney, represents a switchman, who was injured while in the course of his employment at night in the yards of a railroad company. He has sued the railroad for damages under the Federal Employers' Liability Act. The defendant has filed a plea, alleging that at the time and place in question the plaintiff was bound by and working under the provisions of the Illinois Workmen's Compensation Act. To combat the allegations of that plea, X must show the movement of the train in interstate commerce at the time of the accident. The plaintiff himself knows neither the destination of the various freight cars involved nor their numbers. X knows that these movements are governed by switch lists, track books, scale books, and train sheets, which will give the number of each car and its destination. How can he procure this information so that it may be subpoenaed for trial?

Y, the attorney for the railroad, has a different problem. He has been unable to procure any information concerning the injury of the plaintiff. He knows that the man was hospitalized for a long period, suspects that X-rays were taken, and knows that the hospital reports will reveal much that is material to the settlement or trial of the case. He has asked X for an examination of his client, which has been refused. How can he procure the desired information?

Z, a third attorney, is perplexed by still another problem. His client has been injured in an explosion of a railway engine. He knows that the engine had been towed to a certain round house in the railroad yards. His investigators, however, have been unable to gain access to the engine for the purpose of inspecting or photographing it. He desires to have experts examine the engine, believing that such examination will reveal the true cause of the explosion. In what manner should he proceed in order to secure that inspection?

These and thousands of other kindred problems are confronting trial lawyers every day in Chicago. Available for their solution is an instrument of the utmost value and utility—Rule 17 of the Supreme Court.[6]

[6] Ill. Rev. Stat. 1937, Ch. 110, § 259.17.

In a recent article entitled "The Persistence of Chitty,"[7] Judge Harry M. Fisher of the Circuit Court of Cook County says: "The bar has not yet taken the advantage of them [the discovery statutes] that it should. Only recently has it begun to show an appreciation of the discovery of depositions."

Rule 17 is based fundamentally upon the English and Ontario statutes.[8] The first section[9] provides, in substance, that any party, without affidavit, by motion seasonably made (a matter for the discretion of the court) may, either before or after issue joined, and irrespective of other methods of discovery, apply for an order directing any other party to any cause or matter to file a sworn list of all the documents, including photographs, books, accounts, letters, and other papers, which are or which have been in his possession or power, material to the merits of the matter in question in said cause. If such order shall be made as to any or all of the documents, they shall be listed, with sufficient description for identification, in two schedules: (1) those which the party is willing to produce, and (2) those which he is unwilling to produce, together with the reasons for objecting to their production. It is further provided that there need be no further proof of genuineness where the documents are produced by the opposite party.

The only limitation upon this rule is that it shall not apply to memoranda, reports, or documents prepared by or for either party in preparation for trial, nor to any communication between any party or his agent and the attorney for such party.

In this section, the basis is laid for discovery of documents and for their inspection. One of the difficult problems facing the lawyer who desires to get information is the fact that he may have no definite idea as to what documents are in possession of the adverse party relative to the merits of the matter in controversy. This section, as can be seen, is broad enough to enable him to procure discovery without specifying the particular documents in the possession of his adversary.

The documents themselves need not be admissible, the

[7] 6 U. of Chi. L. Rev. 359 at 369.

[8] Ontario Con. Rules of Practice 1928, Rules 327 and 347; Annual Practice 1932, Order 31.

[9] Ill. Rev. Stat. 1937, Ch. 110, § 259.17 (1).

only requirement being that they be "material to the merits of the matter in question." That materiality must be determined upon the issues as they existed at that time rather than when the case is called for trial. There may be many documents available which, although not admissible in evidence, may yet throw considerable light upon the issues which have been formed by the pleadings. For example, the report of a doctor in a personal injury case, although not ordinarily admissible, may be of great value to the lawyer defending an action for damages. The pleadings allege that the plaintiff sustained certain injuries, and it would appear that any medical statement that might be listed would be of considerable moment to the attorney defending such a case. Statements of doctors who have made examinations merely for the purpose of testifying at the trial would not, of course, be subject to the operation of the rule.

Under the English and Canadian interpretations of similar provisions, there are only three types of documents which may be excepted from the operation of the discovery statute: (1) those which would tend to incriminate the party or subject him to a penalty, under which exception the party must claim his privilege under oath in filing his schedule of documents; (2) those which are professionally privileged, such as communications between lawyer and client, the same rules of evidence applying to the listing of such documents as would apply on the trial of the case; (3) those which would be injurious to public interest, e. g., an official public document, the disclosure of which would, in the opinion of the responsible officer in custody thereof, be contrary to public interest.[10]

In addition, in the older cases it has been held that unless a showing is made upon good and sufficient cause that the evidence sought, or the books and papers required to be produced, contained evidence pertinent to the issue on behalf of the party applying for it, application would be denied.[11] However, because of the broad language of the new statute in its entirety, this ground probably does not apply under Rule 17.

Although Rule 17 permits the discovery of documents

[10] Ill. Civil Practice Act Annotated, pp. 378-81.
[11] Lester v. People, 150 Ill. 408, 23 N.E. 387 (1890).

without affidavit, it does require that the documents to be listed be "material to the merits of the matter in question in said cause." It is the opinion of the writer that the proper practice under this section would in most cases require an affidavit on the part of the person who desires the production of the documents, setting out the necessity for the examination of the aforesaid documents so that the court may be able to determine whether or not they are "pertinent to the merits of the matters in controversy."

It would seem clear that "material," "relative," and "pertinent," as used in the rule, are not limited to "competent." This is the attitude of the English courts with respect to similar language, as indicated in the opinion of Lord Justice Brett:[12]

> It seems to me that every document relates to the matters in question in the action, which would not only be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

Some inference with respect to the construction likely to be given these terms may be drawn from the treatment accorded by the Illinois courts to the requirement "pertinent to the issue," found in Section 9 of the Evidence Act.[13] It has been universally held under that section that before an order could be entered, there must be good and sufficient cause shown upon reasonable notice that the evidence shown to be obtained was pertinent to the issues in the case.[14] It has been further held that, while a court has inherent power to order the production of books and papers, such order in all cases must be reasonable, and a court has no right to compel the submission of records to a general inspection and examination for "fishing purposes" or with the view of finding evidence to be used in other suits or prosecutions.[15] The Supreme Court has suggested that the materiality of the evidence and the good and sufficient cause may appear from

[12] Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co., 11 Q.B. Div. 55 (1882).

[13] Ill. Rev. Stat. 1937, Ch. 51, § 9: "The several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue."

[14] Red Star Laboratories Co. v. Pabst, 359 Ill. 451, 194 N.E. 734 (1935).

[15] Firebaugh v. Traff, 353 Ill. 82, 186 N.E. 526 (1933).

the pleadings or may be shown by affidavit filed in support of the motion.[16]

The right of the party to an order for the listing of documents is absolute and exists irrespective of the use or availability of other methods of discovery. The words "possession or power" are inserted for the purpose of preventing the opposing party from passing the buck or hiding the documents which are required to be listed. The most severe penalties can be imposed for conduct of this kind. Even under Section 9 of the Evidence Act,[17] prior to the discovery statutes, it was held[18] that two officers of a defendant corporation, who destroyed documents ordered to be produced, could be fined one thousand dollars and ordered to jail for flaunting the court's order.

The party requesting the listing may inspect and obtain copies of documents listed in schedule 1 when not inconvenient for the party having possession thereof.[19] As a practical matter, there is seldom any occasion to invoke the severe penalties available, inasmuch as the opposing party, by listing documents in schedule 1, has already indicated that he has no objection to producing them for inspection. Arrangements are ordinarily made between the attorneys to inspect and copy these exhibits at their offices.

The rule provides[20] that the party wishing discovery of documents listed in schedule 2 may apply to the court by motion for an order that such documents be produced for inspection and copying. On the application for this order, the opposing party may then present orally the reasons for his refusal to produce, together with any authorities he may have upon the subject, and the court, after hearing the arguments, may either sustain or overrule the motion. If the motion is sustained, an order to produce is entered and, if the party still persists in his refusal to allow inspection, severe penalties are imposed.

The penalty sections of paragraphs 2 and 3 provide that the party listing such documents may be nonsuited or his complaint dismissed, or that any pleading or part thereof

16 Carden v. Ensminger, 329 Ill. 620, 161 N.E. 137 (1928).

17 Ill. Rev. Stat. 1937, Ch. 51 § 9.

18 Harrisburg Coal Mining Co. v. Ender Coal & Coke Co., 272 Ill. App. 113 (1933).

19 Ill. Rev. Stat. 1937, Ch. 110, § 259.17(2).

filed by him may be stricken out and judgment rendered accordingly, or that he may be debarred from maintaining any particular claim, defense, recoupment, set off, or counterclaim or replication respecting which discovery is sought. For example: To an action for personal injuries the defendant answers that the driver of the truck causing the accident was not in his employ, whereupon he is ordered to produce the pay roll records of his corporation. Upon refusal to do so, the entire special plea may be stricken from the files.

If an order for the listing and production of documents is issued and any particular document is not listed, it is not admissible in evidence unless the party failing so to list the document can show to the court that his failure to list it was prompted by a bona fide and reasonable belief that it was not material.[21] Any document listed in schedule 1 and not produced is not admissible on behalf of the party listing it where it is in his possession or control or where it is in the possession of someone else "unless the court is satisfied that the refusal to produce was not due in any degree to the wilful connivance of the party listing it."[22] No document in schedule 2 is admissible in evidence at the instance of the party so listing it except by leave of court.[23]

Where a party has not demanded a list of documents, or when particular documents have not been included on the list, an order may issue to show cause why specified documents should not be produced to be inspected, copied, or photographed.[24] Particularly to be noted is that this provision extends to production for inspection or photographing of "articles or property relative to the merits," as well as to documents. This is an extremely important section. Many cases arise in which visual inspection of some article is necessary to proper proofs at the trial.

Z, previously referred to, whose client was killed in the

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20 Ibid., § 259.17(3).

21 Ibid., § 259.17(4).

22 Ibid., § 259.17(5).

23 Ibid., § 259.17(6).

24 Ibid., § 259.17(8), which also provides, "If the other party claims that the document or article is not in his possession or control he may be ordered to submit to examination in open court or by deposition regarding the locating of such document or article."

In order to prevent the evasion of the penalties of this rule, § 259.17(9) empowers the court, on the application of any party to an action, to require any other party to state by affidavit whether any one or more specific documents is or are, or has or have, at any time, been in his possession or power.

explosion of a locomotive engine, might require the defendant to allow him to inspect and photograph the engine locked up in the round house. Under the New York statute, inspection of a machine used in sealing seltzer water bottles in an action for injuries caused by an explosion of one of the bottles has been allowed,[25] as well as inspection and photographing of a ship's boilers and engines.[26]

Answering Opponent's Motion to List Documents

Since the revisions of Rule 17 are so largely based upon the English practice, it may be well to consider the attitude of the English courts with relation to the duties of one upon whom has been served a motion to list documents. The following language, quoted at length, is indicative of that attitude:

> Any party who has been ordered to make general discovery must make an affidavit, specifying all the documents material to the matters in dispute in the action, which are, or have been in his possession. He must describe them with particularity sufficient to identify them hereafter, should the Court think fit to order any of them to be produced. . . . He must also specify which, if any, he objects to produce . . . and on what grounds he so objects. He must specify all material documents, whether he objects to produce them or not; but immaterial documents he should altogether omit. Any document which he sets out he thereby admits to be material. Hence he should make no reference in his affidavit to any document which he honestly believes to be irrelevant to the action. But, if the document is material, the fact that he does not propose himself to put the document in evidence is no ground for not disclosing it; still less is the fact that it may assist his opponent. Every document which will throw any light on any part of the case is material, and must be disclosed. If some portion of a document or a book is relevant and the rest not, he must specify which portions he admits to be relevant; he has the document or book in his possession, and he must therefore take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question.[27]

If, therefore, a defendant believes that a document called for is not material, he should omit it from his affidavit entirely. The party calling for it can then by motion have the

[25] Donoghue v. Callanan, 136 N.Y.S. 657 (1912).

[26] Gimenes v. New York & Porto Rico S.S. Co., 37 F. (2d) 168 (1929). See also Beyer v. Transit Development Co., 124 N.Y.S. 463 (1910); Parker & Nimme Co. v. Enterprise Tinware Co., Inc., 182 N.Y.S. 909 (1920); Ill. Civil Practice Act Annotated, 383.

[27] Odgers, Pleading and Practice (8th ed.), 282, citing Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington, [1895] 2 Q.B. 148.

court pass upon the question of the materiality of the document.[28]

[28] The following rather simple forms are illustrative of those required under Rule 17:

1. Motion to compel filing of sworn list of documents:

Now comes the plaintiff in the above-entitled cause, by_____, his attorney, and moves for rule on the defendant, the_____Company, a corporation, to file a sworn list of documents, including photographs, books, accounts, letters, or other papers which are, or have been, in his possession or power material to the matter in question in said cause, especially

[Here list documents known and particularly desired.]

_____

Attorneys for Plaintiff

2. Order compelling listing of documents:

It is hereby ordered that the said_____file herein within_____ days after date a sworn list of all documents, including books, accounts, letters, and other papers which are or have been in his possession or power relating to the merits of the matter in question in said cause, and particularly

[Here list documents particularly specified in motion.]

3. List of documents under discovery order:

Now comes the_____in the above entitled cause by_____, his attorney, and pursuant to order of the Court heretofore entered, files hereto his list of documents relating to the merits of the above-entitled cause.

Schedule 1.

_____lists under Schedule 1, as documents he is willing to produce, the following:

Name of Document	Name and Address of Party Holding Same
_____	_____
_____	_____
_____	_____

Schedule 2.

_____lists herewith as documents which he is unwilling to produce, the following:

Name of Document	Name and Address of Party Holding Same
_____	_____
_____	_____
_____	_____

_____says he is unwilling to produce the aforesaid documents in Schedule 2 for the following reasons:

(State reasons)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

_____, being first duly sworn, on oath deposes and says that he is the_____in the above-entitled cause; that pursuant to the order of this court entered_____he files herewith a list of documents relating to the merits of said cause; that above "Exhibit A" is a true and accurate list of said documents and the names and addresses of the parties holding same; and that the matters and things therein stated are true.

Subscribed and sworn to, etc.

4. Affidavit showing pertinency of specific documents:

_____, attorney for_____in the above entitled cause, being first duly sworn on oath deposes and says that

[Here set out in brief the substance of the cause of action showing enough

FORCING THE OPPOSING PARTY TO ADMIT FACTS, OR TO ADMIT THE GENUINENESS OF DOCUMENTS AND PUBLIC RECORDS

Supreme Court Rule 18, which supplements Section 58, provides for the obtaining of admissions from adverse parties. For the purpose of simplifying the admission of documentary evidence, either party may employ the first paragraph of Rule 18[29] and request an admission in writing of the genuineness of the documents in question. The procedure set out by statute requires that the party requesting the admission of the genuineness of the document exhibit to the other party, or his attorney, any paper material to the action and request or deliver a copy of the same, together with a request for such admission, within four days. This section further provides that, if the adverse party fails to

facts to prove to the court the materiality of the documents required to be produced.]

Affiant further says that the documents listed in the accompanying motion are necessary and material in the trial of the said cause.

5. Motion to produce specific documents:

Now comes the_____, by_____, his attorneys, and moves this honorable court to order the_____to produce for inspection and to be copied at the time and place to be fixed by the Court the following described documents pursuant to the statute and rules of Court in such case made and provided_____

6. Order for preceding motion:

It is hereby ordered that_____, _____in the above-entitled cause shall produce for inspection and to be copied on the day of_____at the hour of_____in the office of_____, his attorney, the following described documents_____

* * * *

In case of the unreasonable refusal of the party to produce for inspection and copying any document listed, a motion may be made under Section 2 of Rule 17 for an order that the party listing such document shall be non-suited or his complaint be dismissed, or that any pleading or part thereof filed by him shall be stricken out and judgment returned accordingly, or that he may be debarred from any particular claim, defense, recoupment, setoff, counterclaim or replication respecting which discovery is sought, or an order of attachment as for contempt of court may be issued.

[29] Ill. Rev. Stat. 1937, Ch. 110, § 259.18(1): "Either party may exhibit to the other or to his attorney at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission within 4 days after the request, and the delivery to him of a copy thereof, if such copy be required, and if the party exhibiting the paper be afterward required to prove its genuineness, and the same be finally proved or admitted on the trial, the expense of proving the same, including a reasonable counsel fee for the time and attention devoted thereto, to be ascertained and summarily taxed at the trial, shall be paid by the party refusing the admission, unless it shall appear to the satisfaction of the court, that there were good reasons for the refusal, and an attachment or execution may be granted to enforce the payment of such expense."

make such admission, the expense of proving the same, including a reasonable counsel fee for the time and attention devoted thereto, may be ascertained and taxed at the trial, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

Paragraph 2 provides that any party, by notice in writing not later than ten days before trial, may call on any other party to admit, for the purpose of the cause, matter, or issue only, any specific fact which can be admitted with qualification or explanation as stated therein. A similar provision for costs and attorney's fees is appended to this section.

The third paragraph makes comparable provisions with respect to public records.[30]

In *Wintersteen* v. *National Cooperage & Woodenware Company*,[31] the constitutionality both of Rule 18 and of Article 9 of the Civil Practice Act,[32] is upheld, the court saying:

> . . . we hold that neither section 104 of the Civil Practice act nor Rule 18 of this court contravenes section 2 of article 2 or article 3 of the State constitution or the first section of the fourteenth amendment to the Federal constitution. The application of Rule 18 of this court is a salutary measure and conforms to the modern legislative trend. . . . No one is penalized until he has been found to have acted unreasonably by a court of competent jurisdiction. The law does not require his refusal to be based on valid grounds, but he is not permitted to base a refusal upon caprice or unreasonable grounds. Clearly this provision is intended to expedite litigation and to discourage unnecessary and unreasonable delays.

In the case mentioned, the plaintiff exhibited to the defendant a copy of the rules of the Interstate Commerce Commission as such rules were set out in the declaration and demanded an admission that they were in force and effect and covered the loading of the car for interstate shipment. The defendant refused to make an admission. On the trial, the plaintiff introduced a certified copy of the Interstate

30 Ibid., § 259.18(3): "When any public records are to be used as evidence, the party intending to so use them may prepare a copy of them insofar as they are to be used, and may seasonably present such copy to the adverse party by notice in writing, and such copy shall thereupon be admissible in evidence as admitted facts in the case if otherwise admissible, except insofar as its inaccuracy shall be pointed out under oath by the adverse party in an affidavit filed and served within 10 days after service of such notice and not less than 4 days before the case shall be called for trial."

31 361 Ill. 95, 197 N.E. 578 (1935).

32 Cahill's Stats. 1933, Ch. 110 § 104; also Supreme Court Rule 10.

Commerce Commission rules. After judgment was entered he moved to tax as costs the expense of procuring the certified copy, as well as an allowance for attorney's fees on behalf of his attorney for his services in procuring it. The court allowed the sum of $11.20, money expended for the certified copy, and also $100 attorney's fees, and ordered the amount of $111.20 taxed as costs in the case. The action of the court in so doing was approved by the Supreme Court.

However, in the case of *First Trust and Savings Bank of Kankakee* v. *Town of Ganeer*,[33] the court refused a similar request on the grounds that the admission of facts required could not reasonably be made by the adverse party without qualification.

As a practical matter, Rule 18, with its provision for the admission of the genuineness of documents, affords a quick and economical method of laying the foundation for the admission of any paper and may obviate the necessity of producing witnesses to testify to the identification of the document, its accuracy, and its genuineness. In injury cases, the second section may well be used and is frequently used to establish ownership or operation of an automobile, the agency of the operator, and similar questions that may well be established prior to trial.[34]

[33] 296 Ill. App. 541, 16 N.E. (2d) 806 (1938).

[34] The following forms of motions are illustrative of those necessary under Rule 18:

1. Motion to admit genuineness of document:

To:_____

_____

There is hereto attached a copy of [herein insert the description of document]. In accordance with the statutes made and provided, we hereby request an admission of its genuineness within four (4) days.

_____

Atty. for_____

Received this_____day of_____
a copy of the foregoing motion together with a copy of the aforementioned document.

_____

Atty. for_____

2. Notice to admit facts:

To:_____

_____

We call upon you to admit, for the purposes of the cause now at issue herein only, the following facts:

Upon your refusal to admit such facts, within four (4) days from the date of service upon you of this NOTICE TO ADMIT FACTS, as provided by the Rules of Court, we shall ask the court, upon the trial of this cause, to assess against you

TAKING DEPOSITIONS

The third method of discovery under the Illinois Statute is provided by Supreme Court Rule 19, which is as follows:

(1) Any party to a civil action may cause to be taken, on oral or written interrogatories, by deposition before trial, in the manner provided by law for taking depositions in chancery cases, the testimony of any other party or of any other person, which is relevant to the prosecution or defense of the action, and, if hostile, such person may be examined as though under cross-examination.

(2) When the party or person to be examined is a corporation, joint stock company or unincorporated association, the testimony of one or more of its officers, directors, managing agents, or employees, which is relevant, may be so taken.

(3) When a party, without justification, takes or attempts to take a deposition for discovery, the court may assess the expense of taking such deposition, including a reasonable counsel fee for the time and attention devoted thereto, to be paid by the party taking such deposition.

THE METHOD OF TAKING DEPOSITIONS

Neither the foregoing nor any other rule of the Supreme Court sets out any method of taking the depositions, merely providing that they shall be taken "in the manner provided by law for taking depositions in chancery cases." This manner provided by law is set out in the Evidence Act, Chapter 51, Sections 24 to 37 inclusive. For practical purposes a short analysis of these sections is herein included, together with a few comments on the interpretation of those sections by the courts.

Section 24 provides that, when the testimony of any wit-

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the costs and attorneys' fees incurred by the plaintiff herein in proving the aforesaid facts.

_____
Attorneys for Plaintiff

Received, a copy of the within and foregoing NOTICE TO ADMIT FACTS, this _____day of_____, A.D. 19__

_____
Attorneys for Defendant

3. Motion to admit genuineness of public documents:

To:_____

You are hereby notified that on the trial of the above entitled cause I intend to use a copy of [describe document], which said copy is attached to this notice and presented to you.

_____

Received a copy of the above notice and [state nature of document] this _____day of_____A.D. 19__.

_____

ness residing or being within this state shall be necessary in a chancery hearing, the party wishing to take the same may cause the deposition of such witness to be taken before any judge, justice of the peace, clerk of a court, master in chancery, or notary public without a commission or filing interrogatories, on giving to the adverse party, or his attorney, notice as specifically set out.[35]

In *Hill* v. *Thomas V. Jeffery Company*,[36] the court reviews the development of deposition procedure in the state of Illinois, saying that originally at common law the courts did not have the power to take depositions, that being the function of the chancery courts alone. By various statutes, however, the right to take depositions was conferred upon courts of law, together with the corollary right to enforce the orders of the court in relation thereto.

It has been held that there is no necessity under this section for filing a prior affidavit to the effect that the testimony is either relevant or material.[37] However, where it appears that the deposition is rendered unnecessary because of a prior hearing or a contemporaneous one by another commissioner, notary public, or master in chancery, the court will not hold the witness in contempt for failing to appear.[38] It would appear that the question as to whether or not the testimony is "necessary" in the suit in question would be superseded by the language of Rule 19 to the effect that the testimony must be "relative to the prosecution or defense of the action."

It has further been held that the examination under this section may be had before issue is joined and immediately upon the filing of the bill or complaint.[39] It would seem also that notice by mail together with adequate proof of the receipt of such notice is sufficient.[40] Neither of the cases so indicat-

35 Ten days' notice of the time and place of taking the same, and one day in addition thereto for every fifty miles travel from the place of holding the court to the place where such deposition is to be taken. It further provides that, where the party entitled to notice and his attorney resides in the county where the deposition is to be taken, five days' notice is sufficient.

36 292 Ill. 490, 127 N.E. 124 (1920).

37 People ex rel. Metropolitan Casualty Ins. Co. of N. Y. v. Calumet National Bank, 260 Ill. App. 603 (1931).

38 People ex rel. Jamontas v. Miller, 245 Ill. App. 524 (1927).

39 Schmidt v. Cooper, 274 Ill. 243, 113 N.E. 641 (1916).

40 Brown v. Clement, 68 Ill. 192 (1873); Zinser v. Sanitary Dist. of Chicago, 175 Ill. App. 9 (1912).

ing are entirely satisfactory on the point, however. The wording of the section itself with regard to the notice necessary raises several serious questions which have not yet been passed upon in this state. Where the witness is not a party, there is no provision in the section for notifying him. The only provision is as to notice to the adverse party or his attorney. As a practical matter, however, there must be a notification of the witness also, or obviously he would not be present for the examination or deposition. In view of these ambiguities, it is clear that the proper procedure from a practical standpoint is to serve a notary public subpoena upon any witness who is not a party and whose testimony is required, and at the same time to serve notice on the opponent's lawyers, either personally or by mail, of the proposed deposition.

A further difficulty which might be called to the attention of the bar is the fact that this section is confined to suits in chancery, whereas the application of the section has been broadened to include actions at law. The fundamental difficulty is the attempt to combine substantive and procedural requirements in the same section, whereas logically they should be separated.

Section 25 provides as follows:

> And it shall also be lawful upon satisfactory affidavit being filed, to take the depositions of witnesses residing in this state, to be read in suits at law in like manner and upon like notice as is above provided, in all cases where the witness resides in a different county from that in which court is held, is about to depart from the state, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness or other bodily infirmity.

This section, adopted in 1871, has been largely superseded by the provisions of Rule 19, which refers to such section, along with others, only for the "manner" of taking depositions. Under the law as it is now, the various requirements of this section, as that the witness reside in a different county, do not modify the absolute right of either party to take depositions, although they may be significant when a question of the use of depositions arises.

Section 26 provides in substance that when the testimony of a witness who resides in the state more than one hundred miles from the place of holding court, or does not reside in the state, or is engaged in military or naval service, or is

out of the state is necessary in any civil cause either in law or chancery, the parties wishing to use his deposition may, by giving the adverse party or his attorney ten days' previous notice together with a copy of the interrogatories intended to be put to such witness, sue out from the proper clerk's office a *dedimus potestatum* or commission directed to any competent or disinterested person as a commissioner, or to any judge, master in chancery, notary public, or justice of the peace of the county or city in which such witness may reside, or to any commissioned officer in military or naval service of this state or the United States, authorizing or requiring the witness to come before him at such place as he may designate to take his deposition upon all interrogatories that may be enclosed with or attached to said commission on the part of both the plaintiff and defendant and none others, and to certify the same when thus taken together with said commission and interrogatories into the court in which such cause shall be pending with the least possible delay.

This section applies only to written interrogatories and defines a method by which the testimony of any witness may be taken and returned. As a jurisdictional proposition, the court has no authority to compel the attendance of a witness who resides out of the state,[41] inasmuch as the jurisdiction of the court is confined to the boundaries of the state. It is not necessary under this section that the commissioner have any official status or that the certificate of the commissioner be sealed, inasmuch as his authority is derived from the commission itself.[42]

It has been recently held, in the case of *In re Kettels*,[43] that in the absence of a specific provision in the evidence act covering the manner of giving notice in the taking of depositions, such notice may be given by mail in accordance with Rule 7 of the Supreme Court Rules.[44]

From a practical standpoint, the taking of a witness'

41 Hill v. Thomas V. Jeffery Co., 292 Ill. 490, 127 N.E. 124 (1920).

42 Temby v. William Brunt Pottery Co., 229 Ill. 540, 82 N.E. 336 (1907).

43 365 Ill. 168, 6 N.E. (2d) 146 (1936).

44 Rule 7 provides that service may be made personally or by leaving the paper in the office of the attorney or his clerk, or, if the party is not represented by counsel, with some person of the family of the age of ten years or upward, or by depositing them in a United States post-office or post-office box enclosed in an envelope, plainly addressed to such attorney at his business address, or to the party at his business address or residence, with postage fully prepaid.

deposition by written interrogatories is very unsatisfactory. Its only advantage lies in the cheapness of the method by which the testimony of a witness may be procured. The proponent of the deposition is confronted at once with the problem of so phrasing his questions as to elicit only the desired information. Under Section 33 of the act, neither he nor any representative for him, nor his opponent, may be present when the depositions are taken. The witness, of course, knows nothing of the rules of evidence and may—and frequently does—go off on a long dissertation, delving into facts which are not material or relevant, and subjecting the deposition either to a motion to suppress the evidence in advance of trial or to the sustaining of objections to the answers in the trial itself.

On the other hand, the opposing party is at even more of a disadvantage. Since he is not present at the taking of the deposition, he has no way of anticipating what the answers of the witness may be, nor what questions to ask on cross-examination, and may be, as noted by Dean Wigmore, practically deprived of cross-examination.[45] The question proposed to the witness may not be objectionable in itself, but the answer may be highly objectionable.

The difficulties with regard to written interrogatories directed to witnesses rather than parties are well shown in Chicago by the fact that the Municipal Court Rules, although containing provisions empowering one to take the depositions of parties by written interrogatories, have none with respect to witnesses other than parties.[46]

The section under discussion contains no provision for cross-interrogatories to be filed by the opposing party, nor does it make any provision for a method by which objections may be made to the questions.

The new Federal Court Rules, on the other hand, provide specifically for the serving of cross-interrogatories and re-direct interrogatories. They provide also for the method of objecting to either the form or the substance of the questions and answers, as well as the completion and return of the deposition.[47]

[45] J. H. Wigmore, Evidence, II, p. 1745.
[46] Rule 131, Rules of Municipal Court of Chicago.
[47] Rules 31 and 32, Federal Rules of Civil Procedure.

In view of the chaotic condition of the Illinois statute in this regard, the use of this section is hazardous and unsatisfactory as a practical matter. If counsel representing the opposing parties is served with a notice to take depositions by written interrogatories, he would be wise to elect to take them orally in accordance with Section 28.[48]

Section 28 provides for oral examination upon notice. The party desiring to take the evidence of a nonresident witness may have a commission directed in the same manner as provided in Section 26, previously discussed, to take such evidence upon interrogatories to be propounded to the witness orally. It also provides that where the opposing party has served a notice to take depositions of nonresident witnesses upon written interrogatories, counsel may within three days serve notice of his election to take the depositions orally rather than in writing, in which case the appearance of each party is provided for, together with the same provisions for notice as are contained in Section 24. This section thus gives to the party who is served with notice of the taking of depositions by written interrogatories the right to change the form of the deposition to oral interrogatories. The procedure under this section is well set out in *Lewis v. Fish*,[49] which holds that the party who gives notice that he will sue out a *dedimus* to take the testimony of a witness upon written interrogatories, after receiving notice that the other party has elected to take the deposition upon oral interrogatories, should reply with a notice of the time and place where such deposition will be taken on oral interrogatories in accordance with the statute; since he is the party desiring the testimony, he should give notice of the time and place for taking the same. This section provides a method by which the impracticalities of written interrogatories may be avoided.[50]

Section 30 provides for the swearing in of the witness before

[48] Section 27 provides that when the deposition of any witness is desired and the adverse party is not a resident of the county where suit is pending, or is in default and has no attorney, the notice required by this act may be given by mail, by posting a copy of such notice at the door of the court house where suit is pending, or by publishing it in a newspaper, and, where interrogatories are required, by filing a copy thereof with the clerk of the court.

[49] 40 Ill. App. 372 (1890).

[50] Section 29 merely provides for the assessment of costs upon the failure to take depositions where notice has been served under the previous sections and the opposing attorney has attended at the time and place in question.

the commissioner and the manner in which the commissioner shall examine the witness,[51] requiring that the commissioner shall cause the interrogatories and their answers to be reduced to writing and signed by such witness. It is made the duty of the person taking such deposition to annex at the foot of the deposition his certificate stating that it was sworn to and signed by the deponent, telling also the time and place when and where the same was taken. The section further provides:

And every such deposition, when thus taken and subscribed, and all exhibits produced to the said commissioner, judge, master in chancery, notary public, justice of the peace, or clerk, or other persons authorized to take depositions, as aforesaid, or which shall be proved or referred to by any witness, together with the commission and interrogatories, if any, shall be enclosed, sealed up, and directed to the clerk of the court in which the action shall be pending, with the names of the parties litigant endorsed thereon.

There is a further specific provision for the sealing of the deposition where it is taken out of the state. Of all the sections of the act, this is perhaps the one most frequently abused. In many cases the depositions are never written up. In very few cases are they filed if the deposition contains statements derogatory to the proponent's case. It is also common practice to have the depositions written up and to use them for purposes of impeachment even though they have never been filed. There seems to be no real authority for such procedure, unless it be in the general rule of evidence that a witness may be impeached by any statement out of court contradictory to the statement made under oath.

Although their use for purposes of impeachment is seldom questioned on this ground, a strict interpretation of Sections 30 and 31 of Chapter 51, the evidence and deposition statute, would lead to the conclusion that before a deposition could be admissible in evidence it must be "enclosed, sealed up and directed to the clerk of the court in which the action shall be pending." Unless these precautions are taken the deposition should be regarded by the court as informal and insufficient.[52]

[51] In most instances, as a matter of convenience, it is the practice of attorneys to stipulate that the questions may be asked the witness directly by either counsel without the intervention of a notary public. This avoids the cumbersome necessity of having the witnesses interrogated through the mouth of the commissioner himself.

[52] Ill. Rev. Stat. 1937, Ch. 51, § 37.

The Rules of the Municipal Court of Chicago provide that when any such deposition is taken the party on whose behalf it is taken may, and on demand of the opposing party shall, cause the same to be certified by the officer before whom the same is taken and filed by the clerk in the action.[53] No reason is seen why a motion of this same character can not be made in the Circuit or Superior Court.

It has been held that depositions not returned to the justice issuing the *dedimus,* as required by law, but delivered to the attorneys and kept by them until the trial and then presented, are irregular and not admissible.[54] Every substantial provision of this section must be complied with.[55]

With regard to the question of exhibits, the requirement that any exhibit referred to must be enclosed, sealed up, and directed to the clerk has been strictly interpreted in the following situation. Upon the taking of a deposition of the witness Lewis, he was presented with a written statement previously made by him which he identified as bearing his signature. It was marked for identification. Counsel for plaintiff then and there requested that he be permitted to examine the paper so that he might re-examine Lewis at that time. Such request was refused, counsel saying that he was not offering the paper in evidence. Later the witness died. The paper identified by Lewis was attached to the deposition. At the trial, however, over objection of plaintiff in error it was offered and received in evidence on the unsworn statement of the deposition reporter that the paper was the one identified by Lewis. This was held to be reversible error, the court simply stating that "the statement identified by Lewis was not attached to the deposition or sealed up with it and was for that reason incompetent."[56]

Lawyers are sometimes presented with the question as to whether a witness has a right to correct or amend the deposition, either before or after it has been sworn to and signed by the witness. In *Harrison* v. *Thackaberry,*[57] it was held error to refuse to permit the witness to correct a deposition before swearing to it and signing it. It has also been

[53] Rev. Civil Practice Rules of Municipal Court of Chicago, Rule 135a, § 3.
[54] Louisville, N. A. & C. Ry. Co. v. L. Heilprin & Co., 95 Ill. App. 402 (1900).
[55] Edleman v. Byers & Gilmore, 75 Ill. 367 (1874).
[56] Levinson v. Fidelity & Casualty Co., 348 Ill. 495, 181 N.E. 321 (1932).
[57] 248 Ill. 512, 94 N.E. 172 (1911).

held that after the signature of the witness has been attached no amendments can be made.[58]

Assuming, however, that a witness has been caught in a violent contradiction of a material character which destroys a good deal of the effect of his deposition, can he then, under this ruling, be permitted to change his testimony? No answer can be found under the Illinois decisions to such a question. However, the federal statute[59] has attempted to solve the problem by providing that "any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them."[60]

Section 34 provides that an "examination or deposition which shall be taken and returned according to the provisions of this act may be read as good and competent evidence in the cause in which it shall be taken as if such witness had been present and examined by parol in open court on the hearing or trial thereof."

Under this section a deposition has the same status and the same evidentiary value as the testimony of a witness given orally from the stand.[61] Testimony by deposition should be given the same fair consideration as the jury would give if such testimony were given by witnesses in open court. Moreover, if the parties and the issues are substantially the same, depositions taken in prior actions may be read in evidence at a subsequent trial. The effect of this section on the question of use of the depositions is discussed later under a separate heading.[62]

58 Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334 (1905).

59 Fed. Rules of Civil Procedure, Rule 30.

60 Section 31 merely provides that if a deposition has been returned into court unsealed, or if its seal has been broken previous to its reception by the clerk to whom it is directed, it shall, if objection be made thereto in proper time, be regarded by the court as informal and insufficient.

Section 32 provides a penalty for the breaking of the seal of the deposition unless by consent.

Section 33 is directed to written interrogatories alone and provides that the party, his attorney, or any person interested shall not be permitted to dictate, write, or draw up any deposition which may at any time be taken under this act or be present during the taking of any deposition by written interrogatories and further provides that the violation of this section shall make the interrogatories informal and insufficient. Any deposition in the handwriting of the attorney or interested person is bad.

61 Olcese v. Mobile Fruit Co., 211 Ill. 539, 71 N.E. 1084 (1904).

62 Section 35 merely provides for the further examination within the discretion of the court if the first interrogatories or the first examination is not satisfactory,

Section 36 confers on the commissioner, judge, justice of the peace, notary public, or any person who is required to take a deposition in any cause pending in this state, or by the authority of a commission of any court of record of another state, power to compel the attendance of a witness before him to testify and to compel the witnesses to produce books and papers and testify concerning them. It further provides that, when any such witness refuses to obey such subpoena or to testify, the commissioner shall file a petition or complaint against the offending witness in the circuit court of the county in which such deposition is desired to be or has been attempted to be taken, setting forth the refusal or neglect of the witness. The act further provides that any circuit court in this state, or any judge thereof, upon the filing of such a petition, may upon due notice order the attendance of such a witness and the giving of testimony or the production of books, and, if the witness still refuses to obey the order of the court, the court may punish the witness by fine and imprisonment. It will be noted that the commissioner himself has no power to punish the witness for contempt;[63] the contempt must be a contempt of the court itself before the witness may be punished. The constitutionality of the statute has been upheld in *People* v. *Rushworth.*[64] In that case the relator, the now renowned Harold L. Ickes, was appointed by the Supreme Court of Ontario to take the depositions of witnesses orally in Chicago for a suit pending in Ontario. The commissioner issued *subpoenas duces tecum.* The witness appeared but refused to testify. His conduct was reported to the court in a petition in accordance with the provisions of this act. An order was entered which the witness later refused to obey. This was later held to be contempt of court and the witness punished accordingly.

If the attorney for either party wishes to contest the materiality of any question which is asked a witness on the deposition, he may do so by instructing the witness not to answer the question. The commissioner or notary must then certify the question to the court for its decision. If the court

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or if on the showing the court is convinced that the ends of justice will be served by such a further examination.

[63] Puterbaugh v. Smith, 131 Ill. 199, 23 N.E. 428 (1890).

[64] 294 Ill. 455, 128 N.E. 555 (1920).

orders the question to be answered and counsel still desires to maintain his position, the witness may stand mute in court and be held in contempt, from which order counsel may appeal. The effect of an order holding the witness in contempt is to stop all proceedings until that issue is decided. This procedure was sanctioned in *Hill* v. *Thomas V. Jeffery Company*,[65] wherein it was also held specifically that the order of committment by the Superior Court was a final judgment in the ancillary proceedings brought to enforce the interlocutory order directing the witness to appear and testify, and it was appealable as such.[66]

Use of Depositions

In contrast to the ample provisions of the new Civil Practice Act for the discovery of information material to the issues of the case, the provisions concerning the use of that information are extremely vague and indefinite. The manner of taking depositions is contained in the Depositions Act,[67] which has been previously discussed. This act, of course, was in effect long before the creation of the discovery provisions of the new act. With regard to depositions in actions at law the older statute provides as follows:

> And it shall also be lawful, upon satisfactory affidavit being filed, to take the depositions of witnesses residing in this state, to be read in suits at law, in like manner and upon like notice as is above provided, in all cases where the witness resides in a different county from that in which the court is held, is about to depart from the state, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness, or other bodily infirmity.[68]

The only provision with regard to the use of the deposition so taken was as follows:

> Every examination and deposition which shall be taken and returned according to the provisions of this act, may be read as good and com-

[65] 292 Ill. 490, 127 N.E. 124 (1920).

[66] Section 37 provides that every witness attending before any commissioner, etc., to take depositions shall be entitled to a compensation for his time and attendance and traveling expenses at the same rate and for the time being as is or shall be allowed by law to witnesses attending courts of record in this state; and the party requiring each examination shall pay the expenses thereof but may, if successful in the suit, be allowed for the same in the taxation of costs. This section provides that the witness whose deposition is taken may receive the same fees that he would if he were a witness at the trial of the case. These fees are set out in Ill. Rev. Stat. 1937, Ch. 53, § 65.

[67] Ill. Rev. Stat. 1937, Ch. 51, § 24 et seq.

[68] Ibid., § 25.

petent evidence in the cause in which it shall be taken, as if such witness had been present and examined by parol in open court, on the hearing or trial thereof.[69]

Careful reading of these two provisions together will convince the reader that the use of the deposition under this section was confined or limited to those cases "where the witness resides in a different county from that in which the court is held, is about to depart from the state, is in the custody of legal process, or is unable to attend such court on account of advanced age, sickness, or other bodily infirmity." Supreme Court Rule 19 permits the taking of the testimony of any other party or of any other person whether he lives without the county, is about to depart from the state, is in custody of legal process, or is unable to attend the trial.

The question then arises as to the admissibility of the deposition of a party or witness who does not come within any of the provisos of the prior statute. Is the deposition of a witness who is available, or who is within the jurisdiction, or who is in the courtroom itself, admissible on behalf of the party who took it? From a practical standpoint, this question is of great moment to the bar, inasmuch as so many thousands of depositions are being taken in pending cases today. In many states, both those who have statutes upon the subject and those whose statutes are silent, it has been definitely held that the deposition of a witness who is not a party to the suit and who is present or available at the time of the trial is not admissible. The general rule has been stated as follows:

> All depositions in actions at law are taken de bene esse, that is, subject to the contingency of the witness not being able to attend court at the trial. If, therefore, a witness be actually present throughout the trial, his deposition previously taken may not be read in evidence. Where, however, a party is permitted, under special statutory authority, to take the deposition of an adverse party in an action, it is held that such testimony becomes independent evidence in the case notwithstanding the presence of the party in court. . . . Where the statute makes no provision for the reading of the deposition of a witness not a party to the suit who is present at the time of trial, the right to use such testimony is by implication excluded.[70]

Numerous states have so held, including New Hampshire, Kentucky, Utah, Arizona, Georgia, New York, California, Ohio and Michigan.[71]

[69] Ibid., § 34.

[70] 8 R.C.L. 1136.

[71] Cote v. Sears, Roebuck & Co., 86 N.H. 238, 166 A. 279 (1933); Daley v. Lex-

In *Daley* v. *Lexington and Eastern Railway Company*,[72] the court said:

> The deposition of a witness in an action at law is taken subject to the contingency that the witness who gives the deposition will not be present in court at the trial and is never competent when the witness is present at the trial and able to testify.

In *Donet* v. *Prudential Insurance Company of America*,[73] the court said:

> So far as we have been able to determine, it has been generally held (subject to such exceptions as are made by the statute . . .) that where a witness is present in court, or for that matter is even within the jurisdiction of the court, his deposition is inadmissible in evidence, save as it may be used for the purpose of impeachment, or as containing declarations against the interest of a party to the action.

In many states, as well as in the federal courts, the subject of the admissibility and use of depositions taken under discovery statutes is specifically covered. In New York, for example, the statute provides:

> A deposition taken within the state, except that of a party taken at the instance of an adverse party or a deposition taken in pursuance of a stipulation, shall not be read in evidence, as provided in . . . [Section 303], unless it appears to the satisfaction of the court that the deponent is then dead or is out of the state or at a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of insanity, sickness, or other infirmity, or imprisonment, he is unable to travel to and appear at the court, or that for any reason his attendance cannot be compelled by subpoena, with the exercise of reasonable diligence. A deposition taken without the state may be read in evidence unless an order for its suppression, upon grounds to be prescribed by the rules, shall have been granted by the court.[74]

Under the above quoted statute, as well as many others, a distinction is drawn between the use of the deposition of a party and that of a witness, a party's deposition being admissible despite his presence in court, while that of a witness who is not a party is not admissible except for impeachment purposes if he is present or available at the trial. Similar

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ington & E. Ry. Co., 180 Ky. 658, 203 S.W. 569 (1918); Schmitz v. St. Louis, I. M. & S. Ry. Co., 119 Mo. 256, 24 S.W. 472 (1893); Donet v. Prudential Ins. Co. of America, 23 S.W. (2d) 1104 (Mo. App. 1930); Beem v. Farrell, 135 Iowa 670, 113 N.W. 509 (1907); Nashville, C. & St. L. Ry. Co. v. Byars, 240 Ky. 500, 42 S.W. (2d) 719 (1931); Nauts v. Stahl, 128 Ohio St. 115, 190 N.E. 242 (1934); Drexler v. Zohlen, 216 Wis. 483, 257 N.W. 675 (1934); E. J. McCullen, Examinations before Trial, 547.

72 180 Ky. 658, 203 S.W. 569 (1918).

73 23 S.W. (2d) 1104 (Mo. App., 1930).

74 Civil Practice Act of N.Y., § 304.

provisions are contained in the statutes of California, Ohio, Kentucky, Michigan, Utah, and other states.[75]

After an exhaustive study of the subject in all jurisdictions, Mr. Ragland concludes:

All states which employ the regular deposition procedure as the mode of discovery before trial, except Texas, have the following rules in regard to use of the deposition at the trial: (1) Neither party may use the deposition of a mere witness as original evidence unless the witness is unavailable for oral testimony, but the opponent of the party who calls the witness at the trial may use the deposition to contradict the witness. (2) The taker only may use the deposition of an adverse party (but not of a mere witness) as evidence of an admission. (3) Either party, regardless of who has taken the deposition and regardless of whether it is the deposition of a party or of a witness, may use the deposition in the event the deponent is unavailable for oral testimony at the trial.[76]

In contrast to the vague, indefinite and inadequate provisions of the Illinois Civil Practice Act with reference to the use of depositions, the Federal Rules provide clear and definite standards by which the court may determine the admissibility in evidence of the deposition of a witness taken under discovery statutes.[77] It is to be hoped that the Illinois legislature will recognize the problem confronting Illinois lawyers in this regard and create a statute similar in purpose and effect to the Federal Rules.

In Illinois the subject of the use of a deposition of a witness who is not a party and who is present or available has not been passed upon since the advent of the new discovery statutes, although it is a question of the keenest interest to practicing lawyers. It has been held in several old cases that, where the deposition of a witness has been taken in an-

75 Cal. Code of Civil Procedure, §§ 2021-2; Carroll's Kentucky Codes, § 554; Louisville & N.R.Co. v. McCoy, 261 Ky. 435, 87 S.W. (2d) 921 (1935); Gen. Code of Ohio, § 11525; Nauts v. Stahl, 128 Ohio St. 115, 190 N.E. 242 (1934); Mich. Stats. Ann., Title 27, § 27.860; Rice v. Fidelity & Casualty Co., 250 Mich. 398, 230 N.W. 181 (1930); Rev. Stat. of Utah 1933, Code of Civil Procedure 104-517; Moremeister v. Golding, 84 Utah 324, 27 P. (2d) 447 (1933); Johnson v. State, 33 Ariz. 354, 264 P. 1083 (1928).

76 G. Ragland, Discovery before Trial, p. 163.

77 Fed. Rules of Civil Procedure, Rule 26:

"(d) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent of a public or

other state, his presence at the trial would not render the deposition inadmissible,[78] the basis of the decisions being that, since the witness was a nonresident, the court had no power to compel his appearance and therefore the depositions would be admissible whether the witness appeared or not.

As a practical matter, if depositions taken under the discovery statutes were admissible in evidence regardless of the witness's presence, it would appear that the entire purpose and spirit of the discovery statutes would be defeated. It would have a tendency to restrict the practice of taking depositions from hostile witnesses, because of the fear of enabling the story of such a witness to be heard twice by the jury. Certainly, as a matter within its discretion, the court should not allow in evidence both the deposition of a witness

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private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

"1, that the witness is dead; or

"2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

"3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

"4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

"5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

"(4) If only part of the deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor."

"(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party."

[78] Frink v. Potter, 17 Ill. 405 (1856); Kristel v. Michigan Central Railroad Co., 213 Ill. App. 518 (1919).

and the *viva voce* testimony of the witness on the same issues. To do so would involve an utterly useless duplication of evidence.

Admissions against interest may be proved as substantive evidence by reading the admission as contained in the deposition of the party previously taken. This, of course, may be done as a portion of the party's case and no foundation need be laid. In either instance, whether the deposition is used to impeach the witness or whether the party's deposition is proved as an admission against interest, the opposing party then has the right to show or to offer any other portions of the deposition bearing upon the same subject.

Abandonment of Depositions

The mere taking of a deposition does not make it evidence for either party and the one taking it may in his discretion abandon it on the trial. In this case, the opposing party may use it if he so desires, leaving out of consideration other conditions concerning the availability of the witness. When a party offers a deposition taken by his opponent, he is bound by it to the same extent as by any other evidence which he proffers. It is also subject to precisely the same objections which would be proper if he had taken the deposition himself in the first instance. This seems to be the universal rule in all states and in the federal courts. In *Pennsylvania Railroad Company* v. *John Anda Company,*[79] the court said:

> A letter of one Parsons, appellant's freight agent at Williamsport, to the West Branch National Bank, formed part of a deposition taken by appellee. On the trial appellee did not read the part of the deposition referring to the letter, or offer the letter itself as evidence. Appellant thereupon offered the omitted portion of the deposition as part of its proof, as also the letter in evidence; the objection of appellee to the letter being sustained, it was excluded. The letter was self-serving, its contents hearsay and inadmissible by either party against objection. But it is insisted that appellee is bound by it because it was brought into the proof by deposition found on file, taken by appellee. This is founded on a misconception of the law.

In *McCormick Harvesting Machine Company* v. *Laster,*[80] it was held that where appellant desired not to use a deposition taken by him and on file, it might be read by appellee,

[79] 131 Ill. App. 426 (1907).

[80] 81 Ill. App. 316 (1898).

but, in so doing, the appellee made the witness his own witness and made his testimony not only subject to impeachment but subject also to objections as to its relevancy and pertinency.[81]

The rule in the federal courts prior to the adoption of the new rules was identical, and has been codified by those rules.[82]

Counsel who represent either plaintiffs or defendants whose depositions have been taken are often elated by the showing made by their witness on the depositions. Information may be elicited in response to cross-examination which they could not cover by a direct examination of the witness either in a deposition or at the trial. Their enthusiasm, however, should be tempered by the consideration that, if the opposing party who took the deposition abandons it and they propose to use it, it is subject to the same objection as would be permissible if the witness were present and testified in response to their own interrogation.

Scope of Examination

The primary use of depositions, either oral or written, is, of course, the ascertainment of information to aid in the prosecution or defense of the action. As has been stated, Rule 19 is very broad. The only limitations placed upon the examination are that the testimony which is sought to be taken must be "relevant to the prosecution or defense of the action," and the further implied limitation contained in sub-section 3 of that rule to the effect that when a party without justification takes or attempts to take a deposition for discovery the court may assess against such party the ex-

[81] In Graves v. Boston & M.R.R., 84 N.H. 225, 149 A. 70 (1930), the court said, "Although the defendant took the deposition of John Ramamovitch, the plaintiffs were entitled to use it. . . . Such use was subject, however, to all proper objections and exceptions to the evidence therein contained, even to that which had been elicited by the defendant." To the same effect, see Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899); Chicago College of Osteopathy v. Littlejohn, 234 Mich. 528, 208 N.W. 691 (1926).

[82] Fed. Rules of Civil Procedure, Rule 26:

"(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

See also subsection (f), footnote 77, supra.

pense of taking such deposition, including a reasonable counsel fee.

Few cases can be found in which the above section has been interpreted. In *Kimball* v. *Ryan*,[83] it was held that an examination could be held even before an issue was formulated. In *Aerseth* v. *Stein*,[84] the court suggests the use of the machinery provided by the act to elicit information as to which of two defendants is liable in an accident case. The only express limitation, therefore, of any consequence is that the interrogation must be pertinent to the issues. This is merely declaratory of the law as it was prior to the passage of the Civil Practice Act.[85]

In many jurisdictions, the scope of the examination is at least as broad as would obtain upon examination at the trial. In the beginning, attempts to use the discovery statutes were branded "fishing expeditions."

Of course, any examination the effect of which is to disclose evidence within the knowledge of the opposing party might loosely be characterized by that epithet. On that subject in the case of *Graham* v. *Ohio Telephone and Telegraph Company*,[86] the court said:

> It is manifest that all interrogatories having for their object a discovery may loosely be called "fishing," and that, therefore, it is not an objection to an interrogatory that they required from the defendant information which may be detrimental to the defendant. The real requirement is that the interrogatory itself be pertinent. In other words, where the information sought by the interrogatory will be material or relevant to the relief sought by the petition, a demurrer to the same should be overruled. . . .
>
> The fact that an answer to the interrogatory may at the same time expose, to a certain extent, the defendant's case is no reason for departing from the rule above mentioned.

This liberal interpretation has been followed in a majority of the states employing discovery procedure.[87] Mr. Justice Taft expressed the Ohio view in saying, "There is no objection that I know why each party should not know the other's case."[88]

Some states, such as New Hampshire, provide by statute

[83] 283 Ill. App. 456 (1936). [84] 278 Ill. App. 16 (1934).

[85] Hill v. Thomas V. Jeffery Co., 292 Ill. 490, 127 N.E. 124 (1920); Red Star Laboratories Co. v. Pabst, 359 Ill. 451, 194 N.E. 734 (1935); Cardin v. Ensminger, 329 Ill. 612, 161 N.E. 137 (1928); Firebaugh v. Traff, 353 Ill. 82, 186 N.E. 526 (1933).

[86] 2 Ohio N.P. (N.S.) 612.

[87] G. Ragland, Discovery before Trial, p. 120.

[88] Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. 809 (1888).

that disclosure may be made as to all matters in issue, except the names of witnesses and the manner of proving the opponent's case.[89] This is also substantially true of Massachusetts.[90]

Many practical situations arise wherein justice patently requires a full disclosure of the names of witnesses, particularly those participating in the transaction in question. For example, in a recent case in the Chicago courts, a plaintiff was injured while a passenger upon a street car which collided with a truck. The plaintiff was rendered unconscious and was unable to procure the name of the trucking concern involved in the accident. There was no police report. Upon application to the court under Rule 18, the court held that the defendant street railroad company must disclose to the plaintiff the name and address of the trucking company involved so that it might be made an additional party defendant. The names of employees of a defendant who were immediately connected with the transaction in question can be obtained in New Jersey.[91] In New Hampshire, the servant of a corporation was forced to produce the names of witnesses to an accident when he was summoned to give a deposition in an action against his employer.[92] In Wisconsin,[93] it was held proper to require the defendant to produce the name and address of a witness, there being no abuse of discretion in ordering questions as to his identity to be answered.[94]

In Illinois, it has been held[95] that in a chancery action it was proper under this section for the court to order one of the parties to reveal the names of other bondholders who were necessary parties to the proceedings in chancery. The request for the names, however, must not be frivolous, and the information required must be material to the issues in the case.

It is to be hoped that Illinois will adopt the liberal interpretation of the discovery statutes with respect to the scope

89 N.H. Pub. Laws 1926, Ch. 336, § 25.

90 Mass. Gen. Laws 1933, Ch. 233, § 63.

91 Neske v. Burns, 8 N.J. Misc. 160, 149 A. 761 (1930).

92 Ragland, Discovery before Trial, p. 141; In re Bradley, 71 N.H. 54, 51 A. 264 (1901).

93 Horlick's Malted Milk Co. v. Spiegel, 155 Wis. 201, 144 N.W. 217 (1913).

94 See also Nemerov v. New York Title & Mortgage Co., 268 N.Y.S. 588 (1933); In re Kerwin, 283 N.Y.S. 208 (1935).

95 Ashton v. McQueen, 361 Ill. 132, 197 N.E. 561 (1935).

of the examination. Uniformity of ruling in this regard is essential if chaos is to be avoided. In New York such a chaotic condition existed for many years, some of the courts adopting a liberal, and some an extremely conservative interpretation of their discovery statutes.[96] Whether the reviewing courts will adopt the view that a party is entitled to disclosure of the names and addresses of his opponent's witnesses remains to be seen. Judge Fisher, in commenting upon this problem, states:

> The main disputes arise over the question as to whether statements of parties or witnesses taken before the commencement of the suit need be disclosed to the other party. . . . Since all parties and all witnesses are subject to oral examination before trial, there seems to be no reason for excluding from the scope of discovery written statements made by such parties or witnesses.[97]

Use in Impeachment

Aside from the procuring of information to aid in the prosecution or defense of an action, the primary use of depositions taken under discovery statutes is to impeach witnesses. Depositions may always be used to contradict a witness regardless of his presence. This is true of both depositions taken orally and in writing. In practice, lawyers find depositions very advantageous in pinning the witness down and committing him to a story from which he can not deviate at the trial. There are two methods by which this impeachment may be accomplished: (1) If the deposition has been filed, the witness may be contradicted after the proper foundation is laid by offering in evidence the particular question and answers which are of a contradictory nature. (2) If the deposition has not been filed, the reporter who took the deposition may be called after the proper foundation is laid and asked whether at the time and place of the taking of the deposition the certain question was propounded to the witness and the certain answer given. This is the practice most commonly used in the trial courts today.

Objections to Depositions

As a general rule, objections to the form of the deposition, or to the questions and answers for want of form, must be

[96] G. Ragland, Discovery before Trial, p. 127.
[97] Harry M. Fisher, "The Persistence of Chitty," 6 U. of Chi. L. Rev. 359.

made before the trial by motion to suppress, so that the party taking the deposition may retake the same and avoid the informalities. Where the objection is to questions and answers as incompetent, or where the objection is to relevancy, materiality, or any objection directed to the substance of the depositions, such objections may be made at the trial. These rules have been firmly established for many years in Illinois. It has always been the rule that the competency, relevancy, or materiality of testimony may be questioned at the time of the trial.[98] It is reversible error to refuse to instruct the jury to disregard hearsay in a deposition.[99] It has been held specifically that objections to the competency of the witness may be taken upon the trial.[100] The same principle has been applied to written interrogatories.[101]

Objections to a deposition on the grounds that the answers contained matters of opinion may be sustained at the trial regardless of the failure to file a motion to suppress, where the questions and answers are of such a nature that the taking of a deposition could not have remedied the error.[102] The

98 The reason for this rule is explained in Swift v. Castle, 23 Ill. 132 at 137 (1859), as follows:

"Formal exceptions should be taken and determined before the hearing, for the reason that, if allowed, the party taking the depositions may, if proper, retake them, and avail himself of the benefit of the evidence. While it is not material when exceptions to the substance of evidence are determined, for if the evidence is not admissible under the issue, its presentation in any other form could not obviate the objection, and render it pertinent. Such a practice is more convenient than to separately pass upon the materiality of the various portions of evidence before the hearing; it saves labor, time and expense, and is more satisfactorily determined when the issue, and all the evidence in the case, are before the court, on the hearing, than it could be when only an isolated portion is under consideration. . . . And if the court must, on a motion interposed before the hearing to suppress evidence, examine into all of the facts proved in the case to determine its materiality, it would amount to the labor of a trial of the cause on each motion, and if all the evidence was not then taken, the chancellor, in many cases, could not know but evidence might still be taken which would render what then appeared to be immaterial, highly important on the hearing."

99 "When evidence which is irrelevant, or incompetent in any event to establish a fact, gets into a case in the shape of depositions or otherwise, it is the duty of the court when required, at any stage of the trial, to exclude it, or direct the jury to disregard it." Pittman v. Gaty, 10 Ill. 186 at 189 (1848).

100 Illinois Central R. Co. v. Panebiango, 227 Ill. 170, 81 N.E. 53 (1907); C. H. Albers Commission Co. v. Sessel, 193 Ill. 153, 61 N.E. 1075 (1901); Whitney v. George E. Corbett Boiler & Tank Co., 246 Ill. App. 569 (1927); Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509 (1886).

101 English v. Gordon, 231 Ill. App. 316 (1924).

102 Bird v. Thanhouser, 160 Ill. App. 653 (1911).

doctrine involved is summarized by Dean Wigmore:

> Objections to the procedure of taking and the form of the document must be made before trial; so also objections to the manner of interrogatories, for example, as improperly leading the deponent, or to the manner of the answers, as being insufficient or irresponsive. On the other hand, objections to the materiality or relevancy of particular facts need not be made until the trial.[103]

On the other hand, all technical objections which might be obviated by the retaking of the deposition must be made by a motion to suppress before trial, or they are waived.[104] Objections to the sufficiency of notice,[105] defects in the commission,[106] mistakes in the *dedimus,*[107] and all other matters of a technical nature must be made in motion to suppress before trial.

When the trial has started and the depositions are about to be offered and read in evidence, it is advisable for the attorney to make a record, out of the presence of the jury, of all questions and answers to which he objects. These objections must be made specifically, and, to preserve further the party's rights, a motion to strike out the objectionable questions and answers should be made and noted.[108]

Depositions in Action for Wrongful Death

Frequently the question arises as to the advisability of taking the deposition of the defendant in an action for wrongful death. Section 2 of the Illinois Evidence Act states:

> No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, . . . when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending. . . .

Does the taking of the defendant's deposition waive the ordinary objection to the incompetency of the witness, and if so, to what extent? If the deposition of the defendant is

103 J. H. Wigmore, Evidence, I, pp. 54-5. For a general discussion, see 8 R.C.L. 1129 et seq.; Love v. McElroy, 106 Ill. App. 294 (1902).

104 In re Kettels, 365 Ill. 168, 6 N.E. (2d) 146 (1936); Olson v. Brundage, 139 Ill. App. 559 (1908); Winslow v. Newlan, 45 Ill. 145 (1867); I.C.R.R.Co. v. Foulks, 191 Ill. 57, 60 N.E. 890 (1901).

105 Winslow v. Newlan, 45 Ill. 145 (1867).

106 Richman v. South Omaha Nat. Bank, 76 Ill. App. 637 (1898).

107 Maginnis v. Hartford Fire Ins. Co., 160 Ill. App. 614 (1911).

108 Omaha Packing Co. v. Industrial Comm., 340 Ill. 169, 172 N.E. 40 (1930).

merely taken for the purpose of discovery and not filed or used, is he a competent witness in the trial of the cause? These questions have not been tested by the Illinois courts.

There is a sharp conflict of opinion in the states which have passed upon this subject. The general rule seems to be that the taking of the deposition of a witness with respect to transactions or conversations had with the deceased party amounts to a waiver of the incompetency of such a witness. This is true in Colorado,[109] Kentucky,[110] Missouri,[111] New Hampshire,[112] and Texas.[113] The reason given is that a waiver of objection to competency made at one stage of the taking of testimony is a waiver of that objection at any stage of the proceedings.

In some states it has been held that the mere taking of a deposition of the adverse party amounts to a waiver of his incompetency as to transactions with the deceased party, even though the deposition is never filed.[114] It has been further held that the taking of such a deposition has this effect even though it is never completed or written up.[115]

In *McClenahan* v. *Keyes*,[116] the California court held that the taking of the deposition is a waiver of incompetency even if the deposition is not used at the trial. In New York, however, the rule is to the contrary, there being no waiver if the deposition is not offered.[117] The rule in Wisconsin[118] and Kentucky[119] is the same as in New York.

Here another important question arises. How far does this waiver extend? One line of authorities adopts the view that the examination of a witness concerning any matter about which he could not testify because of the statute has the effect of waving the objection to his incompetency in all

109 Note, 64 A.L.R. 1164; note, 107 A.L.R. 490; Warren v. Adams, 19 Colo. 515, 36 P. 604 (1894).

110 Wilhelm v. Orlamuende's Adm'x, 228 Ky. 719, 15 S.W. (2d) 511 (1929).

111 Radke v. Radke, 221 S.W. 739 (Mo. App., 1920).

112 Barrett v. Cady, 78 N.H. 60, 96 A. 325 (1915).

113 Lester v. Hutson, 167 S.W. 321 (Tex. Civ. App. 1914).

114 Note, 64 A.L.R. 1164 at 1165; Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902).

115 P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co., 167 S.W. 807 (Mo. App., 1916).

116 188 Cal. 574, 206 P. 454 (1922).

117 Farmers' Loan & Trust Co. v. Wagstaff, 185 N.Y.S. 812 (1921); Bambauer v. Schleider, 163 N.Y.S. 186 (1917).

118 Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899).

119 Kentucky Utilities Co. v. McCarty's Adm'r, 169 Ky. 38, 183 S.W. 237 (1916).

material matters, regardless of whether or not those matters were inquired into on such examination.[120]

In *Miller* v. *Consolidated Royalty Oil Company*,[121] the court said that "a litigant cannot be permitted to open the mouth of his adversary so long as he speaks favorably, and then close it to an adverse statement."

Another line of authorities, supported perhaps by better reasoning, holds that the witness is rendered competent only with respect to transactions or conversations concerning which he has been examined.[122] The recent case of *Combs* v. *Younge*,[123] would lead one to believe that Illinois will adopt this latter interpretation. In an action by an administrator, the defendant was called by the administrator for cross-examination as an adverse witness under Section 60 of the practice act. With regard to the scope of the examination and the question of the waiver of his competency, the court said:

> If the party is called by the adverse party who sues or defends as administrator, the party does not become a competent witness for all purposes or upon all the issues of the case, but his disqualification as a witness is removed to the extent that he may testify in his own behalf concerning the *subject matter* about which he was examined by the administrator. This is the rule in Illinois, regardless of what the rule, of broader import, may be in other jurisdictions.

There would seem to be no logical reason why the same rule would not apply to a deposition as was applied here under Section 60 of the practice act. Because of these discrepancies, however, and until there is some decision on the subject, the careful lawyer should proceed with caution in taking the depositions of a defendant in an action for wrongful death.

Conclusion

The writer concludes this somewhat rambling discussion upon the note on which he began. Whereas four years of experience with the discovery statutes demonstrates that they provide an excellent and ample means of pre-trial discovery, that experience likewise discloses pressing necessity for revision in several particulars. The reference back to the archaic chancery provisions of the deposition statutes for the method of taking depositions is indeed a horse and

120 Note, 64 A.L.R. 1164 at 1169.
121 23 F. (2d) 317 (1927).
122 Note, 64 A.L.R. 1164 at 1171.
123 281 Ill. App. 339 (1935).

buggy device in a streamlined age. The lack of specific provisions for and limitations upon the use of depositions creates hopeless doubt and confusion and tends to defeat the purposes of the legislation. The new federal rules offer not only a basis for comparison but a model for needed revision as well.

There are two possible methods by which the necessary changes can be accomplished. It would seem that the Supreme Court has ample power to promulgate rules both for the taking and use of depositions. In making rules for the taking of depositions, however, it would doubtless feel some embarrassment, in view of the existence on the statute books, unrepealed, of the old chancery provisions. One may guess that the present unsatisfactory device of reference to those provisions has resulted from that embarrassment. It would seem preferable for the legislature to repeal those old provisions. Thereupon, the legislature might itself make proper provisions, or it might simply leave the matter to the Supreme Court, which, given a free hand, would doubtless handle the situation adequately.

THE PROBLEM OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

MILTON A. KALLIS*

THE present era is one of rapid change. To meet the demands of new political, economic, and social conditions certain practical adjustments must be made. We have accordingly seen a remarkable expansion of governmental agencies in the field of public administration. As a result, the subject of administrative law has for more than a generation been the fastest growing part of our legal system. Moreover, it presents vital problems which today are pressing for a well-informed and intelligent solution.[1]

Because the subject is still in a formative stage, the courts have ample opportunity for displaying judicial statesmanship in deciding the difficult questions involved.[2] Instead of being slaves to precedent, they can draw on the lessons of history and at the same time use the tools of analysis and understanding to satisfy the needs of the people and to help maintain a stable and yet progressive nation.[3]

THE ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

As life becomes more complex the processes of government increase. In simple society they are vested in a tribal

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1 In an address, "Modern Tendencies and the Law," delivered before the American Bar Association in 1933, Attorney General Homer S. Cummings said, "The field of administrative law, already clouded by much uncertainty, is being widely extended. The functions and limitations of the various departments and agencies of government have been taking on new aspects; and the attainment of administrative unity in this vast complex of powers presents a fascinating problem." 19 A.B.A.J. 576 at 578.

2 See F. Frankfurter, "A Symposium on Administrative Law Based upon Legal Writing 1931-33," 18 Iowa L. Rev. 129.

3 "The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology." B. Cardozo, The Nature of the Judicial Process, 30.

chief and his council of wise and trusted men. With the growth of civilization, they gradually become distributed among what are generally considered to be so-called legislative, executive, and judicial organs of the state. This division of activities leads to a specialization of function and to the origin and development of rules of procedure and technique peculiar to each. Some independence among the different political agencies naturally results. However, there exist a certain interrelation and interaction as well.

The foregoing facts focus our attention on two notable features which have emerged from the inconstancy of our present-day institutions. We have witnessed an unprecedented assumption by the government of activities which formerly were regarded as entirely within the purview of private affairs.[4] Many administrative agencies, therefore, have been created which partake of legislative, executive, and judicial functions. A canvass of the laws of the national government and of the average state readily demonstrates how closely related to the public welfare they are.[5] In addition, the last thirty years have been marked by a prodigious rise and growth of administrative tribunals. Although technically not courts in the constitutional sense, they nevertheless are invested with extensive authority in adjudicating matters of vital concern to individuals.[6]

[4] This point is lucidly developed by Frankfurter in his "The Public and its Government."

[5] See Roscoe Pound, "Organization of Courts," an address originally delivered in 1913 and republished in 11 J. Am. Jud. Soc. 69; A. A. Berle, Jr., "The Expansion of American Administrative Law," 30 Harv. L. Rev. 430; Charles E. Hughes, "The Republic after the War," 53 Am. L. Rev. 661; Guthrie, Presidential Address New York State Bar Association, 46 Rep. N.Y. St. Bar Ass'n 169; Roscoe Pound, "The Crisis in American Law," 10 J. Am. Jud. Soc. 5; F. Frankfurter, "The Task of Administrative Law," 75 U. of Pa. L. Rev. 614; M. Rosenberry, "Administrative Law and the Constitution," 23 Am. Pol. Sci. Rev. 32; Haines, "Effects of the Growth of Administrative Law," 26 Am. Pol. Sci. Rev. 876.

[6] In 1926 there were seventy-eight provisions in the Illinois statutes vesting in nonjudicial officers authority to determine or control private rights. They might roughly be classified according to professions and trades, public health, public utilities, safety of investing public and creditors generally, agriculture, and miscellaneous. Since then the number has materially increased, mostly in the fields of labor, old age assistance, occupational disease, and unemployment problems. The Special Committee on Administrative Law of the American Bar Association in 1934 tentatively enumerated the federal administrative tribunals (emphasis being laid on those agencies to which judicial powers have been delegated). See 59 Rep. A.B.A. 556-560. Chief Justice Rosenberry of Wisconsin has listed fifty-five different types of administrative tribunals exercising so-called quasi-legislative and quasi-judicial powers. M. Rosenberry, "Administrative Law and the Constitution," 23 Am. Pol. Sci. Rev. 32 at 39.

There are certain practical reasons for these administrative bodies. Although they have often been attacked for usurping powers properly belonging to the judiciary, the courts have usually sustained their use of these powers subject to certain safeguards. Thus they have been upheld on the ground either that they are common-law exceptions to the rule that adjudication is basically a judicial function or that they are new devices created to cope with the problems of a civilization which becomes increasingly more complex. In consequence, there is a crying demand for quick and efficient administration in matters requiring specialization of training and knowledge in certain factual situations.[7]

The Problem of Judicial Review

We are now facing what is perhaps the most critical problem in administrative law. For many years the question of the scope of judicial review and control of administrative agencies has caused much confusion. There has been a vast difference of opinion on this subject, and the Supreme Court has recently had occasion to express itself on certain aspects thereof. As a result, a bitter debate has taken place between persons who maintain the traditional attitude of the supremacy of law and those who see these new organs of government as genuine aids to the legislative and executive departments in furtherance of the democratic principle.[8]

The Separation of Functions

To understand the problems involved in the question of judicial review, we can profitably turn to the doctrine of the

[7] See Roscoe Pound, "The Administrative Application of Legal Standards," 44 Rep. A.B.A. 445.

[8] Report of Special Committee on Administrative Law, 63 Rep. A.B.A. 155, 331; De Nike, "The Businessman's Stake in Judicial Review," 17 Harv. Bus. Rev. 40; Gregory Hankin, "The Logan Bill," 27 Ky. L. J. 3; Conference on Administrative Law and the Administrative Process, National Lawyers Guild held on January 21 and 22, 1939, in Washington, D.C. (soon to be published); N.Y. Times, May 27, 1938, p. 33, col. 1, for the intense struggle over judicial review of administrative action which developed last year in the New York State Constitutional Convention. For the attitude of the people of New York, see id., Dec. 9, 1938, p. 4, col. 4. See also Morgan v. United States, 304 U.S. 1 at 19, 20, 58 S. Ct. 773, 82 L. Ed. 1129 (1938); St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); Roscoe Pound, "The Future of Law," 47 Yale L. J. 1, 2, 7; Arthur T. Vanderbilt, "The Place of the Administrative Tribunal in our Legal System," 24 A.B.A.J. 267; Roscoe Pound, "The Constitution: Its Development, Adaptability, and Future," 23 A.B.A.J. 739; Jackson, Founders' Day Address, University of North Carolina (1937).

separation of powers, not as a technical rule of constitutional law, but as a political maxim.[9] The Founding Fathers so considered it; and in dividing the powers they were not primarily concerned with efficiency in government, but with safeguarding against tyranny. The limitation was designed to create checks and balances indispensable to the security of the people against political despotism. Jefferson once observed that "a single consolidated government would become the most corrupt government on earth." Woodrow Wilson expressed the same thought when he said, "The history of liberty is the history of divided power."

The federal and state constitutions do not define the terms *legislative, executive,* and *judicial.* In approaching possible definitions, we should understand that government is not an exact science and that political agencies do not function automatically. If effective work by our public officials be realized, a certain blending as well as separation of functions is desirable. We see this in legislative impeachments, executive vetoes, and judicial declarations of unconstitutionality. The difficulty of effecting even theoretical separation of powers is universally recognized.[10] Accordingly, legislatures have adjudicated contempt charges, divorce cases, election contests, and claims against the government, and have also exercised many functions which are considered executive acts, such as organizing corporations. Obviously they must construe constitutions when they enact statutes. The executive department, in hearing cases involving workmen's compensation, revocation of various kinds of licenses, and removal of persons in the civil service, must know and interpret the law.[11] The judiciary enforces the law by its power to hold in contempt and to issue writs of execution and other judicial

[9] In the Federalist (No. XLVII), Madison refers to the doctrine of separation of powers as a "political maxim." For the same attitude expressed by the United States Supreme Court, see F. Frankfurter and J. M. Landis, "Powers of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010 at 1012-16.

[10] Mr. Justice Cardozo has put the situation in apt language: "But hereafter, as before, the changing combinations of events will beat upon the walls of ancient categories. 'Life has relations not capable of division into inflexible compartments. The moulds expand and shrink.' " B. Cardozo, The Growth of Law, 19.

[11] This fact is readily exemplified by actions for divorce and for workmen's compensation. Neither existed at common law and both are entirely the creatures of statute. Yet, although the law applicable to the latter is much more technical than the former, divorces are perhaps invariably adjudicated

process. Moreover, it declares a rule of law applicable to the case at bar where none already exists.

All departments exercise some judgment and discretion in the performance of their duties. Furthermore, to decide, investigate, and deliberate is not necessarily a judicial function, because many executive officers must frequently render decisions on the law after hearing evidence on the facts. "But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact."[12]

Analytically, the courts have not furnished any absolute tests for legislative, executive, or judicial functions.[13] Generally the basis of decision was either legal history or public policy. We can, however, generalize to some extent.

Constitutions are limitations on the legislative, and grants to the executive and judicial, arms of the government.[14] A

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by courts, while compensation cases are usually heard in the first instance by an administrative tribunal.

12 Mr. Justice Curtis for the Supreme Court in Den v. Hoboken Land & Improvement Co., 18 How. 272 at 280, 15 L. Ed. 372 at 376 (1856), where he also said, "That the auditing of the accounts of a receiver of public money may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." See also Clarence N. Goodwin in 59 Rep. Am. Bar Ass'n 149 (1934): "The finding of facts . . . is not a judicial function nor does it constitute in any true sense judicial action. It is a process gone through with not merely by every administrative agency, but by every person or group called upon to perform any function or transact any business, public or private, and it is incidental to the routine of our daily lives. That it is made the basis of governmental action does not make it judicial in its nature. The interpretation of the law and the construction of statutes are not judicial functions. Bodies, politic and private, as well as public officials and private individuals are required constantly to make such construction and interpretation both in the performance of public functions and in private business. Again we must say that the fact that such interpretation or construction is necessary to the performance of the official function does not make it judicial in its nature." See also Louisville & N. R. Co. v. Garrett, 231 U. S. 298 at 307, 34 S. Ct. 48, 58 L. Ed. 229 (1913).

13 See Thomas M. Cooley, Constitutional Limitations (8th ed.), I, 177, for citations in support of this point.

14 J. Dickinson, Administrative Justice and the Supremacy of Law in United States, p. 21; Prentis v. Atlantic Coast Line, 211 U.S. 210 at 226, 29 S. Ct. 67, 53 L. Ed. 150 at 158 (1908), where Mr. Justice Holmes, speaking for the court, said, "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

legislature, accordingly, can do anything that is not prohibited by the supreme law of the state and the nation and, within the limits imposed by these instruments, can act on any subject within the scope of civil government. This power, in the absence of a constitutional prohibition, even extends to such retroactive statutes as bills of attainder, ex post facto laws, and validating acts. Although a legislature can pass a particular, local, or special law to deal with a past situation, it ordinarily enacts statutes to operate in the future and to take effect not upon certain specified individuals but generally. "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."[15] It is not required to give notice or hearing and does not publicly announce the reasons for its acts. Furthermore, it consists of a large, sometimes unwieldy body of men from all walks of life who are not by previous experience or education necessarily trained for their legislative duties. Principles of politics rather than those of law lie at the foundation of their work.

The executive is concerned with applying, enforcing, and carrying into effect the law. To do this properly, he must, of course, know the law applicable to his functions, but he is more frequently occupied in ascertaining facts and using his discretion. This does not so much involve the use of legal doctrine as it does personal judgment requiring experience with factual situations. These are so distinctively individual that they cannot or, for the sake of good government, should not be encompassed with a particularized and minutely detailed rule of law. Every combination of facts may be different from every other.[16] The essence of the duties of the

[15] J. Dickinson in his Administrative Justice and the Supremacy of Law in United States (1927) on page 168 discusses the difficulty of distinguishing between "questions of law" and "questions of fact."

[16] "Preliminary resort to the commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance is commonly found only in a body of experts." Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

executive department is to deal with problems which require the use of discretion, special knowledge, and training in a busy workaday world—matters outside the ambit of jurisprudence.[17] When an administrative official makes rules and regulations, as he often must, he does so subject always to the paramount policy or will of the legislature as manifested in the statutes. When he performs his adjudicative functions, which are held to be the exercise of non-judicial authority, he is merely effectuating a legislative purpose.

A definition of the judicial function is not easy to frame, because in many respects it closely resembles that of administrative adjudication. A court consists of a small body of professionally and technically trained and experienced men,[18] who, by the use of authoritative legal materials, adjust past or present situations when disposing of justiciable cases or controversies between antagonistic parties whose existing interests are adverse[19] and will be finally affected by the order, judgment, finding, or decree entered, subject to no review, revision, or reversal by any non-judicial officers. A court, moreover, can, at least to a certain extent, enforce such order without the aid of another department and, with some exceptions, is the only agency of government which can impose penalties and forfeitures. It is immaterial that in the performance of its duties it may be laying down a rule for the future guidance of the bench, bar, and public. In the judicial process, ample notice and hearing are given,[20] and reasons for the decisions are stated in publicly announced opinions,[21] no one but the parties themselves being affected by the proceedings. The judicial power, according to the mass

17 "Preliminary resort to the Commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance is commonly found only in a body of experts." Mr. Justice Brandeis, in Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

18 William A. Robson in his book, Justice and Administrative Law, in Chapters V and VI elaborates the legal training of judges and technical training of administrative officials.

19 Nashville C. & St. L. R. Co. v. Wallace, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933).

20 Fidelity Nat. Bank & T. Co. v. Swope, 274 U.S. 123, 47 S. Ct. 511, 71 L. Ed. 959 (1927).

21 Roscoe Pound, "Justice According to Law," 14 Col. L. Rev. 103 at 108-9.

of decisions interpreting the separation of powers clause, embraces every kind of jurisdiction, activity, or authority seen in the courts of England when our Federal Constitution was adopted. Generally what these tribunals did before 1789 the courts in this country under the judicial power can do. Its essence is to adjudicate legal rights of individuals based on the common law and equity, with the power to enforce its acts, to inflict penalties for violations of the law, and to declare with authoritative finality what the law is or was in any dispute properly before it. If the vested rights in question are not those traditionally included in the common law or equity, but have been created since, or are merely additional privileges or new legal rights conferred by the government, or if they concern the latter in its corporate capacity or in its exercise of police power, then it is not always obligatory, though it is legally permissible, that a judicial tribunal, as contrasted with an administrative agency, have jurisdiction.[22] "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the constitution, whether the subject of the litigation be property or status."[23]

Limits of Effective Judicial Action

A vital factor in determining the proper scope of judicial review of administrative decisions is the functional ability of judicial tribunals. There are certain practical limitations on what courts in fact can do. They arise out of the nature of the judicial process, rather than constitutional prohibitions. Where a court cannot adequately protect or give effect to all the interests involved in a case before it or where the judicial machinery is unsuited for rendering justice as the facts require, judges should refrain from hearing the case.[24]

Another reason for judicial self-restraint is that courts

22 Powell, "Separation of Powers: Administrative Exercise of Legislative and Judicial Power," 27 Pol. Sci. Quart. 215 at 238; Williams v. United States, 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933).

23 Tutun v. United States, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738 (1926).

24 See the dissent of Mr. Justice Brandeis in International News Service v. Associated Press, 248 U.S. 215 at 248, 39 S. Ct. 68, 63 L. Ed. 211 at 224 (1918), and in Pennsylvania v. West Virginia, 262 U.S. 553 at 605, 43 S. Ct. 658, 67 L. Ed. 1117 at 1135 (1923); M. Finkelstein, "Judicial Self-Limitation," 37 Harv. L. Rev. 338.

are usually more detached from every-day life than are certain administrative officials. Being freed from the bonds of purely technical rules of evidence, having familiarity with the problems peculiar to the particular type of agency, feeling the pulse of public opinion for the time being, and working with directness and speed, an administrative body can sometimes act within the law with a degree of effectiveness not possible to judicial tribunals. On the other hand, there are defects in the administrative process. Lacking forms and rules in some instances, they are not compelled to deliberate and occasionally do not guard against suggestion, impulse, and political pressure.[25]

Judicial Presumptions Favoring Administrative Findings

We have seen that if the judicial function has any distinctively individual characteristic it is the unique attribute of final, but not necessarily initial, determination of legal disputes as to both so-called questions of "law" and of "fact." With regard to the latter, the court has the last decision because law is clothed with facts. The question now arises as to the extent to which the courts review the decisions of administrative bodies. With regard to a purely factual situation, there is no reason for preferring a court's reaction to that of an administrative agency. On this account, a certain presumption of correctness should attach to the latter's finding of fact. Accordingly, a court should not substitute its own judgment for that of an administrative tribunal when the application of a legal standard is involved.[26] Hence it is not a denial of due process of law for a court to give the same weight to a commission as it would to a lower court where the requisites of notice, hearing, and other relevant factors are present. Where the narrow line between possible confiscation and proper regulation presents a reasonable difference of opinion, the court should not set aside the order of

25 "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, other subservient." Chief Justice Hughes for the court in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 at 52, 56 S. Ct. 720, 80 L. Ed. 1033 at 1041 (1936).

26 For an instance of the application of a standard and the substitution by a reviewing court of its own judgment for that of the administrative agency, see Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929).

the commission.[27] It has been held in connection with appellate review of trial court proceedings that even where the facts are admitted but where a difference of opinion as to the inference that may legitimately be drawn from them exists, it is the province of the jury and not the court to draw the inference.[28] The same weight and respect should be accorded an administrative body.

Another determining fact in the exercise of judicial review is the difficulty which courts sometimes have in examining the facts presented to an administrative commission. Quite often the record of the proceedings is too large for the court to examine intelligently with the limited time at its disposal. In one case, for example, a suit to enjoin a public utility rate as confiscatory, the record before the master in chancery comprised twenty-one volumes of testimony and proceedings.[29]

Methods of Presenting Facts to a Court

There are various ways of presenting the facts to a court. One is upon the record of proceedings before the administrative body. Another is the trial of the case de novo. With respect to disputes involving jurisdictional facts where constitutional rights are involved the United States Supreme Court has sustained the right to a retrial in the court with a disregard of the testimony before the commission.[30] It is not ap-

27 "Where the constitutional validity of a statute depends upon the existence of facts, the courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker." Radice v. New York, 264 U.S. 292 at 294, 44 S. Ct. 325, 68 L. Ed. 690 at 694 (1924).

28 Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720 (1930); Richmond & D. R.R. Co. v. Powers, 149 U.S. 43, 13 S. Ct. 774, 37 L. Ed. 642 (1893); C. & N. W. R. Co. v. Hansen, 166 Ill. 623, 46 N.E. 1071 (1897); Moore v. Rosenmond, 238 N.Y. 356, 144 N.E. 639 (1924).

29 Newton v. Consolidated Gas Co., 258 U.S. 165, 42 S. Ct. 264, 66 L. Ed. 538 (1921); see also Akron, C. & Y. R. Co. v. United States, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923).

30 In Crowell v. Benson, 285 U.S. 22 at 64, 52 S. Ct. 285, 76 L. Ed. 598 (1934), Chief Justice Hughes for the court said, "We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it." See also St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).

parent why the court should have to find the facts on a new record. Unless some special reason exists, it can examine the facts found by the commission on the record made before the latter. Even here it may be queried whether Mr. Justice Brandeis has been entirely consistent in his attitude. Although he dissented from the requirement of a trial de novo in *Crowell* v. *Benson*,[31] which involved an application for compensation for a maritime employee, yet in deportation proceedings he held that citizenship was a fact to be found by judicial process.[32] It is not apparent on what he based his distinction, for in each instance legal rights were involved. To say that one is statutory and the other is constitutional furnishes no answer, because not only the constitution but all laws and treaties made pursuant to it have the status of supreme law. Perhaps a difference of degree or type of legal interest secured is the controlling feature. An analysis of the decisions, however, hardly gives a workable criterion when problems of judicial review are presented.

Concerning the judicial determination of questions of fact, the Supreme Court of the United States has obtained its information in various ways. Sometimes when the validity of legislative or executive action depended on the facts involved, the court dealt with this question just as an ordinary question of law. Thus it assumed that the matter did not depend upon the facts but on reasoning or judicial precedent.[33] On the other hand, it has obtained its information by taking judicial notice of materials incorporated in appellate briefs.[34] At times the court has accepted evidence submitted at administrative proceedings or judicial trials relating to underlying questions of fact. On many occasions it has announced that legislative declarations as to the facts are entitled to great respect by courts. Likewise, the facts embodied in reports by committees in charge of bills have been accorded considerable weight, and the court has shown much defer-

31 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1934).

32 Ng Fung Ho v. White, 259 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922).

33 Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905); McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819); Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287 (1871).

34 Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908); Bunting v. Oregon, 243 U.S. 426, 37 S. Ct. 435, 61 L. Ed. 830 (1917); Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923).

ence to findings of fact by state supreme courts.[35] By analogy, a court should follow the same policy when it reviews a decision of an administrative body. Ordinarily all of the elements of deliberation, discretion, good faith, investigation, notice, hearing, and evidence which have been presumed by the Supreme Court as having accompanied legislative or other judicial action should be considered likewise to have attended the activities of administrative agencies.[36]

Methods and Scope of Review

In defining the scope of judicial review of administrative decisions, we conclude that the old categories of review are satisfactory. The well established principles of common law and equity permit judicial review of administrative action when questions of jurisdiction or abuse of power are involved. Thus, an independent attack can be made directly on administrative decisions by mandamus, prohibition, quo warranto, certiorari, habeas corpus, injunction, tax-payer's bill, and other specifically provided statutory proceedings. Moreover, a finding of an administrative body may be indirectly questioned when it is the basis of a suit between two persons. In addition to the foregoing direct and indirect independent attacks, there can be a true review by courts of administrative decisions. One instance is seen when the commission applies to the court for the enforcement of its order or finding. The same situation also applies where a statute provides for some kind of proceedings by way of appeal or writ of error. In either of these instances the court may conceivably consider for itself three points. Being a judicial tribunal and therefore the official and final arbiter in controversies as to what the law is, it must necessarily examine the conclusions of law reached by the administrative agency. Next it must, in passing upon constitutional right, decide for itself what

35 H. W. Bikle. "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6.

36 In Darnell v. Edwards, 244 U.S. 564 at 569, 37 S. Ct. 701, 61 L. Ed. 1317 (1917), the court said that "in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." See also St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).

the facts are.[37] Moreover, it can concern itself with questions of policy. In doing so, it then becomes an organ for the expression of the popular will. If it cannot clearly see that the particular problem involved is capable of general occurrence and therefore of generalization, it should not attempt to pass on the activities of another branch of the government. Only some authoritative legal material or compelling requirement of justice would warrant the court in doing so.[38]

A further method of review consists of examining the manner in which the administrative body acted. In this sense judicial review is really trying the administrative trial, for it passes upon three questions: the good faith of the agency itself, the regularity or adequacy of its procedure, and its jurisdiction to act in the matter. Another means of actually reviewing the administrative decision is for a court to examine the proceedings and reach a conclusion of its own where the administrative body has failed to do so or has reached an erroneous conclusion.

An examination of the decisions dealing with the nature and scope of judicial review reveals certain reasons which have influenced the courts in adopting the policy of non-interference with administrative action. In the first place, we meet the principle that the sovereign state or nation is supreme and therefore cannot be sued without its consent.

[37] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); Baltimore & O. R. Co. v. United States, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936). But see Washington, V. & M. Co. v. National Labor Relations Board, 301 U.S. 142 at 147, 57 S. Ct. 648, 81 L. Ed. 965 at 970 (1937), indicating limitation of the doctrine to rate proceedings.

[38] See Dickinson, Administrative Justice and the Supremacy of Law (1927), 168, where the author says "the courts will overrule administrative discretion whenever it reaches a result inconsistent with some general proposition of law applicable to the entire class of similar cases. We here uncover the real distinction which lies behind the attempts to distinguish between so-called 'questions of law' and 'questions of fact' that have everywhere confused the language of the opinions. Where the only ground which a court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference, from those matters, then the court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bonds of reason; for the difference is one of discretion or 'fact'. On the other hand, where the ground of difference between court and fact-finding body can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination."

Another is that all things are presumed to be done in due form. A corollary flowing therefrom is that the administrative remedies must be exhausted before a person resorts to a court. The doctrine of separation of powers also has played its part. From it emerges the doctrine that a court must not interfere with the operation of other branches of government. Moreover, certain decisions are not "judicial" in the constitutional sense of distributing powers according to a tripartite division. In their nature some of them clearly involve the use of discretion by nonjudicial officers rather than a determination of law, or, in other words, an application of the law rather than the making or determination of law. Likewise, findings of fact are just as clearly administrative functions as they are judicial or legislative. However, when it is necessary in a dispute to decide what the law is, a legal question arises which can properly be presented to a court.[39]

Specific Questions of Law Involved in Judicial Review

The first question of law which confronts a court in reviewing the decision of an administrative body is that of the latter's jurisdiction. This is sometimes called the question of ultra vires. The basis of this inquiry is the principle that an administrative agency must not exceed the power given it. It must function within the limitations prescribed for it. No commission obviously should be the final arbiter of its own authority. Hence it is proper that a lack of jurisdiction should always be subject to collateral attack in a court of law. If the jurisdiction of the commission depends on the existence of a certain fact, the commission should not be the ultimate and unimpeachable judge and jury, so to speak, of its own power. Therefore it is a judicial question which the court must decide itself. We thus find that administrative decisions have been set aside by the Supreme Court, not necessarily because the effect thereof would be socially harmful, but because the commission in question had no legal power to act in the matter. An instance of this is the Raladam case.[40]

[39] See Ernst Freund, "The Right to a Judicial Review in Rate Controversies," 27 W. Va. L. Q. 207; Nathan Isaacs, "Judicial Review of Administrative Findings," 30 Yale L. J. 781.

[40] Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587, 75 L. Ed. 1324 (1931).

There the court held that the false claims made for a patented medical article were beyond the power of the Federal Trade Commission to consider because no competition was involved.

In exercising its power of judicial review, the court is sometimes confronted by the question of when and what to review when a specific form of judicial relief is provided by statute or otherwise. Ordinarily the question of ultra vires is raised in cases where no review is specified by statute. The Supreme Court has unanimously held that the extent of judicial review should be limited to the method selected.[41] No quarrel can be found with this attitude.

The question of what amount of evidence should be sufficient for the reviewing court to sustain the administrative decision is related to the question of when, if at all, the court should review the order of the commission with respect to the elements of expediency, reasonableness, discretion, and application of legal standards. All of these involve questions of fact. If the decision is fairly reached on a matter of opinion, expediency, reasonableness, or application of the facts to a legal standard, it should not be supplanted by a judicial decision. There is no assurance that the substitution of the court's reaction to, or application of, the facts is preferable to that of an administrative body. What constitutes ample facts? The Supreme Court has said:

> A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority.[42]

In this connection, the question arises as to how the reviewing court should act when it finds that there was substantial evidence before the administrative body but that it does not constitute the weight of the evidence. This last element, namely the value to be given to testimony, may in a given situation be subject to a reasonable and honest difference of opinion. If the court, looking objectively at the record, can say that although it personally does not think that the

41 Booth Fisheries Co. v. Industrial Commission, 261 U.S. 208, 46 S. Ct. 491, 70 L. Ed. 908 (1926).

42 Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U.S. 266 at 277, 53 S. Ct. 627, 77 L. Ed. 1166 (1933).

weight of the evidence was in favor of the administrative finding there might still be an honest divergence of views on this subject, then the finding should not be judicially disturbed. A kindred problem is whether the legal effect of the evidence is a question of law for the court. This again depends on whether there can be a difference of opinion as to the inference that may properly be drawn from the undisputed evidence. If there is, the court should adopt the version of fact found by the administrative agency.

Legislative policy is another vital factor for a reviewing court to keep in mind. Here there is ample opportunity for the judiciary to serve a useful purpose. The court, therefore, should scrutinize the statute involved to see whether the essence of the administrative action is in furtherance of the legislative function, even though there be no specific enactment on the subject but only a statutory objective expressed. It sometimes happens that an administrative agency is a direct arm of the legislature rather than an inherent part of the executive department. The court in performing its duty should see that such administrative agencies are free from improper interference by the executive part of the government. By all means the court should coöperate with the other political agencies, and, although it should regard them with understanding and tolerance, should require them at all times to be responsive to legislative will.

Arbitrary conduct has always been a basis for judicial review of administrative action. It sometimes happens that a statute makes possible unreasonable discrimination. Such an unrestricted authority has been held by some courts to be unconstitutional while others have felt that the delegation of the authority is valid, but that if it is exercised unjustly judicial relief is obtainable.[43]

In the foregoing situation the court should remember that in constitutional and public law litigation it should not anticipate any irregularity and thus foreclose a desirable trial of statutes and administrative orders. If there is an actual threat of a wrong to a person he should have access to

[43] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). The former rule mentioned in the text is applied in People v. Sholem, 294 Ill. 204, 128 N.E. 377 (1920), while the latter is followed in Douglas v. Noble, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923).

the courts, but a mere possibility of wrongful discrimination without more could swamp court dockets if it were permitted to be the basis of legal complaint. The court, therefore, should be reasonably sure that there is actually an injustice done or quite certain to occur before considering questions involved in review.

The element of a fair hearing has created much difficulty. In the discharge of its duties by an administrative tribunal, if the matter does not require summary treatment, a fair hearing may be a fundamental requirement of due process of law. It is difficult to express a general rule. It is not essential, however, that a hearing be given prior to the first order of an administrative body. If there is a full and fair hearing before the order becomes effective, due process of law has been satisfied. Furthermore, unless an impending danger requires instant action, a statute which makes no provision for a hearing and grants no opportunity for a review in any court is invalid.[44]

One workable guide in ascertaining the proper scope of review of administrative action is the principle that, before resort can be had to a court, a person must exhaust all his administrative remedies, unless, because the administrative agency is prejudiced, doing so would be merely an idle gesture.[45] Keeping in mind that matters before administrative commissions often have the semblance of adversary litigation and that ordinarily due process demands notice, hearing, and good faith, we should nevertheless understand that the problem is rather difficult, involving not only questions of fairness but sometimes of speed, efficiency, and secrecy. Moreover, there may be a corrective means within the administrative proceeding itself or a traditional method pursued.[46]

[44] "Congress in requiring a 'full hearing' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. . . . The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. . . . The proceeding had all the essential elements of contested litigation. . . . Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot." Morgan v. United States, 304 U.S. 1 at 19-20, 58 S. Ct. 773, 82 L. Ed. 1129 at 1133 (1938).

[45] Ng Fung Ho v. White, 259 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922).

[46] Peoria & P. V. R. Co. v. United States, 263 U.S. 528, 44 S. Ct. 194, 68 L. Ed. 427 (1924); United States v. Abilene & S. R. Co., 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924).

We must always adhere to the rule that no man may be a judge in his own cause. Therefore, if he is personally interested in the matter, he cannot exercise any authority therein.[47]

An observation as to the manner and extent of review in cases involving alleged confiscation is here appropriate. If a public utility rate is too low or unreasonable the courts have many times considered it an unfounded exercise of power and accordingly tantamount to a mistake of law. One important fact we should keep in mind is that there is a real difference between fair valuation and confiscatory valuation. A valuation is confiscatory when it is unfair and unreasonable and ignores established principles of law, incontestable facts, or ordinary honesty.[48]

A final consideration to be remembered in connection with the subject of judicial review is the matter of trial and error, particularly with respect to difficult questions. Occasionally the question of fact involved is extremely close. In a rate case for example, where there is a difference of opinion as to the valuation, it is desirable if possible that the rate as prescribed by the commission should be tried. There are so many intangible and unpredictable elements entirely beyond the grasp of both commissions and courts that the stamp of judicial disapproval should not, if reasonably avoidable, be placed on many types of administrative action. In a world of transition, where many of our established practices are being upset and consequent adjustments are difficult to make, we should draw on human experience more than on abstract reason.

Conclusions

The foregoing discussion of the extent to which the courts should review administrative decisions calls to our attention the vital but not always obvious fact that in the last analysis the problem of government are not always simple. The basis of the whole problem is one of policy. The doctrine of separ-

47 Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

48 Interstate Commerce Com. v. Ill. C. R. Co., 215 U.S. 452, 30 S. Ct. 155, 54 L. Ed. 280 (1909); Interstate Commerce Com. v. Union Pac. Rd. Co., 222 U.S. 541, 32 S. Ct. 108, 56 L. Ed. 308 (1911).

ation of powers has been a useful principle of constitutional law and public administration. Administrative agencies are necessary to the welfare of the public but should function within due bounds. The courts by virtue of judicial review can use or abuse their office as final arbiter of both questions of law and fact involved in legal disputes. The criterion is the rule of reason and the protection of individual rights with a due regard for the public welfare. We should realize as Holmes once said that "the life of the law has not been logic: it has been experience."[49] Mr. Justice Stone reminded his associates in 1936 that "the only check upon our own exercise of power is our own sense of self-restraint."[50] The courts can be influential in maintaining a proper equilibrium between the various organs of government to the ends that public administration will be efficient and that government will function for safety rather than speed. In this way the judicial agencies of society can truly exhibit the possible and worthwhile attributes of judicial statesmanship.[51]

[49] Holmes, The Common Law, 1.

[50] Dissent in United States v. Butler, 297 U.S. 1 at 79, 56 S. Ct. 312, 80 L. Ed. 477 at 495, 102 A.L.R. 914 (1936); see also Corwin, Court over Constitution (1938), Ch. 1.

[51] For interesting discussions of the problem discussed in this article, see two essays entitled, "To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 A.B.A.J. 453 by Malcolm McDermott and ibid. 543 by Charles B. Stephens. See also J. Landis, The Administrative Process.

NOTES AND COMMENTS

THE PERMANENT NUISANCE DOCTRINE IN ILLINOIS

The doctrine of the so-called "permanent nuisance" is based primarily upon distinctions between completed invasions of the land-owner's interest and continuing invasions of his interest. Where the continuing invasions are caused by a condition, structure, or activity which may be regarded by the law as permanent, many courts have treated such condition, structure, or activity as constituting the original and completed tort, creating but a single cause of action. According to this theory the creation or operation of the source of the subsequent injuries is conceived to give rise to a single cause of action and the subsequent invasions of the land-owner's interest are considered mere items of injury flowing from the original tortious source.

The courts of the various states are not in agreement as to what situations may properly be regarded as permanent. The courts are also at variance in regard to how far the doctrine may be applied as a damage theory without violating fundamental principles. Before examining the extent and limitations of the permanent nuisance concept in Illinois, it will be of value to survey historically the reason which led to the invention of this new principle and the judicial process by which it has been evolved.

The permanent nuisance doctrine has never been recognized in England, New York, and a few other jurisdictions.[1] These courts still hold to the orthodox proposition that, for continuing or recurrent invasions of the land-owner's interest due to the wrongful conduct of another (even though the source of such invasions may be of such a character as to threaten future invasions beyond the right of the land-owner to prevent by injunction or abatement), only such damages may be recovered as have actually accrued in fact up to the time the action is brought. This proposition is based upon the theory that each invasion of a legal right by the wrongful conduct of another is a separate and distinct cause of action regardless of the fact that the source of that invasion may be for all practical and legal purposes permanent in its nature and therefore reasonably certain to be the continuing cause of similar future invasions. The above proposition thus limits the damages recoverable to those consequential injuries which have accrued or will probably accrue from a past and completed invasion. The English doctrine does, however, permit recovery for injurious consequences which are reasonably certain to flow from any distinct tres-

[1] Battishill v. Reed, 18 C.B. 696, 139 Eng. Rep. 1544 (1856); Uline v. New York Cent. & H. R. R. Co., 101 N.Y. 98, 4 N.E. 536, 54 Am. Rep. 661 (1886); Aldworth v. City of Lynn, 153 Mass. 53, 26 N.E. 229, 10 L.R.A. 210 (1891); Coates v. Atchison, T. & S.F.R. Co., 1 Cal. App. 441, 82 P. 640 (1905).

pass or disturbance, but it does not permit recovery of damages for future recurrences of the physical invasion.[2]

Objections to the Doctrine

The jurisdictions which have refused to recognize the permanent nuisance doctrine have based their objections chiefly upon the contention that the permanent nuisance as a legal concept is illogical, in that it treats a potential source of nuisance as itself an existing and subsisting tort, confusing cause and effect and regarding the latter as the former.[3]

These jurisdictions also reject the doctrine upon the ground that damages are too speculative, inasmuch as the court does not have the means of ascertaining with any reasonable degree of certainty the duration of the nuisance.[4]

Furthermore, the doctrine places upon the injured party the perilous task of ascertaining correctly the nice legal question of whether any particular nuisance is temporary or permanent, with severe penalties in the event that he misconceives his precise cause of action. The misconception of the precise nature of the nuisance may result in the plaintiff's conferring by his failure to choose the correct theory of action, immunity upon the tort-feasor by virtue of the effect of the Statute of Limitations.[5]

Finally, it is contended that, although a multiplicity of suits may in certain situations be an unavoidable hardship upon the injured party in cases of continuing nuisances, the remedies at law and in equity are substantially adequate to meet all situations.[6]

Formulation of the Permanent Nuisance Doctrine in America

The doctrine of permanent nuisance was first announced judicially less than a century ago. In 1851 the Supreme Court of New Hampshire rendered its decision in the case of *Town of Troy* v. *Cheshire Railway Com-*

2 See Battishill v. Reed, 18 C.B. 696, 139 Eng. Rep. 1544 (1856).

3 "That evidence was rejected, because that might be the subject of another action. The attempt to recover substantial damages in the first instance is certainly inconsistent with the theory of the action. At common law, the freeholder would in a case like this have had an assize of nusance." Battishill v. Reed, 18 C.B. 696 at 717, 139 Eng. Rep. 1544 at 1552 (1856).

4 See Aldworth v. City of Lynn, 153 Mass. 53, 26 N.E. 229, 10 L.R.A. 210 (1891); Uline v. New York Cent. & H. R.R. Co., 101 N.Y. 98, 4 N.E. 536 at 550 (1886).

5 See Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921).

6 "The rule . . . which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad ample remedy. He may sue and recover his damages as often as he chooses—once a year, or once in six years—and have successive recoveries for damages. He may enjoin the operation of the railroad, and compel the abatement of the nuisance by an action in equity, and where his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment." Uline v. New York Cent. & H. R. Co., 101 N.Y. 98, 4 N.E. 536 at 550 (1886).

pany.[7] This was an action by the town, which was charged by law with the duty of maintaining a highway, for the obstruction of the highway by the company, which had built a railroad across it. The defendant contended that damages must be limited to claims arising before the action was brought. However, the court overruled the defendant's contention and held that the town was entitled to recover any reasonable expenses necessary to be incurred to render the highway passable or to lay out a new one in case the old highway had been rendered unusable and that such recovery was allowable even though no money had been spent therefor. The court supported its holding upon the ground that whenever the nuisance is of such a character that its continuance is necessarily an injury and where it is necessarily of a permanent character, which will continue without change from any cause but human labor, the damage is original and may be at once fully recovered, since the injured person has no means to compel the wrongdoer to abate the cause of injury.

It is readily apparent that this decision, although significant in its damage theory, represented only a very limited departure from established principles. The injury was in its nature a direct trespass and complete in its effect upon the land as soon as it was done. It was a passive structure. Most significant of all, the injury was inflicted by a corporation serving a public interest and therefore entitled to exercise powers of eminent domain. Because of the power of eminent domain possessed by the defendant, the court found it entirely logical to assume that the damage would continue to be inflicted.

The doctrine laid down in the New Hampshire case was adopted by the courts of other states with considerable extension in many instances.[8] The orderly classification of Professor McCormick[9] upon this subject may be followed with only slight modifications thereof as a convenient approach to the Illinois doctrine of permanent nuisance, as viewed in the light of the positions taken by other jurisdictions.

(1) *Cases in which the Defendant has acquired the Lawful Right to Maintain the Structure or Operation Constituting the Nuisance by Eminent Domain Proceedings*

Where the defendant has acquired the lawful right to maintain the nuisance because he is vested with powers of eminent domain, and the nuisance and the injury which it will probably inflict are necessarily substantially permanent, most American jurisdictions, including Illinois, will

[7] 23 N.H. 83, 55 Am Dec. 177 at 188, 189 (1851), which states, "The railroad is, in its nature and design and use, a permanent structure, which cannot be assumed to be liable to change. . . . The injury done to the town is then a permanent injury, once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

[8] Southern Ice & Utilities Co. v. Bryan, 187 Ark. 186, 58 S.W. (2d) 920 (1933), involving an ice factory; Missouri Pac. R. Co. v. Davis, 186 Ark. 401, 53 S.W. (2d) 851 (1932), concerning railway coal chutes; Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 P. 450 (1916), involving a cement plant.

[9] Charles T. McCormick, Handbook on the Law of Damages, 500 et seq.

regard the continuing nuisance as permanent and will therefore allow recovery of all damages, past, present, and future, in a single action.[10] However, the Illinois authorities apparently confine the doctrine under this head to nuisances properly created by structures and operations within the sphere of eminent domain, with certain qualifications.

Two reasons have been chiefly relied upon for treating continuing nuisances under this general head as permanent and allowing prospective damages under the single cause of action theory. One reason is that where defendant possesses power of eminent domain there is no remedy in favor of the plaintiff to abate the nuisance. In *Schlosser* v. *Sanitary District of Chicago*,[11] a sanitary district having powers of eminent domain and being affected with a public interest turned the waters of the canal of the Sanitary District of Chicago into the Illinois River by lowering the dam at Lockport, Illinois, thus injuring a riparian land-owner by the flooding of his land. In an action for damages brought by the land-owner against the district, the court held that actions for damages arising from the operation of a Sanitary District must be brought within five years from the time the original nuisance was first created. The court also held that damages in such action must be recovered in a single suit and that such suit concludes the question of damages for all time, regardless of whether or not the extent of the injuries could have been forseen at the time of bringing suit.

The other chief reason relied upon for invoking the doctrine in cases coming under this head is based upon an expansion of the eminent domain powers incorporated into the revised Constitution of Illinois of 1870. The Constitution provides that private property shall not be taken or damaged for public use, without just compensation, and that such compensation, when not made by the state shall be ascertained by a jury, as shall be prescribed by law.[12] Under the Constitution an action by a lot owner for a physical injury to his property, resulting from the construction and operation of a railway in the public street near his lot, may be regarded as a proceeding to recover compensation for the damage to private property in the furtherance of the public good. In such a case, the assessment being full compensation for all present and future damages, one recovery will bar any subsequent action for the same cause.[13]

[10] Horner v. Baltimore & O.S.W.R.Co., 165 Ill. App. 370 (1911); Bernhardt v. Baltimore & O.S.W.R.Co., 165 Ill. App. 408 (1911); Missouri Pac. R. Co. v. Davis, 186 Ark. 401, 53 S.W. (2d) 851 (1932); Stodghill v. C. B. & Q. R. Co., 53 Iowa 341, 5 N.W. 495 (1880).

[11] 299 Ill. 77, 132 N.E. 291 (1921). In Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884), the court elaborated upon the principles of the instant case and reasoned that the just compensation to be made for damaged land is intended as an indemnity, not for successive, constantly accruing damages as they may afterwards be suffered, but for all the landowner may suffer from all the future consequences of the careful and prudent operation of the proposed public structure, improvement, or operation. The question was also discussed exhaustively by Justice Brandeis in Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933).

[12] Ill. Const. 1870, Art. II, § 13.

[13] Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884).

The decision in *Ohio and Mississippi Railway Company* v. *Wachter*[14] also touches this point, holding that all special damages, present and prospective, to the owner of lands, resulting or to result from the proper construction, maintenance, and operation of a railroad under the laws of Illinois, constitute as to such land-owner one indivisible cause of action, which may be enforced under the eminent domain statute or any other appropriate form of action. Thus the courts have taken cognizance of the words of the eminent domain provision in the Constitution including damage to property as equivalent to a taking thereof and have construed them to allow damages for a permanent nuisance to be recovered in a single action by analogy to the proceeding to condemn under the eminent domain powers.

It should be noted that the cases which base the application of the single cause of action theory of damages upon the test of lawfulness and upon the constitutional guaranty are not confined to instances where the defendant has acquired the right to maintain the permanent nuisance by eminent domain proceedings, but include also instances where the defendant is authorized by statute to take or damage property by eminent domain proceedings but has failed to take such proceedings. In the situations last indicated the defendant is deemed to have an inchoate right to render the taking or the damage lawful and therefore immune from abatement or injunction if suit for such abatement is threatened.[15] It is also apparent that the application of the doctrine to this general classification of cases based upon the test of lawfulness is not restricted to mere passive structures, such a dams, culverts, and embankments,[16] but extends to actual invasions of the plaintiff's land caused directly by active operations, such as smoke, coal dust, and noxious odors, in the absence of wrongful conduct.[17]

(2) *Cases in which the Defendant has Powers of Eminent Domain but has created the Structure or Carried on the Operation Willfully or Negligently*

Some jurisdictions permit actions to be based upon the permanent nuisance concept where the injury is caused by the negligent or willful creation of a defective structure or the negligent or willful carrying on of an active operation affected with a public interest.[18] These jurisdic-

14 123 Ill. 440, 15 N.E. 379 (1888). See also Catello v. Chicago, B. & Q. R. Co., 298 Ill. 248, 131 N.E. 591 (1921); Miller v. Sanitary Dist. of Chicago, 242 Ill. 321, 90 N.E. 1 (1909); Vette v. Sanitary Dist. of Chicago, 260 Ill. 432, 103 N.E. 241 (1913); Barry v. Chicago, I. & St. L. S. L. Ry. Co., 149 Ill. App. 626 (1909). But as to temporary nuisances, see Cleveland, C., C. & St. L. Ry. Co., v. Pattison, 67 Ill. App. 351 (1896).

15 Catello v. Chicago, B. & Q. R. Co., 298 Ill. 248, 131 N.E. 591 (1921); Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921).

16 Ohio & M.R.Co. v. Wachter, 123 Ill. 440, 15 N.E. 279 (1888).

17 Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884).

18 Harvey v. Mason City & Fort Dodge R. Co., 129 Iowa 465, 105 N.W. 958, 3 L.R.A. (N.S.) 973, 113 Am St. Rep. 483 (1906); see also Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S. E. 451, 27 A.L.R. 54 (1922).

tions support their holdings principally upon the ground that a power to create and continue such a nuisance, immune to abatement because of the public or semi-public interest being served, is, for all practical purposes, tantamount to the potential or actual lawful right to do so. On the other hand other jurisdictions have refused to extend the concept to cases of this sort, for the reason that to do so would require the courts to presume the continuance of wrongful conduct in the future under circumstances where such wrongful conduct might well be remedied voluntarily by the defendant at any time.[19] Further, the doctrine would permit the tort feasor by his own wrongful conduct to acquire a permanent interest in the land of a party who is wholly innocent of either wrong or laches.

The Illinois decisions appear to draw a line of distinction between cases of such wrongful conduct resulting from active invasions due to active processes and operations, on the one hand, and cases of wrongful conduct in the construction of purely passive structures, on the other hand, rejecting the application of a permanent nuisance doctrine to the former and allowing it to be invoked in the latter situations, with certain limitations and even some conflicts of authority.

In *Chicago and Eastern Illinois Railroad Company* v. *Loeb*,[20] it was held that damages from the proper construction and operation of a railroad through the city from smoke and cinders must be recovered in a single action by the occupant of adjoining land at the beginning of the operation of the railroad and a subsequent grantee of the land has no cause of action. The plaintiff alleged negligence in the operation of the railroad but was unable to sustain this allegation by the evidence. In that case the court stated, by way of obiter dicta, that the adjacent property holders may recover from time to time for damages resulting from willful or negligent acts as to which the company would not have been protected by its charter and the license of the city council to lay its tracks in the street. The case of a lawful activity as distinguished from a negligent or willful one seems to be clearly suggested.

Thus the construction of a permanent nuisance, such as a railroad, vests the right of action in the owner of the land upon the construction of the nuisance, and a subsequent grantee of the land cannot maintain an action for the proper use of such a permanent structure after his purchase.[21] However, a different rule will probably prevail when the subsequent owner seeks to recover for negligence and consequent damages in the operation.[22]

While the above references indicate a flat refusal on the part of our courts to extend the doctrine to continuing or recurrent nuisances caused by active and wrongful operations, the decisions are less clear as to whether the doctrine should be applied to purely passive structures upon the land of the defendant which cause injuries to the adjoining land of the plaintiff. In one of the early cases in which a purely passive structure

[19] Stein v. Chesapeake & O. R. Co., 132 Ky. 322, 116 S. W. 733 (1909); Perry v. Norfolk Southern R. Co., 171 N. C. 38, 87 S. E. 948 (1916).

[20] 118 Ill. 203, 8 N.E. 460 (1884). [21] Ibid.

[22] C., B. & Q. R.R. Co. v. Schaffer, 124 Ill. 112, 16 N.E. 239 (1888).

caused recurrent injuries to an adjacent land-owner because of defects in its construction, the court refused to apply the permanent nuisance doctrine.[23]

This case held that notwithstanding the condemnation of land for a railroad and the payment of the compensation or damages awarded the land-owner, the company will be liable to him or to his grantee for damages resulting from its negligence, either in the construction, maintaining or operating of its road. The court seems to reason that the taking or damaging of property for public use under eminent domain powers is permitted only to the extent that such taking or damage is necessary for such use. Since the allowance of the permanent nuisance doctrine and the recovery of prospective damages in a single action has the practical effect of giving the tort-feasor a permanent easement or license in the plaintiff's land, the invoking of the doctrine accomplishes practically all that a proceeding in condemnation could accomplish. The courts are unwilling to regard a negligent or wrongful taking or damaging of property as necessary and they are even more unwilling to permit greater rights to be acquired by a negligent or willful wrongdoer than could be acquired by a rightful and proper exercise of eminent domain powers.

However, a subsequent decision[24] by the Illinois Supreme Court should be contrasted with the case just discussed. Here the facts were strikingly similar to those involved in the preceding case, and the court, speaking through Justice Farmer, points out that where a railroad embankment has been constructed as intended by the company for continuous future use, an abutting owner whose land is damaged by the obstruction of the flow of water is not obliged to resort to some proceeding to compel the company to perform its duty by making more or larger openings for the water, nor is he obliged to treat the embankment as temporary and bring successive actions for damages as they accrue. The court takes the position that if the defendant considered and intended its structure to be permanent, the plaintiff might also treat it as permanent. The fact that it was not impracticable or impossible to remedy the source of the damage did not necessarily require plaintiff to treat the structure as temporary. The fact that he might have done so and have declared for damages only up to the time of commencing the suit, and not for permanent injury, did not require him to do so. Justice Farmer concludes the opinion in the main case by this significant suggestion: "It may well be that he (the land-owner) may have an election to treat the structure as permanent or temporary under certain circumstances."

Thus it appears that there is some confusion in the decisions coming within this classification, with a general tendency to refuse to apply the doctrine to continuing nuisances caused by public enterprises improperly constructed or conducted, although there is some proclivity to let in the doctrine where the injuries are caused by defects in purely passive structures.

[23] Ohio & M.R.Co. v. Wachter, 123 Ill. 440, 15 N.E. 279 (1888).

[24] Strange v. C., C., C. & St. L. Ry. Co., 245 Ill. 246, 91 N.E. 1036 (1910).

(3) *Cases in which the Defendant Causes the Continuing Nuisance by the Construction of a Passive Structure or by the Active Operation of an Establishment of a Purely Private Character*

Some jurisdictions extend the permanent nuisance concept to continuing nuisances caused by structures and even active operations where the plaintiff is precluded from obtaining abatement because of some public inconvenience which would result therefrom or because of a balance of equities in favor of the defendant.[25] It is clear that the utilization of the doctrine cannot here be supported upon the test of lawfulness. However, even in jurisdictions which adhere strictly to the lawfulness test the court decisions almost invariably contain references to the physical test of permanence as a make-weight argument. It will be recalled that the decision in the original case of *Town of Troy* v. *Cheshire Railway Company*[26] was based to a large extent upon the proposition that an injury which will continue without change from any cause but human labor is a permanent nuisance. A few jurisdictions have elevated this last-mentioned proposition to the station of a primary and self-sufficient sanction for letting in the doctrine of the single cause of action. However, the Illinois courts have not as yet clearly indicated an acceptance of this technique.

In considering and applying the test of physical permanence the various jurisdictions have differed as to the precise meaning to be given to the term. (1) Some courts place the emphasis upon the lasting and substantial qualities of the source or structure itself.[27] (2) Others stress the permanence of the injury involved.[28] (3) Still other courts give the greatest weight to the expense of abatement.[29]

Illinois seems to place the emphasis upon the permanence of the injury, although, as already pointed out, our courts apparently accept the physical test of permanence only to the extent of using it as a make-weight argument in the cases which are primarily supported by the test of lawfulness. Thus the physical test is employed secondarily in *Jones* v. *Sanitary District of Chicago*,[30] where it is said that it is the permanency of the injury, and not merely the permanency of the structure causing the injury, which is the test in determining whether damages for all time to come may be recovered in one action. This case presented a situation where the structure could not be inherently a nuisance because the method of its operation and the action of the forces of nature had to be considered in determining whether a continuing injury would result. This decision distinguishes between permanent and intermittent flooding and allows recurrent actions for the latter as divisible, temporary nuisances.

25 See Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933).

26 23 N.H. 83, 55 Am. Dec. 177 (1851).

27 Martin v. Chicago S. F. & C. Ry. Co., 47 Mo. App. 452 (1891).

28 Harvey v. Mason City & Fort Dodge R. Co., 129 Iowa 465, 105 N.W. 958, 3 L.R.A. (N.S.) 973, 13 Am. St. Rep. 483 (1906).

29 Chicago, St. L. & N.O.R.Co. v. Bullock, 222 Ky. 10, 299 S.W. 1085 (1927).

30 252 Ill. 591, 97 N.E. 210 (1912). See also Suehr v. Sanitary Dist. of Chicago, 149 Ill. App. 328 (1909), aff'd 242 Ill. 496, 90 N.E. 197 (1909).

The criterion of the permanency of the injury was therefore of practically primary value in deciding the case, although the court would doubtless have refused to give the test so much weight if the case could have been determined upon the usual test of lawfulness alone.

In *N. K. Fairbank Company* v. *Bahre*,[31] the following situation was presented. An action on the case for nuisance was brought for the depositing of a quantity of soap stock upon a lot adjoining plaintiff's premises which caused noxious odors and fumes to pollute the premises of the plaintiff. It was held that plaintiff's right of recovery was limited to damages up to the commencement of the suit and that it was error to allow recovery for pollution occurring subsequently as far as that suit was concerned. Under the facts of this case the decision was clearly sound.

In *Schlitz Brewing Company* v. *Compton*,[32] the proceeding was also an action on the case for a nuisance. The defendant company maintained a building adjoining the premises of the plaintiff. The roof of the defendant's structure sloped toward the plaintiff's premises in such a manner as to cause recurrent discharge of rain water upon plaintiff's premises whenever storms occurred, thus causing injury to the land-owner. Plaintiff's damages were limited to those accruing before suit was brought and it was error to allow evidence of injury by storms and consequent flooding occurring after the suit was commenced.[33] The court states that the recovery of damages for an unlawful act, such as the erection of a private nuisance, will not render the act or the continuance of the nuisance legal. There is a legal obligation to remove a nuisance, and the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title to result from the recovery of damages for prospective misconduct.

In *N. K. Fairbank Company* v. *Bahre*,[34] the opinion refers to the earlier decision here under consideration and makes mention of the fact that the brewing company's roof and drains could easily and readily have been altered so as to abate the nuisance. This suggests that the court is taking care not to lay down too broad a rejection of the permanent nuisance doctrine, even in regard to private establishments, especially where such establishments are passive structures and substantially permanent. The temporary character of the nuisance in the case under consideration might also have been supported upon the fact of the intermittent character of the flooding caused by the defective passive situation. In *Jones* v. *Sanitary District of Chicago*,[35] under similar conditions, a nuisance was held to be merely temporary even where caused by a structure created and maintained by a defendant serving a public interest. There seems to be no Illinois case squarely presenting the situation of a purely passive and substantially permanent private establishment causing continuous injury. If such a case were presented with equities in favor of extending the

[31] 213 Ill. 636, 73 N.E. 322 (1905). [32] 142 Ill. 511, 32 N.E. 693 (1892).

[33] See Cooper v. Randall, 59 Ill. 317 (1871); C., B. & Q. R.R. Co. v. Schaffer, 124 Ill. 112, 16 N.E. 239 (1888).

[34] 213 Ill. 636, 73 N.E. 322 (1905). [35] 252 Ill. 591, 97 N.E. 210 (1912).

doctrine of permanent nuisance to private enterprises the court would find little difficulty in constructing a rationale consistent with the general trend of the Illinois cases upon which to so extend it.

Legal and Practical Consequences of the Application of the Permanent Nuisance Doctrine

The result of the limitation to a single cause of action is that the judgment rendered operates practically to grant a license or easement to the defendant which will burden the land of the plaintiff and his grantees for all time to come. The plaintiff does not suffer serious hardship for he is compensated therefore, but his grantee has no remedy for invasions flowing from the original tort and this is true even though no judgment has been rendered in favor of his grantor, since it is held that the cause of action for a permanent nuisance is not transferred to the grantee by the conveyance of the title to the land.[36]

In the case of a permanent nuisance the period required to bar the action is computed from the time the original structure was created or the original activity commenced which constitutes the nuisance and from which source all invasions of the land-owner's interest are deemed to flow.[37] This means that he who owned the land at that time must bring his action, if ever he is to bring it successfully, within the statutory period as measured from that time. If he waits longer he is barred from recovery, not only for injuries of longer standing than the statutory period, but also for all injuries whatever, or whenever suffered, as a result of that original tort. On the other hand, if the plaintiff conceives the nuisance to be permanent and sues within the statutory period he may be unable to perceive the ultimate extent of the injuries involved. If the plaintiff conceives the nuisance to be merely temporary and the court holds otherwise, his damages will be limited to the past invasion which he has proved by reason of his misconception of his cause of action. To obviate these difficulties, it is submitted that statutory[38] or judicial[39] reform is advisable, permitting the plaintiff to elect as of the time of bringing his action whether he will treat a continuing nuisance as temporary or permanent.

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36 Chicago & E.I.R. Co. v. Loeb, 118 Ill. 203, 8 N E. 460 (1884).

37 Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921); Horner v. Baltimore & O.S.W.R. Co., 165 Ill. App. 370 (1911); Bernhardt v. Baltimore & O.S.W.R.Co., 165 Ill. App. 408 (1911); Fincher v. Baltimore & O.S.W. R.Co., 179 Ill. App. 622 (1913).

38 Charles T. McCormick, Handbook on the Law of Damages, 514, advocating such a statute. See also note, 27 Ill. L. Rev. 953.

39 Under Strange v. Cleveland, C., C. & St. L. R. Co., 245 Ill. 246, 91 N.E. 1036 (1910), it would be an easy matter for our Illinois courts to allow such an election.

NOTES ON PREVIOUSLY DISCUSSED CASES

EVIDENCE—WEIGHT AND SUFFICIENCY—WHETHER IT IS NECESSARY IN CIVIL ACTION TO PROVE CRIMINAL OFFENSE BEYOND REASONABLE DOUBT.—The Illinois Supreme Court has stated positively, in *Sundquist* v. *Hardware Mutual Fire Insurance Company of Minnesota*,[1] that the burden of proof in all civil cases will be satisfied by a mere preponderance of the evidence, even in those cases where the commission of a felony by the other party is pleaded. Previous to this, a long line of Illinois cases, though not strongly supporting the proposition, had conveyed the impression that Illinois, even in a civil case, required proof beyond a reasonable doubt where the other party was charged with a felony by the pleadings.[2] The overwhelming weight of authority over the country was, however, to the contrary.[3] In the instant case, the Appellate Court, following the traditional Illinois stand, held that a felony must be proven beyond a reasonable doubt in all civil actions.[4] The Supreme Court, while disapproving this position and affirming that "the reasonable doubt rule . . . will no longer be adhered to in this court," did not reverse the Appellate Court, inasmuch as the error complained of was the mere refusal to give an instruction, which was deemed to be cured by the giving of other instructions and interrogatories.

R. W. BERGSTROM

WILLS—REVOCATION—DIVORCE AS EFFECTING REVOCATION BY IMPLICATION.—The Supreme Court of Illinois in *Gartin* v. *Gartin*[1] decided, reversing the Appellate Court, that neither divorce coupled with property settlement nor any other facts not provided for in the Illinois statutes[2] will operate as revocation of a will. The language of the case of *Phillippe* v. *Clevenger*[3] to the effect that Section 17 "of the wills act only applies to the revocation of a will where there is an express intention on the part of the testator to re-

1 371 Ill. 360, 21 N.E. (2d) 297 (1939).

2 See note, 17 CHICAGO-KENT LAW REVIEW 79.

3 Ibid.

4 Sundquist v. Hardware Mutual Fire Ins. Co. of Minn., 296 Ill. App. 510, 16 N.E. (2d) 771 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 79.

1 371 Ill. 418, 21 N.E. (2d) 289 (1939). For a discussion of the decision of the Illinois Appellate Court in 296 Ill. App. 330, 16 N.E. (2d) 184 (1938), see 17 CHICAGO-KENT LAW REVIEW 97.

2 Ill. Rev. Stat. 1937, Ch. 148, § 19: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

Ill. Rev. Stat. 1937, Ch. 39 § 10: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will."

3 239 Ill. 117, 87 N.E. 858, 16 Ann. Cas. 207 (1909).

voke a will, and that said section does not apply to the revocation of a will, or a part thereof, arising by implication of law" was discounted on the grounds that the case merely decided that a conveyance of the bequeathed property by the testator to the legatee resulted in an ademption, despite the subsequent reacquisition of the property by the testator.

The Court in the instant case recognized the existence of decisions[4] in other states opposed to its holding but declined to recognize those cases as authority in this state on the grounds that the statutory provisions of Illinois are materially different from those of the other jurisdictions.

W. L. SCHLEGEL

CIVIL PRACTICE ACT CASES

JURY—RIGHT TO TRIAL BY JURY—EFFECT OF PLAINTIFF'S FILING INADEQUATE COUNTER-AFFIDAVITS TO MOTION TO DISMISS UNDER SECTION 48—Some light on the interpretation to be given to Subsection 3[1] of Section 48 of the Illinois Civil Practice Act has been shed by the case of *Fitzpatrick* v. *Pitcairn*.[2] The plaintiff therein, as administratrix, sued the defendant railway company to recover for the wrongful death of her intestate. More than a year after the accident, the plaintiff amended her complaint by adding the receivers of the defendant railway company as additional parties defendant. The receivers filed a motion to dismiss relying on Subsection (f)[3] of Section 48, and in their motion they set forth chronologically the proceedings up to that point. The plaintiff filed counter-affidavits in which she inadequately sought to explain her failure to sue the receivers of the railway company at the outset, and she requested a jury trial on the issues of fact alleged to be created by the defendant's affidavits and her counter-affidavits. The trial court refused to dismiss the defendant's motion and thus force him to file an answer[4] in order that a jury trial might be had. The court held that, since the plaintiff had not controverted the facts set out in the defendant's motion, the only issue was one of law, and this holding was affirmed on appeal.

The practice as outlined in Section 48 and as now interpreted in the Fitzpatrick case thus appears to require that if the plaintiff does

4 For a discussion of these cases, see 17 CHICAGO-KENT LAW REVIEW 97.

1 "If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury." Ill. Rev. Stat. 1937, Ch. 110, § 172(3).

2 371 Ill. 203, 20 N.E. (2d) 280 (1939).

3 "That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon." Ill. Rev. Stat. 1937, Ch. 110, § 172(f).

4 Under the former practice such new matter had to be introduced into the record by an appropriate plea upon which issue could be taken and trial had before the appropriate forum.

not file counter-affidavits or other proof denying or avoiding the effect of the new matter contained in the motion to dismiss, the court must assume the same to be true and give judgment accordingly as a matter of law.[5] It would further seem that where counter-affidavits or other proof are offered to a motion to dismiss, the court would be compelled to deny such motion if the issue were one of fact, if the action were one at law, and if a request for a jury trial were made.[6] If either one of the latter two elements were missing, the court would be free to exercise its discretion in the matter.

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[5] Stern v. Auerbach, 197 N.Y.S. 295 (1922), a case decided under an analogous New York statute. The instant case would also lead to this conclusion.

[6] Ill. Const. of 1870, Art. II, § 5, which provides that "the right of trial by jury as heretofore enjoyed, shall remain inviolate . . .," is thus reinforced by the section under consideration. See M. Weisbrod, "Some Observations on Section 48 of the Illinois Civil Practice Act," 16 CHICAGO-KENT REVIEW 118 at 133, 136, 142, 147. See also Ill. Rev. Stat. 1937, Ch. 110, § 188, for the procedure involved in the request for jury trial.

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS—AMENABILITY OF SALARY OF FEDERAL JUDGE TO INCOME TAX.—In 1932 Congress passed an income tax statute including in gross income the compensation of "judges of courts of the United States taking office after June 6, 1932." A federal district judge was subsequently appointed to the position of circuit judge, and, as such, he was taxed upon his salary. Paying the tax under protest, he sued to get it back on the ground that the tax was an unconstitutional diminution of a federal judge's salary.[1] The United States Supreme Court denied his claim.[2]

Since the positions of circuit and district judge are wholly separate, the plaintiff was treated as one who had taken office after the date mentioned in the statute. This being so, the court stated, "To suggest

[1] U.S. Const., Art. 3, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

[2] O'Malley v. Woodrough, 83 L. Ed. (Adv.) 850 (1939).

that it [the tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government is to trivialize the great historic experience on which the framers based the safeguards of Article 3, § 1. To subject them to a general tax is merely to recognize that judges are also citizens. . . ." The opinion disapproved of the decision in *Evans* v. *Gore*[3] and overruled *Miles* v. *Graham*[4] to the extent of its inconsistency with the instant case.

The constitutional clause affirming that the compensation of judges "shall not be diminished during their Continuance in Office"[5] was construed to forbid indirect diminution by income taxation of the salaries of judges in a letter written by Chief Justice Taney to the Secretary of the Treasury.[6] In *Evans* v. *Gore*[7] a district judge was held exempt from taxation under a later statute taxing all net income "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States . . . the compensation received as such." The court said that an indirect diminution of the salary by taking back part of it under a tax was well within the constitutional prohibition.[8] Justice Holmes, however, dissented, because (1) the tax does not violate the spirit of the constitutional clause, because a tax which all must pay will not affect the independence of the judiciary, (2) the tax does not violate the letter of the clause, because after the judge gets the salary it loses its non-taxable character, and (3) at any rate, the sixteenth amendment would validate the tax, since the words

[3] 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

[4] 268 U.S. 501, 45 S. Ct. 601, 69 L. Ed. 1067 (1925).

[5] U.S. Const., Art. 3, § 1.

[6] Letter of Chief Justice Taney to Hon. S. P. Chase, Secretary of the Treasury, 157 U.S. 701, 15 S. Ct. ix, 39 L. Ed. 1155 (1863). Finding that an income tax law had been construed to include federal judges, the Chief Justice wrote, "Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an Act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void. . . ."

Justice Field, concurring in overthrowing an income tax law, later stated, "The law of Congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the Constistution that their compensation shall not be diminished during their continuance in office." Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 at 604, 15 S. Ct. 673, 39 L. Ed. 759 at 827 (1895).

[7] 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

[8] All diminutions "which, by their necessary operation and effect, withhold or take from the judge a part of that which has been promised by law for his services, must be regarded as within the prohibition."

"from whatever source derived" in that amendment[9] are mere surplusage unless construed to give power to tax incomes from anywhere.[10]

With the statute thus multilated, the Treasury Department did not give up hope, instead attempting to tax a judge of the court of claims who was appointed *after* the act was passed and who consequently, it was thought, could not object that his compensation was being diminished during his continuance in office. He also paid under protest and was allowed to recover in a suit for the tax. The District Court, although it expressed a doubt as to whether federal judges could ever be taxed on their salaries,[11] placed the decision on the firm ground that the clause taxing all judges had been declared unconstitutional and the court would not rewrite the statute for Congress to tax only judges taking office after the statute was passed.[12] But the Supreme Court, while affirming the District Court and quoting its holding, seems to have handed down, in *Miles* v. *Graham*,[13] the proposition that, when Congress definitely declares a certain sum to be the compensation for a federal judge, it cannot in a separate tax cut down that sum, even though the taxing statute was passed before the salary was fixed.[14] This is obviously inconsistent with the holding in the instant case.

However, the present case also manifests a hostile intent toward

9 "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const., Amendment 16.

10 However, Mr. Justice Holmes apparently later changed his mind. See Gillespie v. Oklahoma, 257 U.S. 501 at 505, 42 S. Ct. 171, 66 L. Ed. 338 at 341 (1922), where he cites Evans v. Gore with apparent approval.

11 "Under our system of surtaxes constantly changing, both in rate and method of ascertainment, and even under the same statute being greatly affected by the greater or less receipt of income from other sources, the actual tax imposed upon a judge's salary will constantly vary." Graham v. Miles, 284 F. 878 at 880 (1922).

12 The opinion, however, seems to express a wistful preference for the dissent in the Evans case. Graham v. Miles, 284 F. 878 at 881 (1922).

13 268 U.S. 501, 45 S. Ct. 601, 69 L. Ed. 1067 (1925).

14 "The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office." Miles v. Graham, 268 U.S. 501 at 508, 45 S. Ct. 601, 69 L. Ed. 1067 at 1070 (1925). However, in Ex parte Bakelite Corp., 279 U.S. 438 at 455, 49 S. Ct. 411, 73 L. Ed. 789 at 796 (1929), the court in an elaborate dictum said that the court of claims was a mere legislative, and not a constitutional, court, apparently disapproving Miles v. Graham. Mere legislative courts are not subject to the constitutional restriction against diminishing a judge's salary. For a full discussion of this, see Wilbur G. Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894 at 907; O'Donoghue v. United States, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933); Williams v. United States, 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933). See also note, 46 Harv. L. Rev. 677 at 680, which says, "The Bakelite opinion must be taken to overrule Miles v. Graham."

Evans v. *Gore*,[15] whose holding, like the doctrine of reciprocal tax immunities, seems "presently marked for destruction." Division of authority on the question is indicated among the state courts which have had to construe similar provisions in state constitutions.[16] However, to support Mr. Justice Holmes's argument that a tax upon a judge's net income is no more a diminishing of his salary than a tax upon his house would be, there are several encouraging analogies. The supremacy of state and federal governments in their respective spheres requires that each be immune in its sphere from hindrance by the other, but this has recently been held not to bar taxation which does not burden the exercise of the governmental function;[17] and this is of added importance because the court in the Evans case took as persuasive the old absolute immunity rule of *Collector* v. *Day*.[18] True, here the analogy is not exact, since this is a mere *implied* constitutional restriction whose content may change as necessity demands, whereas in the case of the federal judges the Constitution is explicit.

Similarly, the power of Congress to regulate interstate commerce[19] has been construed to bar the states from thus taxing such commerce,[20] but this does not prohibit a tax by a state upon the net income of a domestic corporation engaged in such commerce.[21] Again, however, we

[15] 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

[16] See Martin v. Wolfford, 269 Ky. 411, 107 S. W. (2d) 267 (1937), holding a state judge taxable under such a provision; Taylor v. Gehner, 329 Mo. 511, 45 S.W. (2d) 59, 82 A.L.R. 986 (1931), also holding a state judge taxable; Poorman v. State Bd. of Equalization, 99 Mont. 543, 45 P. (2d) 307 (1935), containing a similar holding; Commissioners v. Chapman, 2 Rawle (34 Pa.) 73 (1829), to the same effect. The last case has sometimes been thought to be overruled by Commonwealth ex rel. Hepburn v. Mann, 5 Watts & S. (61 Pa.) 403 (1843). Actually, however, this last case involved a discriminatory tax, and the court states at 417, "The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation." See also Dupont v. Green, 195 A. 273 (Del., 1937), holding an attorney general taxable under a constitution protecting "public officers" from diminution of their salaries; State ex rel. Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915), in which, however, a state constitutional amendment affected the issue. For cases holding judges not taxable under such provisions, see City of New Orleans v. Lea, 14 La. Ann. 197 (1859); Gordy v. Dennis, 5 A. (2d) 69 (Md. 1939); Letter of Attorney General of North Carolina, 48 N.C. 543 (1856); In re Taxation of Salaries of Judges, 131 N.C. 692, 42 S.E. 970 (1902); Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903); Long v. Watts, 183 N.C. 99, 110 S.E. 765, 22 A.L.R. 277 (1922).

[17] Graves v. New York ex rel. O'Keefe, 59 S. Ct. 595, 83 L. Ed. (Adv.) 577, 120 A.L.R. 1466 (U.S., 1939). For the history and principles of this doctrine, see note, 17 CHICAGO-KENT LAW REVIEW 159.

[18] 11 Wall. 113, 20 L. Ed. 122 (1871).

[19] U.S. Const., Art. 1, § 8, Clause 3.

[20] Philadelphia etc. Mail Steamship Co. v. Pennsylvania, 122 U.S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (1887); Ratterman v. Western Union Telegraph Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229 (1888).

[21] United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918). See also St. Louis Southwestern R. Co. v. Arkansas ex rel. Norwood, 235 U.S. 350, 35 S. Ct. 99, 59 L. Ed. 265 (1914); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688, 15 S. Ct. 268, 39 L. Ed. 311 (1895); Attorney-General of Massachusetts v. Western Union Tel. Co., 141 U.S. 40, 11 S. Ct. 889, 35 L. Ed. 628

have the objection that this restriction on the power of the states is merely implied and should be implied no further than necessary.[22] This is not so in the case of the express constitutional prohibition against the taxing of exports,[23] which does not prevent a tax upon the net income of a corporation engaged in the export business,[24] since the clause is interpreted as requiring that exportation be free "from any tax which *directly* burdens the exportation." A strong parallel can be drawn between reasoning based on the fact that "the tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses,"[25] and the contention of Justice Holmes that once the salary is in a judge's hands it loses its immune character.

As to the contention that the broad language of the Sixteenth Amendment, giving power to tax incomes "from whatever source derived," should permit the tax, the amendment indicates on its face that it bestows such power. However, the court, in other factual situations, has used language limiting the scope of that amendment.[26] Nonetheless, upon the one ground or the other, it appears that the immunity of the salaries of federal judges is doomed.

R. W. BERGSTROM

DEEDS — CONSTRUCTION AND OPERATION OF RESERVATION — WHETHER GRANTOR MAY RESERVE LIFE ESTATE TO SPOUSE. — A married woman who owned property in her own right wished to give it to her sons, providing that she and her husband should have the use of the land during their respective lives. The husband joined in the conveyance with the wife, thereby waiving his dower and homestead rights, and a reservation was inserted in the deed, as follows: "The aforesaid Grantors hereby expressly reserve unto themselves the use of the above conveyed premises for and during the time of their natural lives." The wife predeceased her husband, and his creditors sought to levy on his interest in the land, claiming that he had a life estate in the property. The grantors'

(1891); Maine v. Grand Trunk R. Co., 142 U.S. 217, 12 S. Ct. 121, 35 L. Ed. 994 (1891); Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891).

22 For a possible further qualification see Escanaba, Etc., Trans. Co. v. Chicago, 107 U.S. 678, 2 S. Ct. 185, 27 L. Ed. 442 (1883).

23 "No tax or duty shall be laid on articles exported from any state." U.S. Const., Art. 1, § 9, Clause 5.

24 William E. Peck & Co. v. Lowe, 247 U.S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918). See also Turpin v. Burgess, 117 U.S. 504, 6 S. Ct. 835, 29 L. Ed. 988 (1886).

25 William E. Peck & Co. v. Lowe, 247 U.S. 165 at 175, 38 S. Ct. 432, 62 L. Ed. 1049 at 1052 (1918).

26 Stanton v. Baltic Min. Co., 240 U.S. 103 at 112, 36 S. Ct. 278, 60 L. Ed. 546 at 554 (1916); Brushaber v. Union P. R. Co., 240 U.S. 1 at 17, 36 S. Ct. 236, 60 L. Ed. 493 at 501 (1916), noted in 29 Harv. L. Rev. 536; Peck & Co. v. Lowe, 247 U.S. 165 at 172, 38 S. Ct. 432, 62 L. Ed. 1049 at 1051 (1918); Eisner v. Macomber, 252 U.S. 189 at 206, 40 S. Ct. 189, 64 L. Ed. 521 at 528, 9 A.L.R. 1570 (1920). For a strong argument that the sixteenth amendment should be construed liberally, see Taxation of Government Bondholders and Employees, A Study by the Department of Justice (U.S. Govt. Printing Office, 1939).

sons, who were also the grantees in the deed, brought suit in equity in the nature of a bill to quiet title to the land. The Illinois Appellate Court held, in *Saunders* v. *Saunders*,[1] that a grantor cannot make a reservation in a deed in favor of a third person, even if that third person be a spouse of the grantor.

That a reservation to a stranger in a deed is void in the absence of an excepting clause and specific words of grant to the third party is well settled.[2] But although a reservation will not give any title to a stranger, it may operate as an exception to the grant, if such appears to be the intention of the parties.[3] However, even where the reserved estate is held to operate as an exception, such estate cannot vest in the third party unless there are words of grant to him in the deed.[4] So our grantor in the instant case is precluded from taking advantage of this exception to the general rule in attempting to reserve a life estate to her spouse.

But, contended the defendants, there is another exception to the rule, recognized in Illinois, in the case of the reserving of a life estate to a spouse. That there is such an exception to the general rule in favor of a husband and wife is recognized and followed in many states.[5] Thus it is held in Michigan that, where a husband and wife are the grantors, they may reserve to both, or to the survivor of them, a life estate in

1 300 Ill. App. 368, 21 N.E. (2d) 34 (1939).

2 Tiedeman on Real Property, 3rd Ed., § 608, p. 884; Jones on Real Property, Vol. I, § 528, p. 438; Roberts v. Dazey, 284 Ill. 241, 119 N.E. 910 (1918); Butler v. Gosling, 130 Cal. 422, 62 P. 596 (1900); Stone v. Stone, 141 Ia. 438, 119 N.W. 712, 20 L.R.A. (N.S.) 221 (1909); Hill v. Lord, 48 Me. 83 (1861); Herbert v. Pue, 72 Md. 307, 20 A. 182 (1890); Burchard v. Walther, 58 Neb. 539, 78 N.W. 1061 (1899); Beardslee v. New Berlin Light, Etc. Co., 207 N.Y. 34, 100 N.E. 434, Ann. Cas. 1914 B 1287 (rev. 140 App. Div. 942, 125 N.Y.S. 1112) (1912); Edwards v. Brusha, 18 Okl. 234, 90 P. 727 (1907); In re Palin, 28 R.I. 12, 65 A. 282 (1906); Brace v. Van Eps, 21 S.D. 65, 109 N.W. 147 (1906); Simmons v. Northern Pac. Ry. Co., 88 Wash. 384, 153 P. 321 (1915); Strasson v. Montgomery, 32 Wis. 52 (1873); Whitlock's Case, 8 Coke 69b, 77 Eng. Rep. 580.

3 Martin v. Cook, 102 Mich. 267, 60 N.W. 679 (1894), citing Shep. Touch. 86; Bridger v. Pierson, 45 N.Y. 601 (1871); West Point Iron Co. v. Reymert, 45 N.Y. 703 (1871); Richardson v. Palmer, 38 N.H. 212 (1859); Corning v. Troy Iron and Nail Factory, 40 N.Y. 191 (1869); Hall v. Ionia, 38 Mich. 493 (1878); Ericson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N.W. 161 (1883); Bassett v. Budlong, 77 Mich. 338, 43 N.W. 984 (1889).

4 Lemon v. Lemon, 273 Mo. 484, 201 S.W. 103 (1918); Legout v. Price, 318 Ill. 425, 149 N.E. 427 (1925).

5 Graves v. Atwood, 52 Conn. 512, 52 Am. Rep. 610 (1885); Martin v. Stewart, 33 Ky. L. 729, 111 S.W. 281 (1908); Hollomon v. Hollomon, 12 La. Ann. 607 (1857); Watson v. Cressey, 79 Me. 381, 10 A. 59 (1887); Steel v. Steel, 4 Allen (86 Mass.) 417 (1862); Martin v. Cook, 102 Mich. 267, 60 N.W. 679 (1894); Dennett v. Dennett, 40 N.H. 498 (1860). A conveyance for a valuable consideration on condition that the grantor and his wife shall have the use and possession of the property for life may be construed as a conveyance with a condition subsequent that the grantee shall permit such use, or an agreement to convey the use after the grantor's death, or a covenant to stand seized to the use of the grantor for life, then of his wife, and the remainder to the grantee, and may be enforced in equity. Sherman v. Estate of Dodge, 28 Vt. 26 (1855).

the property.[6] An early New York court did not allow the deed to operate as a reservation in favor of the surviving spouse, but held it good as a covenant to stand seised to the use of the grantor during his life and after his death to the use of his wife for life.[7] The Pennsylvania court held the same way under a like situation.[8]

In a Kentucky case,[9] it was held that a deed reserving to the grantor and his wife the usufruct of the property during their lives or the life of the survivor does not violate rules against estates to vest in the future or forbidding reservation of an estate to a stranger or one not a party to the deed.[10] In North Carolina, the court has held that a grantor and his wife hold a life estate by the entirety under a deed by them reserving such estate to them, the widow becoming sole tenant for life on the death of the husband.[11]

However, this exception in favor of husband and wife has been rejected by other courts.[12] The Missouri court, for one, has several times refused to depart from the general rule. In *Lemon* v. *Lemon*,[13] the grantor, who owned the land, reserved for himself the rents and profits and excepted from the conveyance a life estate and attempted to reserve and except for his wife a similar estate and interest for her life. "But unfortunately," said the court, "he reserved it in himself, and did not convey, nor has he ever conveyed it to the defendant."[14]

In Illinois the general rule is recognized and accepted.[15] But as to the allowance of a reservation in a deed of a life estate to a non-owning spouse, there is some doubt. That the exception has also been allowed in Illinois has been the understanding of many attorneys, and in so believing they rely on the often-cited case of *Dubois* v. *Judy*.[16] Here a warranty deed conveyed property to "the heirs-at-law of Woodson P. Greene . . . reserving herein, however, and hereby conveying to Woodson P. Greene a life estate in the above described real estate, the said grantees first above named to have and receive said lands at the death of Woodson P. Greene." In answering the argument that the rule in Shelley's case does not apply, the court said, "Strictly, a reservation in a deed is some right in favor of the grantor created out of or retained in the granted premises. A purported reservation in favor of a third person can only take effect as a grant to him by way of exception to

6 Derham v. Hovey, 195 Mich. 243, 161 N.W. 883, 21 A.L.R. 999 (1917).

7 Jackson v. Swart, 20 Johns. (N.Y.) 85 (1822).

8 Sergeant v. Ford, 2 Watts & S. (Pa.) 122 (1841).

9 Hall v. Meade, 244 Ky. 718, 51 S.W. (2d) 974 (1932).

10 See also Francis v. Combs, 221 Ky. 644, 299 S.W. 543 (1927), where a deed by a sole owner of the fee reserving a life estate to herself and husband was held to establish a life estate in the surviving husband.

11 Jones v. Potter, 89 N.C. 220 (1883). See also Reynolds v. Powell, 10 Ky. L. 932, 11 S.W. 202 (1889).

12 See note, 39 A.L.R. 128 for an annotation on the general subject.

13 273 Mo. 484, 201 S.W. 103 (1918).

14 To the same effect, see Meador v. Ward, 303 Mo. 176, 260 S.W. 106 (1924).

15 Roberts v. Dazey, 284 Ill. 241, 119 N.E. 910 (1918); Eckhart v. Irons, 18 Ill. App. 173 (1885); Legout v. Price, 318 Ill. 425, 149 N.E. 427 (1925).

16 291 Ill. 340, 126 N.E. 104 (1920).

the other grant and in such case, there must be words of conveyance to the third person, except that a grantor may reserve to himself and his wife an estate during their natural lives, which will continue during the life of a survivor." This last statement was obviously not material to the determination of the case.

In support of the above statement, the Supreme Court cites the case of *White* v. *Willard*.[17] Here devisees under the grantor's will sued to set aside deeds, one of which reserved a life estate to his wife, on the grounds (1) that there was no delivery, and (2) the deeds were testamentary dispositions, mainly because of the statement in one deed that the grantees' interest was not to become "absolute" till after the death of the grantors.

As to the "testamentary" argument, the court observed, "In the view we take of the foregoing clause, it has no other effect than to reserve a life estate in the grantor and his wife and the survivor of them." And as to delivery, the surviving spouse was held to have been given sufficient interest by the reservation of the life estate to disqualify her from testifying.

These two, together with *Abel* v. *Schuett*,[18] are the only cases cited as supporting the application of an exception to the general rule in favor of husband and wife, and the last case is pure dicta on this point. The Appellate Court in the instant case dismisses both the Dubois case and the White case as dicta, relying on *Lemon* v. *Lemon*, the Missouri case mentioned above, and *Bullard* v. *Suedmeier*,[19] where the deed contained this clause: "This conveyance shall not take effect during the lifetime of the grantor, Christian Suedmeier and Anna Margaret Suedmeier." The owner of the land, the grantor, died before his spouse who claimed a life estate in the conveyed premises. The court found that the widow did not have a life estate in, or the use of the premises.

Thus it seems to be a case of the Appellate Court specifically holding contrary to the attitude of the Supreme Court, but one can only hazard a guess as to the outcome should this case or a similar one come before the Supreme Court. E. R. BERNSTEIN

DEEDS—ESTATES AND INTERESTS CREATED—WHEN THE WORDS, "HEIRS OF HER BODY," WILL BE CONSTRUED AS WORDS OF PURCHASE AND NOT OF LIMITATION.—Modern courts have shown a gratifying tendency to apply rules of construction less rigorously than was formerly the practice, particularly in cases involving expressions or limitations which the courts have never had occasion to consider in the past.

This tendency is well illustrated in the recent case of *Albers* v. *Donovan*,[1] where the conveyance was to "Jennie Donovan and the heirs born of her body in fee simple." The question for decision was whether the limitation created a fee tail, subject to the Statute on Entails,[2] or a class gift in fee simple to Jennie Donovan and the

17 232 Ill. 464, 83 N.E. 954 (1908).
18 329 Ill. 323, 160 N.E. 548 (1928).
19 291 Ill. 400, 126 N.E. 117 (1920).
1 371 Ill. 458, 21 N.E. (2d) 563 (1939).
2 Ill. Rev. Stat. 1937, Ch. 30, § 5.

heirs of her body. The answer of the Illinois Supreme Court was that a class gift was created.

After the Statute de Donis in 1285, a conveyance to devise to A and the heirs of his body was so construed that an estate tail passed, A taking a fee for his life and the heirs of his body in successive generations taking the fee for their respective lives. The estate would terminate only when A's line became extinct. Because this result was undesirable, the Illinois legislature, in 1827, passed the Statute on Entails which provided that what would have been a fee tail at common law is an estate in A for life, with the remainder in fee simple absolute to the person or persons to whom the estate tail would have passed upon the death of A.

The words, "heirs of the body," are presumed to be used technically as words of limitation except where the contrary appears on the face of the instrument.[3] One of the first cases in which this problem arose was *Perrin* v. *Blake*[4] where the court said "if the intent of the testator manifestly and certainly appeared, (by plain expression, or necessary implication from other parts of the will,) that the heirs of the body of A should take by purchase, and not by descent. . . ."

Illinois has very clearly followed this view as shown by a long line of decisions,[5] and the case of *Butler* v. *Huestis*[6] is typical. According to the facts, the will gave and bequeathed to Altieri A. Huestis the property with the use, rents and profits during her life, "the reversion and fee thereof to the heirs of her body at and after her decease." It was stated in the opinion that the fact that the enjoyment of the estate was postponed until "at and after her decease" and then to become absolute showed clearly that the testatrix did not use the words "heirs of her body" in the sense of words of limitation, but it better effected the purpose of the testatrix to construe the words as words of purchase.

In the instant case, the court said that the language on the face of the deed indicated no intent to create a common law fee tail and that the additional words "in fee simple" showed that the grantor intended the words, "heirs born of her body," as words of purchase to describe the persons who were to share in the estate. If the words had been construed as words of limitation, the estate created would have been a fee tail, and it would have been necessary to hold that the words, "in fee simple," were surplusage. For these reasons the conclusion that Jennie Donovan and the heirs of her body held the estate as tenants in common seems to be a proper one. The decision is a striking example of the trend towards construing "heirs" or "heirs

[3] 18 C. J. 324, § 314(b).

[4] 4 Burr. 2579 at 2581, 98 Eng. Rep. 355 at 357 (1770).

[5] Hempstead v. Hempstead, 285 Ill. 448, 120 N.E. 782 (1918); Griswold v. Hicks, 132 Ill. 494, 24 N.E. 63 (1890); Baulos v. Ash, 19 Ill. 187 (1857); Bunn v. Butler, 300 Ill. 269, 133 N.E. 246 (1921); Hickox v. Klaholt, 291 Ill. 544, 126 N.E. 166 (1920).

[6] 68 Ill. 594 (1873).

of the body" as words of purchase and not of limitation when by so doing, the intention of the settlor, as gathered from the entire instrument, will be given effect. V. BUSSE

INFANTS—APPEAL AND ERROR—VALIDITY OF A JUDGMENT RENDERED AGAINST AN INFANT FOR WHOM NO GUARDIAN AD LITEM WAS APPOINTED.—Where an infant is a party to the trial of a cause and no guardian ad litem is appointed by the court to represent him, is a judgment rendered against the minor subject to be reversed, set aside, or vacated on the sole ground that no guardian ad litem was appointed? In the case of *Zielinski* v. *Pleason*,[1] the court said that some injustice must be made to appear because of the failure to appoint a guardian ad litem for the infant before the judgment will be vacated. There the infant plaintiff brought an action for damages as the result of an automobile accident, and the defendant counterclaimed, alleging that the plaintiff was negligent. Judgment was rendered for the defendant on the claim and counterclaim. The fact of the plaintiff's infancy was not called to the attention of the court until the motion of the plaintiff for a new trial, which motion was overruled. But the lower court then appointed the plaintiff's mother as guardian ad litem to represent him in any further proceedings of the cause. The judgment was reversed, however, on the merits of the case.

"At common law, if an infant plaintiff was not represented by his general guardian, he was required to sue by guardian ad litem; but by the Statute of Westminster he was authorized to sue also by next friend."[2] The reason for this rule was that an infant was presumed to have insufficient discretion to choose a proper person to represent him, and so the law put it out of his power to injure himself.[3] The appointment of a guardian ad litem is not a matter of jurisdiction but of procedure, and where a judgment is rendered against an infant plaintiff or defendant for whom no guardian ad litem has been appointed, the judgment is not void, but voidable, and is subject to direct attack only.[4]

The more widely entertained opinion[5] is that failure to appoint a guardian ad litem for an infant properly before the court is grounds

1 299 Ill. App. 594, 20 N.E. (2d) 620 (1939).

2 31 C.J. 1124, § 271(b).

3 Note 1, Hesketh v. Lee, 2 Wms. Saund. 94, 85 Eng. Rep. 766 (1669).

4 14 R.C.L. 286, § 54.

5 Where the infant defendant appeared and pleaded, see Richmond v. Tayleur, 1 P. Wms. 734, 24 Eng. Rep. 591. (1721); Ralston v. Lahee, 8 Iowa 17 (1859); English v. Savage, 5 Or. 518 (1875); Crockett v. Drew, 5 Gray 399 (1855); Frost v. Frost, 37 N.Y.S. 18 (1895); Chapman v. Branch, 72 W.Va. 54, 78 S.E. 235 (1913); Conto v. Silvia, 170 Mass. 152, 49 N.E. 86 (1898); Barber v. Graves, 18 Vt. 290 (1846). Where the infant defaulted, see O'Hara v. McConnell, 93 U.S. 150, 23 L.Ed. 840 (1876). Where the infant was plaintiff see Conway v. Clark, 177 Ala. 99, 58 So. 441 (1912).

for a new trial[6] or for the reversal or vacation of the judgment, without regard to actual prejudice to the infant.

In *Johnson* v. *Waterhouse*,[7] involving a tort action, the infant defendant was assisted in his defense by his father, but no guardian ad litem was appointed. The court maintained that a judgment could not be properly rendered against an infant unless he has a guardian by whom he may defend, and if the judgment is so rendered, the infant is entitled to maintain a writ of error to have the judgment reversed. The fact that the father assisted the infant will not affect the decision since no legal right of guardianship or of parentage will enable any one to act for the infant without an appointment by court as guardian. The Illinois courts previous to the Zielinski case have generally held that such a judgment is erroneous and that the record must show affirmatively that a guardian ad litem has been appointed; otherwise the judgment will be reversed on appeal or error, without regard to the merits of the case.[8]

The court in the instant case relied on several Illinois decisions to support its conclusion. One of the cases, *Lemon* v. *Sweeney*,[9] was a bill for an injunction to restrain the collection of a judgment rendered against the infant, but the court said that since there was no allegation that the judgment was unjust, and because equity will interfere only to prevent injustice, failure to appoint a guardian ad litem did not cause the judgment to be void. The case is not authority for the case at hand because in the former the judgment was not attacked in the same court where it was originally handed down. The other case of *People ex rel. Landwehr* v. *Humbracht*[10] was a proceeding under the Bastardy Act.[11] Such proceeding is criminal in part, and it was held that it is not necessary to appoint a guardian ad litem in criminal actions. Hence, neither case appears to be sufficiently in point to support the present decision. There was also cited an Idaho case, *Trolinger v. Cluff*,[12] in which the decision was to the effect that, unless the minor makes some showing that he has a meritorious defense or has been misled or been deprived of some legal right because of his minority, he should not be permitted to have the judgment vacated on the sole ground of failure to appoint a guardian ad litem. But this case was based upon a statute[13] which provides,

6 31 C.J. 1121, § 266(4).

7 152 Mass. 585, 26 N.E. 234 (1891).

8 Where the infant was defendant and appeared and pleaded without a guardian ad litem, see Bellchambers v. Ebeling, 294 Ill. App. 247, 13 N.E. (2d) 804 (1938); McCarthy v. Cain, 301 Ill. 534, 134 N.E. 62 (1922); Collins v. Hastings, 283 Ill. App. 304 (1936); Thurston v. Tubbs, 250 Ill. 540, 95 N.E. 479 (1911). Where the infant defaulted, see Peak v. Shasted, 21 Ill. 137, 74 Am. Dec. 83 (1859); Quigley v. Roberts, 44 Ill. 503 (1867); White v. Kilmartin, 205 Ill. 525, 68 N.E. 1086 (1903).

9 6 Ill. App. 507 (1880).

10 215 Ill. App. 29 (1919).

11 Ill. Rev. Stat. 1937, Ch. 17.

12 56 Idaho 570, 57 P. (2d) 332 (1936).

13 Idaho Rev. Codes (1932), § 4231 (I.C.A. § 5-907). There is also another statute, I.C.A. § 5-306, providing that failure to appoint a guardian ad litem for an infant defendant does not warrant setting aside, vacating or reversing a judgment or decree unless substantial rights of the infant are affected by the failure.

"The court must, in every stage of an action, disregard any error or defect in pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect."

A few other jurisdictions have similar statutes[14] upon which their courts rely in consideration of this question, and therefore since Illinois does not have such provision, it is not advisable that cases from these states be followed in Illinois. However, Illinois does have a statute which recites ". . . nor shall any judgment upon verdict . . . be reversed, impaired or in any way affected . . . for any other default or negligence of any officer of the court, or of the parties or their counselors or attorneys, by which neither party shall have been prejudiced."[15] This statute is broad enough so that a court, in reliance upon it, might hold that the judgment against an infant will not be reversed or vacated except where substantial injustice appears as a result of the failure to appoint a guardian ad litem, but research has not revealed an Illinois case so applying the provision.

An infant is, in the eyes of the law, incapable of handling his own affairs. He is at a disadvantage because of his youth and inexperience, and the court should see to it that his interests are properly protected by appointing a guardian ad litem to assist him. However, when the infant has had the benefit of capable counsel and when his case has been handled to the best possible advantages, the infant should not be allowed to have the judgment reversed or set aside merely for failure to appoint a guardian ad litem, especially when there is no showing that the result might have been different had a guardian ad litem taken charge of the minor's suit or defense. It would be unfair to burden the other parties with the expenses of another trial in such case. This viewpoint is a logical one, and is worthy of consideration though the prevailing Illinois view and the weight of authority in those jurisdictions not controlled by statute is contrary. V. BUSSE

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—NECESSITY OF AN EMPLOYER-EMPLOYEE RELATIONSHIP UNDER THE ILLINOIS ANTI-INJUNCTION ACT.—The Meadowmoor Dairy Company sells its products to independent contractors, called vendors, who in turn sell to stores and homes. This method of marketing seems to be very efficient, because the company has been able to dispose of its products at a lower price than those of other dairies which were compelled, because of a decreased volume of

[14] Ark. Civil Procedure Code (1937), § 657 and 657(1). See also Callaghan's Mich. Stat. Ann., § 27.2618 providing that "No judgment or verdict shall be set aside or reversed, or a new trial be granted . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall appear that the error complained of has resulted in a miscarriage of justice." In Curtis v. Curtis, 250 Mich. 105, 229 N.W. 622 (1930), the court said it was not an abuse of discretion to refuse to reverse the judgment against the infant merely for failure to appoint a guardian ad litem.

[15] Ill. Rev. Stat. 1937, Ch. 7, § 6(14).

business, to "lay off" some of their milk wagon drivers. The Milk Wagon Driver's Union, of which the discharged employees were members, objected to the Meadowmoor system, since the vendors did not observe union hours or methods, and the union picketed the company's plant as well as the stores which purchased its milk.[1] The company sued to enjoin this conduct and the Illinois Supreme Court held that the anti-injunction act[2] could not "be invoked for the purpose of compelling a producer not employing labor to change its system of distribution."[3] The court further stated that an employer-employee relationship would be essential[4] to an application of the act, in accordance with the decisions of the federal courts under the Clayton anti-injunction provision.[5]

Behind the construction of every such act lurks a constitutional question. In *Truax* v. *Corrigan*,[6] where picketing, accompanied by libellous signs, obstructions of the entrances to the plaintiff's place of business, and threats to the plaintiff's customers, was resorted to, the Supreme Court of the United States held that the Arizona act was unconstitutional, as construed to forbid an injunction under such circumstances. The court indicated that if a state statute legalizes previously unlawful conduct in labor disputes, to the detriment of an employer's "property rights," the statute violates due process of law. If, on the other hand, the provision merely denies equitable relief under the circumstances, equal protection of the laws is denied. In either case the classification is unreasonable under the Truax case. Where acts of Congress are involved, equal protection of the law is not guaranteed by the Constitution,[7] but denial of equitable relief to protect a "property right" if based upon an unreasonable classification would seem to violate due process.[8] The latter point has not been adjudicated authoritatively

1 Violence was alleged and proved by the plaintiff. This matter has a bearing on the constitutional issue. See notes 10 and 21 infra.

2 Ill. Rev. Stat. 1937, Ch. 48, § 2a: "No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

3 Meadowmoor Dairies v. Milk Wagon Drivers' Union, Etc., 21 N.E. (2d) 308 at 313 (Ill., 1939).

4 Ibid., at 313.

5 29 U.S.C.A. § 52.

6 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

7 Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921); Siddons v. Edmonston, 42 App. D.C. 459 (1914).

8 See Dent v. State of West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); McCray v. United States, 295 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

in regard to anti-injunction acts.[9] A further question is presented in regard to the constitutional issue. Where the "laborers" have engaged in unlawful conduct as an incident to their picketing, is a statute violative of due process or equal protection of the laws which forbids an injunction against the peaceful picketing? Does labor lose its right to picket peacefully by merging it in an unlawful plan? The courts have not been uniform in their holdings on this point,[10] but it would seem that such a construction would not render the act unconstitutional.[11]

It seems rather likely that these constitutional problems had something to do with the evolution of the doctrine that an anti-injunction act is not applicable unless the disputing parties stand in the relationship of employer and employee. Conduct which has been recognized as lawful in a dispute between an employer and his workers and their union has not been so recognized in other types of disagreement.[12] This fact, in view of the Truax case, has caused the courts to evince a justifiable tendency to require the relationship as an essential to the invocation of the act. The fact that many of the earlier cases laying down the doctrine have involved situations where the conduct was unlawful seems to strengthen this conclusion. Thus we find that the rule was invoked to defeat the operation of the Clayton provision where a secondary boycott

[9] See Blankenship v. Kurfman, 96 F. (2d) 450 (1938); Senn v. Tile Layers' Protective Union, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937); Lauf v. E. G. Shinner & Co., 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1937); Levering & Garrigues Co. v. Morrin, 71 F. (2d) 284 (1934).

[10] United States v. Railway Employees' Dept. A.F.L., 283 F. 479 at 494 (1922), in which it was said that "the so-called peaceable and lawful acts are so interwoven with the whole plan of intimidation and obstruction that to go through the formality of enjoining the commission of assaults and other acts of violence and leave the defendants free to pursue the open and ostensibly peaceful part of their program would be an idle ceremony." To the same effect, see Vaughan v. Kansas City Moving Picture Operators' Union, 36 F. (2d) 78 (1929). But see Great Northern Ry. Co. v. Local G.F.L. of I.A. of M., 283 F. 557 (1922), where it was said: "In respect to the terms of the order, it is proper to observe that they must be within section 20 of the Clayton Act . . . which provides that in strikes ex-employees shall not be restrained 'from recommending, advising, or persuading others by peaceful means' to quit work, or to refuse to work for the employer, nor 'from attending at any place where any such person or persons [ex-employees] may lawfully be, for the purpose of peacefully obtaining or communicating information' or to exercise persuasion as aforesaid, nor 'from peaceably assembling in a lawful manner, and for lawful purposes.' " See also Great Northern Ry. Co. v. Brosseau, 286 F. 414 at 423 (1923): "There will be some hotheads, and a few who may be believers in dynamite and the dagger as a means of furthering the cause of working men. I cannot conceive, however, of a graver injustice than to treat the acts of any such individuals or groups as an index of the character or intent of any union in the railway service. . . . Why not deal with such wrongs and crimes as we do in other fields of life? Why not treat them as the acts of those who do them, or aid and abet such doers? Why not hunt down the guilty persons and punish them, and not impute their misdeeds to the striking union and its officers? . . . Just legal administration can give but one answer to these questions."

[11] American Steel Foundries v. Tri-City C.T. Council, 257 U.S. 184, 42 S. Ct. 72, 66 L. Ed. 189 (1921).

[12] See Quinton's Market v. Patterson, 21 N.E. (2d) 546 (Mass., 1939); note, 99 A.L.R. 533.

was resorted to,[13] where interference with contract was present,[14] and where acts of violence had been committed.[15] The later cases extended the doctrine to situations where peaceful picketing was the sole conduct of the employees.[16] Furthermore it was held that labor unions, none of whose members were employed by the plaintiff were not "employees" under the act.[17] Some decisions[18] carried the doctrine to the point where the relationship was required as of the time of the injunction suit, which ruling virtually nullified the act, since every employer would naturally discharge a picketing employee.[19] The Supreme Court of the United States limited the doctrine in *American Steel Foundaries* v. *Tri City Central Trades Council*,[20] where it was held that the Clayton Act did apply and did forbid an injunction of peaceful picketing by ex-employees and by a labor union which reasonably contemplated employment of its men by the plaintiff, even where there had been some violence[21] before the suit was brought.

It is interesting to note that the language in the Clayton Act which

[13] See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196 (1920); Central Metal Products Corporation v. O'Brien, 278 F. 827 (1922), app. dismissed 284 F. 850 (1922).

[14] Montgomery v. Pacific Electric Ry. Co., 258 F. 382 (1919); Armstrong v. United States, 18 F. (2d) 371 (1927); Buyer v. Guillan, 271 F. 65 (1921).

[15] See Quinlivan v. Dail-Overland Co., 274 F. 56 (1921); International Organization, Etc. v. Red Jacket C. C. & C. Co., 18 F. (2d) 839 (1927); State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 P. 686 (1921); Vaughn v. Kansas City Moving Picture Operators' Union, 36 F. (2d) 78 (1921).

[16] Waitresses' Union v. Benish Restaurant Co., 6 F. (2d) 568 (1925); United States Gypsum Co., v. Heslop, 39 F. (2d) 228 (1930); Montgomery v. Pacific Electric Ry. Co., 293 F. 680 (1923), cert. den. 264 U.S. 586, 44 S. Ct. 334, 68 L. Ed. 862 (1924). See also Ferguson v. Peake, 18 F. (2d) 166 (1928).

[17] Waitresses' Union v. Benish Restaurant Co., 6 F. (2d) 568 (1925). This view was rejected in regard to the Illinois Act in Schuster v. International Ass'n of Machinists, 293 Ill. App. 177, 12 N.E. (2d) 50 (1937).

[18] Canoe Creek Coal Co. v. Christinson, 281 F. 559 (1922). See also A. J. Monday Co. v. Automobile, A. & V. Workers, Local No. 25, 171 Wis. 532, 177 N.W. 867 (1920), where the court stated that an employer-employee relationship as of the time of the suit was necessary and then proceeded to grant an injunction against all save peaceful conduct, which was all that the court could constitutionally do under Truax v. Corrigan. For a discussion of the lengths to which the doctrine was carried under the Clayton Act, see F. Frankfurter and N. Green, "Congressional Power Over the Labor Injunction," 31 Col. L. Rev. 385 at 405.

[19] See the dissent of Justice Brandeis in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196 (1920): "If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship." See also the dissent in G. Heitkemper v. Central Labor Council, 99 Ore. 1, 192 P. 765 (1920): "It seems . . . that to hold that this statute only applies in cases where the employes were still actually engaged in working for their employer, and that it was not intended to be effective in cases where the relation of employer and employe are temporarily suspended by a strike . . . would be altogether too narrow—so narrow as to be absolutely absurd. Such a construction would entirely defeat the obvious purpose of the statute."

[20] 257 U.S. 184, 42 S. Ct. 72, 66 L. Ed. 189 (1921).

[21] This point is of interest in that it indicates an attitude on the part of the

the courts seized upon to justify the employer-employee doctrine was not incorporated in the Illinois act,[22] which would seem to indicate that the legislature disapproved of the doctrine, at least in its extreme implications. It would seem, however, that the legislature did not contemplate the type of controversy represented by the instant case. Surely it was not meant that labor unions should be permitted to picket a man merely because he distributes his goods through independent contractors and not through employees of his own. If the act were construed to deny injunctive relief in such a case, the constitutional question of *Truax* v. *Corrigan*[23] might be raised again. Therefore it seems that the instant case was sound, but it is unfortunate that the decision was couched in the terms of the employer-employee doctrine, since there is a danger that future cases[24] will extend the rule to the unjustifiable limits that were reached under the Clayton act.

W. L. SCHLEGEL

INTERNATIONAL LAW—RELATIONS BETWEEN STATES—JURISDICTION OVER FUNDS DEPOSITED WITHIN A STATE BY FOREIGN CORPORATIONS.—In the days of the Imperial Russian government, a Russian insurance corporation, desirous of doing business in New York, complied with the New York statute by depositing with state officers a required sum from its capital as security "for the protection of all its policyholders and creditors within the United States." This sum was by statute considered as the aggregate capital of the corporation in regard to business done under the statute.[1] The Soviet government later decreed that all insurance companies be nationalized and their property become state property. Soviet Russia not yet being recognized by the United States, this decree was disregarded as

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Supreme Court that the Clayton Act could constitutionally forbid an injunction against peaceful conduct even where there had been acts of violence.

22 The Clayton Act reads as follows: "No restraining order or injunction shall be granted . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment. . . ." This language is not present in the Illinois Act, which otherwise follows substantially the terms of the Clayton Act.

23 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

24 The case of Ross W. Swing v. American Federation of Labor (not reported at time of going to press) in the Illinois Supreme Court on rehearing, has held that the Anti-injunction Act does not apply to a labor union which the employees have refused to join.

1 "No insurance corporation organized and existing under the government or laws of any state or country outside of the United States . . . [shall transact business here unless it] shall have securities or other property within the United States, deposited with insurance departments or state officers. . . . For all purposes specified in this chapter, the capital of such a foreign insurance corporation . . . shall be the aggregate value of all securities and other property [so deposited]." Consol. Laws of N.Y., Ch. 30, § 27. Compare the Illinois provisions. Ill. Rev. Stat. 1937, Ch. 73, §§ 720, 721, 722, requires the foreign insurance company to file certain information and obtain a certificate of authority. Section 723 (3) provides, "Before a certificate of authority is issued to a foreign or alien company . . . it shall deposit with the Director securities which are authorized investments for similar domestic companies . . . of the amount, if any, required of a domestic company

to extraterritorial effect, and the company, though dead in Russia, continued to do business in New York until 1925. At this time, the Superintendent of Insurance, pursuant to court order, took possession as liquidator, paying off domestic policyholders and creditors and foreign lien creditors. There was a considerable sum remaining, which was deposited with the sole remaining director as a conservator on delivery of a bond that he would distribute to creditors and shareholders on court order and only then. Foreign creditors and stockholders immediately brought suit for parts of that fund, and during pendency of the consolidated suits the United States recognized Soviet Russia. The United States, as assignee, under the treaty with Russia, of the Soviet Union's claims, now also laid claim to the fund.

The New York Court of Appeals denied the claim of Russia and of its assignee, the United States, to the fund, holding that the distribution of funds to foreign creditors and shareholders would still go on under the jurisdiction of the courts of New York. The court conceded that a recognition as a *de jure* government acts retroactively, validating all previous decrees made by that government, but said that the decree would have no effect upon these assets of the branch of the company, (1) because, despite the fact that all the expert testimony was to the contrary, the decree was not intended by Russia to apply to these assets, and (2) even if it was so intended, these assets were beyond the jurisdiction of Russia, since the insurance company, by complying with the insurance laws of New York, in effect created a subsidiary corporation organized under the laws of that state, so that the sum deposited must be governed by the laws of that state, regardless of the status of the parent company. Upon both points, three of the seven judges of the Court of Appeals dissented, expressly denying that the branch was either a factual or a legal entity, since the deposit of funds was mere "security for business transacted by it here and not elsewhere."[2]

A mere de facto government's decrees have no extraterritorial effect, except as to property within the jurisdiction at the time of the decree.[3] The power to recognize this sovereign as a government *de jure* rests in the

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similarly organized and doing the same kind or kinds of business, or, in the case of such alien company, of the amount of two hundred thousand dollars; or in lieu of such deposit such foreign or alien company shall satisfy the Director that it has on deposit with an official of a state of the United States, authorized by the law of such a state to accept such deposit, securities of at least a like amount, for the benefit and security of all policy obligations of such company in the United States."

2 Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N.E. (2d) 758 (N.Y., 1939).

3 For a full discussion of this point, see note, 17 CHICAGO-KENT LAW REVIEW 286. See also E. D. Dickinson, "The Unrecognized Government or State in English and American Law," 22 Mich. L. Rev. 29; T. Baty, "So-called 'De Facto' Recognition," 31 Yale L. J. 469; L. Connick, "The Effect of Soviet Decrees in American Courts," 34 Yale L. J. 499; M. A. Kallis, "The Legal Effects of Non-recognition of Russia," 20 Va. L. Rev. 1; note, 38 Harv. L. Rev. 816. The "refusal to give effect to decrees of unrecognized states conflicts with the principle that the acts of a government in its own territory will not be inquired into by a foreign court." O. K. Fraenkel,

executive and legislative departments of the forum, and not in the courts.[4] When such a recognition takes place, the courts take judicial notice of it[5] and consider it to relate back to the time when the new government actually gained power.[6] The acts and decrees of such a recognized power over property within its jurisdiction will be given effect[7] by our courts,[8] with several exceptions, two of which are pertinent here: (1) Penal statutes, and, some say, statutes imposing a forfeiture, will not be enforced by another nation;[9] and (2) a foreign statute which is against the public policy of the forum, it has been held, will not be enforced.[10] Neither of these principles was made a basic ground for the decision.

Before recognition of Russia, our courts refused to give its decrees effect, but originally declined to allow the directors of the dissolved companies to recover balances in this country, on the ground that it might subject the depositary to double liability if he ever decided to do business in Russia.[11] However, where the depositary was a state trustee, this objection was held not to apply;[12] and later, when the danger of double liability was seen to be remote, even a private depositary was ordered to pay over the funds to the directors.[13] The recognition of Russia raises the question of whether the Soviet Union does not have the right to the funds.

The New York court can find some authorities sustaining its position that the decrees were not intended to confiscate these assets. The law of a foreign country must be proved as matters of fact are proved,[14] but from

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"The Juristic Status of Foreign States, Their Property and Their Acts," 25 Col. L. Rev. 544 at 563.

[4] Jones v. United States, 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890); Duff Development Co., Ltd. v. Kelantan Government, [1924] A. C. 797; Oetjen v. Central Leather Co., 246 U.S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918).

[5] Ricaud v. American Metal Co., 246 U.S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918).

[6] Oetjen v. Central Leather Co., 246 U.S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); Monte Blanco Real Estate Corp. v. Wolvin Line, 147 La. 563, 85 So. 242 (1920).

[7] Joseph H. Beale, The Conflict of Laws, III, 1664: "A court neither will nor can apply any law to the case before it other than the law of the forum. It must necessarily follow that foreign law, in so far as it is in any way material to the issue, must operate not as law but as fact."

[8] Princess Paley Olga v. Weisz, [1929] 1 K.B. 718; Ricaud v. American Metal Co., 246 U.S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918); Terrazas v. Holmes, 115 Tex. 32, 275 S.W. 392 (1925); Terrazas v. Donohue, 115 Tex. 46, 275 S.W. 396 (1925); Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918).

[9] Ogden v. Folliott, 3 T.R. 726, 100 Eng. Rep. 825 (1790); Macleod v. Attorney-General for New South Wales, [1891] A.C. 455; Lecouturier v. Rey, [1910] A.C. 262.

[10] Wolff v. Oxholm, 6 M. & S. 92, 105 Eng. Rep. 1177 (1817); Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); see also concurring opinion of Justices Stone, Brandeis, and Cardozo in United States v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937). Contra, Wright v. Nutt, 1 H. Bl. 136. 126 Eng. Rep. 83 (1788).

[11] Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925).

[12] People, by Beha v. Russian Reinsurance Co., 255 N.Y. 415, 175 N.E. 114 (1931).

[13] Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479 (1930), cert. den. 282 U.S. 878, 51 S. Ct. 82, 75 L. Ed. 775 (1930).

[14] Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929).

then on the question of construction is one for the court.[15] British cases have held that the Russian decrees as to banks did not dissolve them,[16] and on this authority a later British case came to a similar conclusion in regard to the similar insurance corporation decrees.[17] However, a recent English decision came to an opposite conclusion as to banks and said that "even though the foreign law has already been proved before it in another case," this is not binding—"the Court must act upon the evidence before it in the actual case."[18] If sound, this would destroy the validity of all authority on the question, including doubts expressed by the courts of many other nations.[19]

On the subsidiary corporation question, the court may have even more trouble. One dealing with a foreign corporation impliedly subjects his investment to acts of the corporation's sovereign, "in the absence of legislation equivalent to making it a corporation of the . . . [investor's] country."[20] Dictum in an earlier case stated that the status of the local department of a foreign corporation was "analogous to that of a corporation."[21] A case which seems to be in point is *In re Stoddard*,[22] dealing with an insolvent Norwegian insurance company. After paying all creditors on policies within the country, the court refused to pay further even to United States citizens on policies made outside of this country, instead turning over the funds to the Norwegian liquidator. The court expressly stated that the domestic agency was "a complete and separate organization," but went on to say this was only for the purpose of securing "business transacted by it here and not elsewhere," that "it is the fair presumption that the Legislature intended to adjust the amount of this capital to domestic business and to the risks incurred in issuing policies here, and not to those which might be incurred by issuing policies abroad. . . ."

Thus it is seen that the argument that the decrees were not intended to apply here is doubtful, and the argument that the local department was in effect a subsidiary corporation is probably erroneous. In view of this,

[15] Wheeler v. St. Paul Crushed Stone Co., 191 Ind. 75, 132 N.E. 1 (1921); Electric Welding Co. v. Prince, 200 Mass. 386, 86 N.E. 947 (1909); Rice v. Rankans, 101 Mich. 378, 59 N.W. 660 (1894); Keasler v. Mutual Life Ins. Co., 177 N.C. 394, 99 S.E. 97 (1919). See also Mexican C. R. Co. v. Gehr, 66 Ill. App. 173 (1896).

[16] Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse, [1925] A.C. 112. See also In re Russian Bank for Foreign Trade, [1933] Ch. Div. 745.

[17] Employers' Liability Assur. Corp. v. Sedgwick, Collins, & Co., [1927] A.C. 95. See also Russian Ins. Co. v. London & Lancashire Ins. Co., [1928] Ch. Div. 922.

[18] Lazard Bros. & Co. v. Midland Bank, Ltd., [1933] A.C. 289 at 297.

[19] See P. Wohl, "Nationalization of Joint Stock Banking Corporations in Soviet Russia and Its Bearing on Their Legal Status Abroad," 75 U. of Pa. L. Rev. 385 at 386, 392, 395. See also United States v. Belmont, 301 U.S. 324 at 326, 57 S. Ct. 758, 81 L. Ed. 1134 at 1137 (1937), in which, however, the effect of the decree was admitted by demurrer. United States v. Belmont, 85 F. (2d) 542 (1936).

[20] Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527 at 537, 3 S. Ct. 363, 27 L. Ed. 1020 at 1024 (1883).

[21] Fred S. James & Co. v. Rossia Ins. Co. of America, 247 N.Y. 262, 160 N.E. 364 at 365 (1928).

[22] 242 N.Y. 148, 151 N.E. 159 at 162 (1926).

it seems possible that the majority holding is, in the words of the minority, "based on a lingering policy of non-approval and non-recognition of the nationalization and confiscation decrees of the Soviet government. . . ."[23]

R. W. BERGSTROM

JOINT TENANCY—SEVERANCE—EFFECT OF CONTRACT TO CONVEY ON AN ESTATE OF JOINT TENANCY IN LAND REGISTERED UNDER THE TORRENS ACT.—Alfred and Frances Hendriksen had an estate in joint tenancy in land registered under the Torrens Act.[1] Three days before he died, Alfred made a deed purporting to convey his interest to one Irving Naiburg, who in turn immediately made a deed running to one Louise Hendriksen as grantee. Approximately a month after the death of Alfred, Louise Hendriksen first presented the instruments for registration and requested that a certificate of title be issued to her on the property embraced by them. The statute provides that an unregistered deed on Torrens land shall operate only as a contract to convey between the parties,[2] and Frances Hendriksen opposed the application, contending that a contract to convey was not effectual to work a severance of the joint estate and that by virtue of right of survivorship she was now seized of the whole.

The Illinois Court in affirming a decision for the petitioner, Louise Hendricksen,[3] held that proceedings under the Torrens Act were governed by equitable principles and, in accordance with such principles, a contract to convey effects a severance of the joint tenancy, there being nothing in the provisions of the Land Registration Act which necessitated a departure from the general rule here.

The authority on the effect of a contract to convey on an estate of joint tenancy is amazingly sparse, with the exception of brief text or encyclopediac statements,[4] and largely English. As would be expected, those cases which hold that an agreement to convey effects a severance occur in equity, where the chancellor is aided in that conclusion by the doctrines of equitable conversion and equitable title and by a justified susceptibility to equitable considerations in general.

Apparently the only American decision in which the point was seriously raised is the case of *Kurowski* v. *Retail Hardware Mutual Fire Insurance Company*,[5] decided by the Supreme Court of Wisconsin. The plaintiff

[23] Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N.E. (2d) 758 at 774 (N.Y., 1939).

[1] Ill. Rev. Stat. 1937, Ch. 30, §§ 45 ff.

[2] Ill. Rev. Stat. 1937, Ch. 30, § 98: "A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, . . . shall take effect only by way of contract, between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this Act . . . ."

[3] Naiburg v. Hendriksen, 370 Ill. 502, 19 N.E. (2d) 348 (1939).

[4] "A covenant to sell by a joint tenant severs the tenancy in equity, though not in law. . . ." 11 Am. and Eng. Encyc. of Law 1143. "A joint tenancy may also be severed by a contract or covenant, by a joint tenant, to convey or dispose of his interest. . . ." 33 C.J. 908. These statements are based almost wholly on the authority of the cases discussed further on in this article.

[5] 203 Wis. 644, 234 N.W. 900 (1931).

there sought recovery for fire losses allegedly covered by a policy with the defendant company, which defended that the plaintiff was not the sole owner of the premises as required by statute. The plaintiff and his wife had been joint tenants in the property, and it was contended that by an agreement between the parties without conveyance such joint estate had been terminated and that, the wife now being dead, a half-interest in the property vested in her heirs. The court conceded that a mere contract to convey could effect a severance, but held that no severance resulted in this case, and thus their statement is purest dictum. In *Gould* v. *Kemp*,[6] Kemp wrote a letter to one Ward stating that his (the writer's) share of property held by them jointly as legatees under a certain will was to be subject to disposition by Ward's will. A bill being brought by the executors of Ward to claim such moiety, the court regarded the legacy as in joint tenancy and held that the tenancy was severed by the missive. Commenting on the authorities, the court says: "This shews that the bare agreement has the force of actual severance, and that the severance is held to be executed, though there exists only an agreement which is as yet unperformed. . . ."[7]

In the case of *In re Wilford's Estate*,[8] two sisters took certain houses under a will in what was said to be joint tenancy. Subsequently they agreed to make mutual wills devising the property to each other, with an undertaking that the survivor should make a will devising the property to certain persons then agreed on. The survivor failed to carry out the agreement, and on her death this bill for administration was brought, the residuary legatees of the survivor contending that she took the whole interest in the property on the death of her sister by virtue of right of survivorship. The court, however, ruled that the transactions between the sisters had severed the joint tenancy. An earlier case[9] was a bill to compel surrender of a copyhold estate under a covenant in a mortgage to convey such interest. Defendant, as the widow of the mortgagor, claimed an estate in free bench,[10] to which she was entitled under the laws if her husband died possessed of the estate and without alienating. The widow was ordered to execute instruments of conveyance, the court ruling that an agreement to convey is in equity a conveyance, since vendor or heirs could be held as trustee of the estate for the purchaser, and remarking, "A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity."[11] By the time *Burnaby* v. *Equitable Reversionary Interest Society*[12] was decided, the question whether a mere agreement could effect a severance of joint tenancy was hardly considered susceptible of argument, the court in that case being primarily concerned with the power of the wife of the plaintiff—an infant—to make such an agreement.

6 2 Myl. & K. 304, 39 Eng. Rep. 959 (1834).

7 39 Eng. Rep. 959 at 961.

8 11 Ch. Div. 267 (1879).

9 Brown v. Raindle, 3 Ves. Jr. 256, 30 Eng. Rep. 998 (1796).

10 Free bench, according to 27 C.J. 895, is "that estate in copyhold lands which the wife has on the death of her husband for her dower, according to the custom of the manor."

11 30 Eng. Rep. 998 at 999.

12 28 Ch. Div. 416 (1885).

In another decision,[13] the English court held that an agreement by a wife to convey any after-acquired property above a certain value to trustees severed the wife's joint estate as one of three cestuis under a trust subsequently set up. Said the court, "It is quite clear that any agreement to sever made by a joint tenant, if it binds the parties, if it is made for value, is just as effectual as if the intention of the parties expressed in the agreement had actually been carried out by a conveyance of the property."[14]

However, it was argued by appellant in the principal case that, even if a contract to convey would formerly effect a severance of an estate of joint tenancy, the principle was now modified by the Torrens Act. The object of the Torrens Act is to provide a method of registration of titles whereby, by reference to a certificate, the state of title to a particular piece of land may be ascertained and relied upon by those who would deal with the property.[15] Appellant here can hardly claim estoppel by reason of the nonregistration, as she has in no way changed her position in reliance on the record title, so it is hard to perceive how the existence of the Torrens Act can aid her case in this respect.[16] The court was asked to rule that, because the conveyance was not filed until after the death of the grantor, at which time the right of survivorship attached, the interest was not severed until that event. The appellant also argued, relying on the general rule that liens and conveyances affect Torrens land only on their being filed on the certificate,[17] that the right of survivorship, being prior, took precedence,[18] overlooking the fact that registration is important only to give notice, and that lack of registration should, in the absence of clear legis-

[13] In re Hewett, [1894] 1 Ch. 362.

[14] [1894] 1 Ch. 362 at 367.

[15] As it was well stated in the case of Application of Bickel, 301 Ill. 484 at 491, 134 N.E. 76 at 79 (1922): "The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title . . . to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place . . . to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested . . . to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in that regard . . . and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested. . . ."

[16] 21 C. J. 1173: One who clothes another with title is estopped to deny such title, however, "in accordance with the general rules no estoppel arises in favor of one whose acts were not influenced by such conduct, or who has suffered no injury therefrom. . . . There can be no estoppel in favor of persons who did not act in reliance on the acts or representations of the party whom it is sought to estop. . . ."

[17] Ill. Rev. Stat. 1937, Ch. 30, §§ 98, 119, 121-3.

[18] That if severence does not occur before death survivorship takes precedence is well established. Thus a joint tenancy may not be severed or affected by devise or testamentary direction. Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).

lative intent, be of consequence only where one is prejudiced by such lack of notice. The court however refused to extend the rule beyond the limitations placed upon it by the underlying reason, and, in declining to add thus to the mysteries of property law, its conclusion appears fully warranted by precedent and common sense.

R. G. MAYER

TAXES—MULTIPLE TAXATION—DEATH TAX ON POWER OF DISPOSAL OF TRUST ADMINISTERED ELSEWHERE.—Two cases recently decided by the Supreme Court of the United States have clarified an issue upon which there has been much discussion[1] and, undoubtedly, the principles annunciated will have far reaching application.

In *Curry* v. *McCanless*,[2] a decedent, domiciled in Tennessee, created a trust in Alabama, with directions to pay the income to her for life, and with a reservation of the right to dispose of the trust estate by her will. The death tax was paid on the trust estate in Alabama, and the corpus of the trust was also included in her gross estate for purposes of the Tennessee transfer tax.

In *Graves* v. *Elliot*,[3] a decedent, domiciled in Colorado, created a trust in Colorado, to pay the income to her daughter for life, and eventually to pay the principal to the daughter's children. She reserved the right to change the beneficiaries without their consent, to revoke or modify the trust, and to remove the trustee, but never exercised any of these powers. At the time of her death, the decedent was a resident of New York. Colorado collected a tax upon the transfer of the trust, and New York included the corpus of the trust in the decedent's gross estate for purposes of the New York transfer tax.

The court upheld the power of each state to tax in both instances. The basis upon which the decisions rest is that, since two distinct sets of legal relationships were created, one in the trustees and the other in the owner of the power of disposal, each was a source, or potential source, of wealth, receiving the benefit and protection of the state where located and consequently within its jurisdiction for tax purposes.

There is no express prohibition of multiple taxation in the Constitution. In 1905, however, the court took cognizance of the injustice of multiple taxation and clearly decided that tangible property permanently situated outside the state of domicile of the owner is subject to taxation only in the state where so permanently located, and not in the state of the

1 Robert C. Brown, "Multiple Taxation by the States—What is Left of It?" 48 Harv. L. Rev. 407; Maurice H. Merrill, "Jurisdiction to Tax—Another Word," 44 Yale L. J. 582; John F. Bonner, "Single Situs for Inheritance Taxation of Intangibles," 16 Minn. L. Rev. 335; Francis C. Nash, "And Again Multiple Taxation," 26 Georgetown L. J. 288.

2 59 S. Ct. 900, 83 L. Ed. (Adv.) 865 (1939).

3 59 S. Ct. 913, 83 L. Ed. (Adv.) 880 (1939).

owner's domicile.[4] This principle was later extended to inheritance taxation.[5]

As to intangible personal property, however, there are two divergent lines of reasoning. One is based upon the conviction that multiple taxation is unreasonable and oppressive. Several divided opinions have allowed only one state to tax, by attributing to intangibles a situs at the domicile of the owner by the maxim *mobilia sequunter personam*, where no situs has already been established by legal ownership and control elsewhere.[6]

The other is based upon the theory that control, protection, and benefit are together the justification for all taxation, and therefore any state conferring such benefit or protection is entitled to its quid pro quo.[7]

From a purely legalistic standpoint this theory may be defended.

[4] Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493 (1905).

[5] Frick v. Pennsylvania, 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925).

[6] Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A.L.R. 386 (1929), where it was said that while the fiction *mobilia sequunter personam* may be applied in order to determine the situs of intangible personal property for taxation, it must yield to the established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if to do so would result in inescapable and patent injustice, whether through double taxation or otherwise. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000 (1930). "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, is not sufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota." Baldwin v. Missouri, 281 U.S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A.L.R. 1303 (1930); Beidler v. South Carolina Tax Commission, 282 U.S. 1, 51 S. Ct. 54, 75 L. Ed. 131 (1930); First Nat. Bank v. Maine, 284 U.S. 312 at 326, 52 S. Ct. 174, 76 L. Ed. 313 at 319, 77 A.L.R. 1401 (1932), which states, "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."

[7] Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A.L.R. 386 (1929), where Mr. Justice Stone, concurring, specifically exempts from the decision whether or not Virginia, had it so desired, might have taxed the equitable interests of the beneficiaries of the trust held in Maryland. He contends that there would be no double taxation in the real sense, since the legal interests protected and taxed by the two taxing jurisdictions are different. Mr. Justice Holmes, dissenting in the same case, said that the fact that the legal title is in trustees in Maryland and may be taxed there does not affect the right of Virginia to tax the equitable interest in Virginia, since this is not prevented by anything in the Constitution. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000 (1930), where Mr. Justice Stone, concurring, said that a single economic interest may have such legal relationships within different taxing jurisdictions as to justify its taxation in both. Consequently, no principle broadly prohibiting taxation merely because it is double should be laid down. Mr. Justice Holmes, dissenting, said that it is not disputed that the transfer is taxable in New York, but there is no constitutional objection to the same transaction being taxable in Minnesota, inasmuch as Minnesota law keeps the debt

There is ample authority that a power to appoint by will, reserved by the donor, and the power to revoke a trust, even though unexercised, are property rights, and consequently proper subjects for taxation.[8]

However, the court early in the century developed the doctrine of "business situs" to permit state property taxation of intangibles used in a localized business owned by a domiciliary of another state.[9] It was decided that the legal fiction expressed in the maxim *mobilia sequunter personam* must yield to this extent, at least, to actual control elsewhere.[10] This doctrine was reaffirmed in *Wheeling Steel Corporation* v. *Fox*.[11]

There is no question that real estate and tangible personal property may only be taxed where such property is physically present.[12] Not to allow intangible property, which has acquired a legal situs in a state, the same immunity as that given to tangible property belonging to an individual, or to intangibles belonging to a corporation under the business situs doctrine, seems to be lacking in logic. Multiple taxation of intangible property is just as objectionable from an economic standpoint as either of the other two instances.

A great many of the states have passed reciprocal tax statutes in order to avoid multiple taxation.[13] These statutes, however, are not uni-

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alive and hence is entitled to the quid pro quo in return. Baldwin v. Missouri, 281 U.S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A.L.R. 1303 (1930), where Mr. Justice Stone, dissenting, said that to hold one must pay taxes in two places, reaching the same economic interest, with respect to which he has sought and secured the benefit of the laws in both, does not seem to him so oppressive or arbitrary as to infringe constitutional limitations.

[8] Chanler v. Kelsey, 205 U.S. 466, 27 S. Ct. 550, 51 L. Ed. 882 (1907); Bullen v. Wisconsin, 240 U.S. 625, 36 S. Ct. 473, 60 L. Ed. 830 (1916); Saltonstall v. Saltonstall, 276 U.S. 260, 48 S. Ct. 225, 72 L. Ed. 565 (1928); Chase Nat. Bank v. United States, 278 U.S. 327, 49 S. Ct. 126, 73 L. Ed. 405 (1929); Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 53 S. Ct. 244, 77 L. Ed. 463 (1933); Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S. Ct. 123, 73 L. Ed. 410 (1929). See also Frederick O. Dicus, "Taxation of Powers of Appointment under the Illinois Inheritance Tax Law," 14 CHICAGO-KENT REVIEW 14; Frederick O. Dicus, "Taxability of Rights of Withdrawal under Federal Estate Tax," 17 CHICAGO-KENT LAW REVIEW 209; Erwin N. Griswold, "Powers of Appointment and the Federal Estate Tax," 52 Harv. L. Rev. 929; "—A Dissent," W. Barton Leach, 52 Harv. L. Rev. 961.

[9] New Orleans v. Stempel, 175 U.S. 309, 20 S. Ct. 110, 44 L. Ed. 174 (1899); Bristol v. Washington County, 177 U.S. 133, 20 S. Ct. 585, 44 L. Ed. 701 (1900); State Board of Assessors v. Comptoir National D'Escompte, 191 U.S. 388, 24 S. Ct. 109, 48 L. Ed. 232 (1903); Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395, 27 S. Ct. 499, 51 L. Ed. 853 (1907).

[10] Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U.S. 346, 31 S. Ct. 550, 55 L. Ed. 762, L.R.A. 1915C 903 (1911).

[11] 298 U.S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

[12] Frick v. Pennsylvania, 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925).

[13] Ill. Rev. Stat. 1937, Ch. 120, § 375:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, in the following cases:

"(2) When the transfer is by will or intestate laws of property within the State, or having a taxable situs in this State and not subject to inheritance, succession

form,[14] and, consequently, the results are not as satisfactory as could be obtained by allowing intangible property, which has a legal situs for tax purposes in one jurisdiction, immunity from taxation elsewhere.

J. R. Scott

Workmen's Compensation Acts — Injuries for Which Compensation May Be Had—Whether Injury Occasioned by Rescue of Third Person May Be Held to Arise out of Employment.—Prior to the injury which resulted in his death, one Puttkammer worked for the Wille Coal Company where he did general work around the coal yard and sometimes drove a truck. On the day of the fatal injury, Puttkammer had delivered his last load of coal and was on his way back to the yard. At the corner of One Hundred and Seventy-Third and Halsted streets the traffic was obstructed by two cars which had collided. Puttkammer pulled over to the east side of the four lane highway, stopped the truck, and went over to the cars, where he picked up an injured child. He was walking back to the truck when another northbound car struck one of the damaged cars and knocked it against Puttkammer, who was thrown to the street and killed. The Illinois Industrial Commission refused compensation on the ground that the injury did not arise out of the employment. The Superior Court of Cook County set aside this order and was sustained by the Supreme Court in *Puttkammer* v. *Industrial Commission*.[1] In the opinion, the court said that to be compensable the injury must have arisen out of and in the course of the employment,[2] that the giving aid to an injured child on the highway is natural, and that it is immaterial whether he went to the damaged cars to give aid or to see whether his way was clear, neither act taking him out of the course of his employment because it was foreseeable.

The modern tendency of the decisions is to allow compensation in every case where a liberal construction of the statute would justify it. But, as was said in one decision, "even in view of this liberal construction,

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or estate tax in the state of the decedent's residence, and the decedent was a nonresident of the State at the time of his death.

"(3) When the transfer is of property made by a resident, . . . by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, or where any change in the use or enjoyment of property included in such transfer . . . may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor . . . to alter, or to amend, or to revoke any transfer . . . thus subject to alterations, amendment, or revocation.

"(4) Whenever any person . . . shall exercise a power of appointment . . . in the same manner as though the property . . . belonged absolutely to the donee. . . ."

[14] Note, 43 Harv. L. Rev. 641; note, 28 Col. L. Rev. 806.

[1] 371 Ill. 497, 21 N.E. (2d) 575 (1939).

[2] "Arising out of" does not mean the same as "in the course of" the employment. See In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913); Mueller Constr. Co. v. Industrial Board of Illinois, 283 Ill. 148, 118 N.E. 1028 (1918); Griffith v. Cole Bros., 183 Iowa 415, 165 N.W. 577 (1917); Larke v. John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 A. 320 (1916).

it is not enough for the applicant to say that the accident would not have happened if he had not been engaged in the particular employment or if he had not been at the particular place."[3] The accident must occur because of something he was doing in the course of his employment and because he was exposed to some particular danger by the nature of his employment.[4]

According to the so-called doctrine of street risks, no compensation will be allowed in case of an injury or death from a peril to which the public at large is exposed, but there is a well recognized exception in the case of an employee whose employment requires him to be frequently or continually in the street.[5] It is also held that injuries sustained by an employee who, when confronted by a sudden emergency, goes beyond his regular duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property are compensable as they arise out of and in the course of the employment.[6]

In the case of *Sichterman* v. *Kent Storage Company*,[7] the employee was a traveling salesman for the defendant. While traveling in his car on his return from making business calls, he came across a peddler whose wagon had been struck by another car. Sichterman drove about twenty five feet beyond, stopped, walked back, and had just asked the peddler if there was anything he could do when he was struck by another car. The

3 Walker v. Hyde, 43 Idaho 625, 253 P. 1104 (1927). To the same effect, see Peet v. Mills, 76 Wash. 437, 136 P. 685 (1913).

4 Walker v. Hyde, 43 Idaho 625, 253 P. 1104 (1927); In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913); California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257 (1923). Glotzl v. Stumpp, 220 N.Y. 71, 114 N.E. 1053 (1917), seems to be clearly out of line. There the employee was a driver of a florist delivery truck and assisted the man who accompanied him in order to deliver the flowers. The driver fell off a ladder while putting flowers in a window box and was injured. The court said, in refusing compensation, that there was no connection between driving a truck and the fall from the ladder; but it would certainly seem to be to the employer's interest for his employee to respond to a request to help with the flowers at a home where the delivery was made.

5 Mueller Constr. Co. v. Industrial Board of Illinois, 283 Ill. 148, 118 N.E. 1028 (1918); Beaudry v. Watkins, 191 Mich. 445, 158 N.W. 16 (1916); Kunze v. Detroit Shade Tree Co., 192 Mich. 435, 158 N.W. 851 (1916). In Capitol Paper Co. v. Conner, 81 Ind. App. 545, 144 N.E. 474 (1924) it was said, "The mere fact that the hazard is one to which every person on the street is exposed is not sufficient to defeat compensation." In New Amsterdam Casualty Co. v. Sumrell, 30 Ga. App. 682, 118 S.E. 786 (1923), the court stated, "If the work of an employee or the performance of an incidental duty involves an exposure to the perils of the highway, the protection of the Workmen's Compensation Act extends to the employee while he is passing along the highway in the performance of his duties."

6 Owners' Realty Co. v. Bailey, 153 Md. 274, 138 A. 235 (1927); Brock-Haffner Press Co. v. Industrial Commission, 68 Colo. 291, 187 P. 44 (1920); U.S. Fidelity & Guaranty Co. v. Industrial Accident Commission, 174 Cal. 616, 163 P. 1013 (1917); Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N.E. 999 (1915); Ocean Accident & Guaranty Co. v. Industrial Accident Commission, 180 Cal. 389, 182 P. 35 (1919). See L.R.A. 1916A 57, citing Collins v. Collins, [1907] 2 I.R. (Ir.) 104, where it was said that the rule was otherwise where the perilous situation does not arise out of the employment, or where the employee goes to the aid of his employer who is being attacked by a gang of ruffians.

7 217 Mich. 364, 186 N.W. 498 (1922).

court was of the opinion that the accident occurred when the employee was performing an act of humanity entirely dissociated from the employer's work and did not arise out of the employment.

In *Priglise* v. *Fonda J. & G. R. Company*,[8] an injury was sustained by a flagman while trying to rescue a child who had fallen on the tracks of another railroad company whose tracks were parallel. The majority of the court, in holding that the injury did not arise out of and in the course of the employment, said the act of the deceased was not within his employment because the other railroad company employed a man to prevent the identical situation which led to the accident and so it could not have been contemplated that an emergency would arise authorizing Priglise to do what he did.

The instant case would seem to be out of line according to the present law upon the subject and the above cases.[9] There appears to be no causal connection between the injury and the employment, except for the fact that were it not for the employment the employee would not have been at the place of the accident, which is, as has already been stated, not sufficient. The case would also be eliminated from the principle of emergency, which extends only to injuries received in the attempt of the employee to save his own life, the life of a fellow workman, or the employer's property. Here the injury was received while aiding a third person, a stranger to the employer, not on or near the employer's property. But in the three classes within the scope of the principle, the employer has a direct interest, for, when the employee saves his own life or the life of a fellow workman, it is a financial saving to the employer, and the same applies with respect to his property. The employer is not intended to be made an insurer of the safety of the employee at all times during the period of the employment, but only for injuries occurring during the performance of some acts for the employer in the course of the employment or incident to it.[10]

A rather dubious argument in favor of the decision may be founded on

8 183 N.Y. S. 414 (1920).

9 See also Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928), where the employee was a chauffeur for the employer. A police officer jumped on the running board of the cab and ordered the driver to chase another car in order that he might arrest the occupant. The cab collided with another car, and the driver was injured and died. Compensation was awarded, the court saying that since there was a statute compelling citizens, in a case of pursuit, to obey when so ordered by a police officer, the danger of pursuit was incidental to the management of the cab. It was a risk of the employment and an incident of his service. This case can be differentiated from Kennelly v. Stearns Salt & Lumber Co., 190 Mich. 628, 157 N.W. 378 (1916), in which the employee, with a gang of men, was building a railroad when he and the others were ordered by the fire warden to assist him in putting out a forest fire. While he was so engaged, he was injured. There was a statute authorizing the fire warden to call to his aid in emergencies any able-bodied man over eighteen. The court refused compensation, but here the employee had left his work temporarily, while in the case of the cab driver, he continued to do the work of his general employment, the court being of the opinion that the owner of the cab could recover the customary rate of fare.

10 N.K. Fairbanks Co. v. Industrial Commission, 285 Ill. 11, 120 N.E. 457 (1918).

the basis of the employer's good will. Since it is the custom of business houses to have the name of the company or their trucks, if the employee had not stopped but passed by, such a cold-blooded act would have an effect on persons witnessing it which would be undesirable from the employer's standpoint, as it might cause those persons and others hearing of the incident to discontinue doing business with the company. Good will is a very valuable part of a business, especially a business that deals directly with the consumer, as in the case of a coal company. Again, it has often been said that the Workmen's Compensation Acts rest on economic and humanitarian principles. If this is true, nothing could move a court more easily toward invoking these principles than the giving aid to a stricken child. As was said in the dissenting opinion of one case,[11] if the employee could have given aid and had not, he might very well have lost his job. If the employer had seen the accident, he probably would have had the employee go to the rescue. It is a reasonable inference that, in the case of an emergency, a workman will conduct himself as a human being, and this the employer could foresee at the time of hiring a man.

Since the modern trend has been toward a liberal interpretation of the Workmen's Compensation Acts, this may be another extension along that line, but it is at the most a matter of conjecture whether other jurisdictions will follow it.

V. BUSSE

[11] Priglise v. Fonda J. & G. R. Co., 183 N.Y. S. 414 (1920).