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STARE DECISIS AMONG [SIC] THE APPELLATE COURT OF ILLINOIS

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What precedential impact should be accorded to decisions of the Appellate Court of Illinois? Authors Mattis and Yalowitz examine the Illinois history of the stare decisis doctrine as it relates to Illinois appellate decisions. They demonstrate the inadequacy of the present Illinois approach, which requires trial courts to follow appellate court decisions of any division while those divisions remain free to adopt conflicting positions. Alternative approaches to this question are then analyzed in detail. The authors conclude by recommending a two-pronged approach. First, all appellate court divisions should recognize decisions of coordinate divisions as binding unless clearly erroneous. Second, if an appellate division decides that a decision of a coordinate division was erroneous, its contrary opinion should be regarded as having overruled the prior decision. Such an approach would eliminate inappropriate vestiges of territorialism, promote stability in the law, and afford trial courts clear guidance.

Whenever a judicial system employs a three-tiered structure with trial courts, an intermediate appellate court or courts, and a high court, the issue arises of what precedential value decisions of the intermediate court or courts¹ shall be accorded. Illinois has had intermediate appellate courts since 1877, and for more than a century has struggled with this issue. This Article will examine the history of the appellate court structure in terms of the precedential effect of its decisions; explore, by comparing other systems, the alternatives to the present effect given to appellate court decisions; and consider what improvements can be made in the approach currently followed by the Illinois courts.

STARE DECISIS DEFINED

This Article presupposes a working knowledge of the general concept of stare decisis, a concept used here synonymously with precedent, as the principle stating that a court will stand by its own decisions as well as by

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1. The ambiguity of the word "court" must be tolerated in this study, for sometimes it will be used to mean an institution—e.g., the Appellate Court of Illinois—and sometimes a panel of judges sitting to decide a case on appeal.

those of a higher court in a given judicial hierarchy.² Of course, modern stare decisis does not mean that a point of law once decided is settled for all time.³ It does mean that a decision will be followed, distinguished, or overruled by the deciding court, as well as followed by lower courts in the same judicial system. Much has been written about the subject of stare decisis generally, elucidating the distinction between stare decisis, res judicata, and the law of the case, and discussing the guideposts of ratio decidendi as contrasted to obiter dicta.⁴

Although courts agree that stare decisis is the great fundamental principle in our law, they use various techniques either to avoid that which has been decided, or to justify the stagnancy of the law.⁵ Thus, even if all the various divisions of the Appellate Court of Illinois were bound by prior decisions of any division of the court, these techniques of avoidance, especially the distinguishing of factual circumstances, would persist. Nonetheless, acceptance of the principle of stare decisis within the appellate court would prove beneficial to the Illinois judicial system.⁶

The principle of stare decisis takes on an added dimension when it is applied to decisions of intermediate courts rather than to the high court in a judicial system. In common law jurisdictions, decisions of the high court bind all courts subordinate to it in the judicial hierarchy for which it is the summit.⁷ This aspect of the principle may be termed "vertical stare decisis." The question of what vertical precedential value will be accorded to decisions arises in connection with a study of high or intermediate appellate courts. However, when problems of stare decisis at the intermediate appellate level are considered, the additional effect of decisions upon coordinate courts, divisions, or branches must be addressed. This aspect of the principle may be termed "horizontal stare decisis."

2. The doctrine embodies a judicial policy that a determination of a point of law by a court will generally be followed by a court of the same rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case. The rationale behind the policy is the need to promote certainty, stability, and predictability of the law. *Brewer's Dairy v. Dolloff*, 268 A.2d 636, 638 (Me. 1970).

3. Between 1861 and 1966, the English House of Lords would not overrule its own decisions. F. MORRISON, *COURTS AND THE POLITICAL PROCESS IN ENGLAND* 144-46 (1973). Until 1949, decisions of the Supreme Court of Canada were reviewable by the Privy Council, so the Supreme Court of Canada would not overrule its own decisions. Now, the highest judicial body in England will overrule itself and the Supreme Court of Canada will overrule its decisions. See generally Curtis, *Stare Decisis at Common Law in Canada*, 12 U.B.C.L. REV. 1 (1978).

4. E.g., R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974), collecting, citing and excerpting many sources.

5. K. LEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62-64 (1960).

6. The benefits of stare decisis in the promotion of visible justice, evenhandedness of the law regardless of parties, uniformity, rational legal planning and reduction of forum shopping, are thoroughly discussed in the literature and will not be extensively developed here.

7. Of course, decisions of the high court serve as precedent in the deciding court until they are overruled in view of changed circumstances.

SKETCHES OF ALTERNATIVE APPROACHES

The vertical and horizontal aspects of stare decisis lead to a number of possible approaches when considering decisions of intermediate courts.

First, the decisions of intermediate courts may bind neither the trial courts nor the intermediate courts in the judicial system. Under this approach, no stare-decisis effect, even upon the deciding court, is attached to the decisions of an appellate court.

Second, the decisions of the intermediate courts may bind the trial courts in the particular geographical district in which the respective appellate courts sit, but not bind other intermediate courts in the judicial system. Under this approach, decisions of the appellate courts are granted vertical, but not horizontal, stare decisis effect.

Third, the decisions of the intermediate court (this assumes one court in the institutional sense, although there may be numerous divisions of the court) may bind all trial courts in the judicial system, and also bind the coordinate divisions, panels, or branches in the judicial system. Under this approach, the attributes of both vertical and horizontal stare decisis obtain.

Finally, the decisions of the intermediate court may bind *all* the trial courts within the state, yet not bind coordinate branches of the intermediate court. This is the current status of stare decisis as developed in the Appellate Court of Illinois.⁸ The vertical stare decisis found in the Illinois system is analogous to the spines of an umbrella: all the trial courts within the state fall under the precedential web of each district appellate court regardless of geographical location. There is, however, no horizontal stare decisis.⁹

The judiciary article of the Illinois constitution, as adopted by the people of the State of Illinois in 1962 and 1970, vests the judicial power of the state in "a Supreme Court, an Appellate Court and Circuit Courts."¹⁰ Patently, this language indicates that a single supreme court, a single appellate court, and numerous circuit courts are constitutionally deemed to exist in this state. It would, therefore, seem to follow that the Appellate Court of Illinois, organized in the five judicial districts of this state, is but one court sitting in five separate locations for the sake of convenience. Based on this analysis, it is difficult to comprehend how two divisions of the appellate court could produce differing interpretations of the same law, based on similar factual circumstances, without regarding the later division as overruling the former decision:¹¹ a single court cannot logically profess to hold differing opinions on the same question where the sole basis of the differentiation of result is the geographic location of the forum. This, however, is the position that the Illinois courts have adopted.

8. See Part I. C.3. of text.

9. See Part I. B. of text.

10. ILL. CONST. art. VI, § 1; ILL. CONST. art. VI, § 1 (1870, amended 1962).

11. If the two decisions are filed simultaneously, the stare decisis question is, of course, evaded. See text's AFTERWORD, at 605.

How this rather curious approach to stare decisis came about, and how it works in operation, especially from the perspective of the trial judge, is the subject of part I of this Article. Part II will then explore the alternative approaches to stare decisis that may be applicable to the Illinois design and will recommend strengthening the horizontal precedential effect of decisions of the Appellate Court of Illinois.

I. THE HISTORY OF THE STRUCTURE OF ILLINOIS' INTERMEDIATE APPELLATE COURT(S) AND THE RESULTING STARE DECISIS EFFECTS

As already indicated, whether a judicial system has a unitary intermediate appellate court in the institutional sense, as opposed to multiple appellate courts, is logically related to the issue of whether decisions of the appellate court bind that court. An understanding of the development of the judicial structure, then, is necessary to an understanding of the stare decisis effects of decisions at the intermediate level.

A. The Early Multiple Court Structure

Under the 1870 constitution, authorization was given to the legislature to establish "inferior appellate courts . . . in districts formed for that purpose."¹² In 1877, the General Assembly enacted "An Act to Establish Appellate Courts" with these words:

There are hereby created four Appellate Courts in this State, to be called the Appellate Courts in and for the districts hereby created Said Appellate Courts shall be Courts of Record, with seals and clerks for each respectively; and each shall be held by three of the Judges of the Circuit Court, to be assigned in the manner hereinafter provided.¹³

The four legislatively-established appellate courts existed until the 1962 revision of the constitutional article on the judiciary, article VI, became effective in 1964. Clearly, from 1877 until 1964, there were four intermediate appellate courts in Illinois, not one. Circuit judges were assigned to appellate court service by the supreme court. Additional compensation to the circuit judges for that service was constitutionally prohibited.¹⁴ Because the appellate courts were distinct and separate entities, it is not surprising that a decision of one appellate court was not binding on the other three.¹⁵

12. ILL. CONST. of 1870, art. VI, § 11.

13. An Act to Establish Appellate Courts, 1877 Ill. Laws § 1, at 69.

14. ILL. CONST. art. VI, § 11 (1870, amended 1962).

15. *E.g.*, *Barker v. Chicago, Peoria & St. Louis Ry.*, 149 Ill. App. 520 (3d Dist. 1909), *aff'd*, 243 Ill. 482, 90 N.E. 1057 (1910); *McGlasson v. Housel*, 127 Ill. App. 360 (1st Dist. 1906). When appellate courts would follow decisions from other districts, as they did in the cases cited above, it was only after making it clear that they were not bound to do so. But in *Illinois Central R.R. v. People ex rel. Keller*, 81 Ill. App. 176, 181 (4th Dist. 1898) (emphasis added), the appellate court for the fourth district went so far as to say: "If the [third district

In fact, a sentence in the original section 17 ("the section 17 sentence") of the Act to Establish Appellate Courts provided that opinions of an appellate court "shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed."¹⁶ While this section 17 sentence was in effect, a decision of, for example, the first district appellate court not only lacked stare decisis effect on the third district appellate court, it even lacked precedential impact in its own district.¹⁷ Moreover, the trial courts within a given district were not bound to follow a decision of the appellate court of that district in another case, even as to a necessary part of the opinion in the former appellate decision.¹⁸

However, section 17 preserved one aspect of stare decisis. Under the "law of the case" doctrine, an appellate court decision bound both the trial court

opinion construing a state statute] be accepted as authority, it is conclusive of the case at bar, and we feel disposed to follow it until such time as our Supreme Court shall [give] us a construction of this statute."

16. Act to Amend the Act to Establish Appellate Courts, 1885 Ill. Laws § 1, at 65 (emphasis added). The entire statute read as follows:

§ 17. All opinions or decisions of said court upon a final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the cause in which rendered; *Provided*, that such opinion shall not be of binding authority in any cause or proceeding, other than in which they [*sic*] may be filed.

Id. The 1885 version of § 17 amended the earlier language. The 1877 statute read as follows:

§ 17. In case the judgment, order or decree from which an appeal or writ of error may have been prosecuted, shall be affirmed by the Appellate Court, such court shall make an order affirming the same, and in case such judgment, order or decree shall be reversed and the cause remanded to the court, from which such appeal or writ of error shall have been prosecuted, for a new trial therein, said Appellate Court shall state briefly in writing the reasons for such reversal and file the same with the files in said cause; *Provided*, That the reasons so filed shall not be of binding authority in any cause or proceeding other than that in which they may be filed or given.

Act to Establish Appellate Courts, 1877 Ill. Laws § 17, at 72.

In 1935, the entire "section 17 sentence" was deleted beginning with the word "*Provided*." Act of Apr. 25, 1935, to Amend § 17 of the Act to Establish Appellate Courts, ILL. REV. STAT. ch. 37, § 41 (1935). The remainder of the statute was repealed in 1976 "to make changes consistent with the 1970 Constitution, the Civil Practice Act (ch. 110) and the Supreme Court Rules (ch. 110A)." ILL. ANN. STAT. ch. 37, § 41 (Smith-Hurd 1978 Supp.).

17. *Journal Co. of Troy v. F.A.L. Motor Co.*, 181 Ill. App. 530 (1st Dist. 1913); *People ex rel. Hoyne v. Grant*, 208 Ill. App. 235 (1st Dist. 1917), *aff'd*, 283 Ill. 391, 119 N.E. 344 (1918) (decision by another division in the first district, even though certiorari had been denied by the supreme court, not binding where the cause and parties were not the same but the legal issues as perceived by the two divisions were identical); *People ex rel. Nelson v. Sherrard State Bank*, 258 Ill. App. 168 (2d Dist. 1930) (second district not bound by prior decision of second district as to validity of a contract when same issue litigated by different parties: "[I]t is doubtful if the doctrine of *stare decisis* can be applied to an opinion of the Appellate Courts of this State in view of [the section 17 sentence quoted in text, *supra*]." *Id.* at 172. See note 95 *infra* for further discussion of *People ex rel. Hoyne v. Grant* as it relates to the effect of the supreme court's denial of leave to appeal.

18. *E.g.*, *Heffron v. Knickerbocker*, 57 Ill. App. 339 (1st Dist. 1894); *Knickerbocker Ice Co. v. Katlinsky*, 55 Ill. App. 284 (1st Dist. 1894).

on remand and the appellate court on a second appeal of the same case.¹⁹ Yet the extent to which the section 17 "no-binding-effect" philosophy permeated the appellate courts is indicated by a statement in one opinion doubting the viability even of the law of the case.²⁰ In sum, the section 17 sentence denied all stare decisis effect to appellate court decisions on: (1) the deciding court; (2) coordinate divisions within the district of the deciding court; (3) appellate courts in other districts; or (4) any trial court in a different case.

The inefficiency and injudiciousness of the complete absence of horizontal or vertical stare decisis were underscored by the number of decisions litigating and relitigating these nonsubstantive issues.²¹ Furthermore, the pre-1935 function of the Illinois appellate courts was merely review for correctness or justice in the individual case. The design negated the institutional function of "authoritative ascertainment and declaration of a legal precept for such cases as the one in hand,"²² *i.e.*, the concept of precedent. These facts were recognized by the legislature in 1935, when the section 17 sentence was repealed.²³ The impact of that repeal was dramatic; it went far in overturning more than a half-century of Illinois jurisprudence relating to stare decisis among the four appellate courts.

B. The Later "Multiple" Court Structure: A Transition Period

In *Hughes v. Medendorp*, the third district appellate court interpreted the effect of this repeal: "[A]n opinion of the Appellate Court is binding authority, not only upon said court, but upon all inferior courts in this State."²⁴ The appellant had argued that a witness was incompetent under a certain statute and was supported in her contention by a first district decision.²⁵ In reversing the trial court for failing to follow that decision, the court spoke on

19. *Baum v. Hartmann*, 238 Ill. 519, 87 N.E. 334 (1909); *Union Nat'l Bank v. Hines*, 187 Ill. 109, 58 N.E. 405 (1900); *Gridley v. Wood*, 220 Ill. App. 46 (3d Dist. 1920), *rev'd on other grounds*, 305 Ill. 376, 137 N.E. 251 (1922). This was true notwithstanding a change in the personnel of the appellate court. *Garrett v. Peirce*, 84 Ill. App. 31 (2d Dist. 1899).

20. *Westfall v. Albert*, 107 Ill. App. 51, 53 (1st Dist. 1903), *aff'd*, 212 Ill. 68, 72 N.E. 4 (1904). The appellate court held itself bound by the former adjudication of the branch appellate court, *res judicata*, but said: "[U]nder a strict construction of the statute creating the branch court, there may be some question as to whether its judgment *in the same case* is binding upon this court . . ." (Emphasis added.) In any event, "law of the case" is not an immutable principle. *E.g.*, *Marshall Field & Co. v. Nyman*, 285 Ill. 306, 120 N.E. 756 (1918).

21. At least 98 cases interpreted the § 17 sentence. *See* annotations at ILL. ANN. STAT. ch. 37, § 41 (Smith-Hurd 1972).

22. R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 1 (1941). For a more general discussion of the function of intermediate appellate courts *see* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976); ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO COURT ORGANIZATION* 30-32 (1973).

23. *See* note 16 *supra*.

24. 294 Ill. App. 424, 427-28, 13 N.E.2d 1015, 1017 (3d Dist. 1938).

25. *In re Estate of Teehan*, 287 Ill. App. 58, 4 N.E.2d 513 (1st Dist. 1936).

two areas affected by the repeal of the section 17 sentence: (1) it said that a decision of an appellate court binds the deciding court in a later case—a reversal of the prior position,²⁶ and (2) it held that a decision of an appellate court of *any* district binds *all* the trial courts in the state. This latter holding is a striking overturn of the rule that a trial court was not bound even by its district's appellate decision in another case,²⁷ as well as an extension of that overturn.²⁸

It is plausible that the intention of the legislature in deleting the section 17 sentence was to assure that a decision of one of the four appellate courts would bind not only the trial courts, but the other appellate courts as well. But, as to horizontal stare decisis, the *Medendorp* court said nothing. However, in reversing the trial court solely on the authority of the cited first district decision, the third district proceeded as if it were bound by the former; and it is always important to attend to what a court does in addition to what it says.

Any assertion that *Medendorp* stands for horizontal stare decisis was dissipated, however, by the same district's 1949 opinion in *Hughes v. Bandy*.²⁹ *Bandy* squarely faced the contention that the third district appellate court was bound by a fourth district decision³⁰ on the issue of the propriety of additur. The *Bandy* opinion does not develop the rationale of the contention. However, the appellee's reference to the portion of the statute remaining after the repeal of the "no binding effect" provision (the section 17 sentence),³¹ and to *Medendorp*, indicates the rationale to be that the repeal of the section 17 "no binding effect" sentence, and *Medendorp*'s reliance on a sister court's decision, meant that a decision of one district court was binding on another. The *Bandy* court rejected the contention. While it "hoped that all of our appellate courts would agree on the law," it held that "until our Supreme Court has passed on the important question here presented we do not consider that we are bound to follow such decision of one of the other branches of our Appellate Court."³²

Thus, at the time of revision of the judiciary article of the constitution in 1962, the effect of a decision of one of the four appellate courts in Illinois

26. See note 17 and accompanying text *supra*.

27. See note 18 and accompanying text *supra*.

28. To hold that a trial court is bound by its district's appellate decision overturns the prior rule; to hold that a trial court is bound by any district's appellate decision extends that overturn.

29. 336 Ill. App. 472, 84 N.E.2d 664 (3d Dist. 1949), *aff'd on substantive issue*, 404 Ill. 74, 87 N.E.2d 855 (1949).

30. *Chapman v. Deep Rock Oil Corp.*, 333 Ill. App. 529, 77 N.E.2d 883 (4th Dist. 1948).

31. See note 16 *supra*.

32. *Hughes v. Bandy*, 336 Ill. App. at 478, 84 N.E.2d at 666. A year earlier the second district appellate court had held itself not obliged to follow the first district "[i]n the absence of a decision on the precise issue by the Illinois Supreme Court." *Parker v. Parker*, 335 Ill. App. 293, 299, 81 N.E.2d 745, 748 (2d Dist. 1948). Ironically, the third district, in *Bandy*, cited the second district—*Parker*—as authority for the proposition that one district is not obliged to follow another district.

was to bind all trial courts and the deciding appellate division, but not the other divisions of the appellate court.

C. *The Unitary Court Structure*

1. *The Constitution and the Supreme Court Rules*

Article VI of the constitution of 1870 was totally revised by amendment adopted by the voters in 1962, effective January 1, 1964. A major significance of the amendment was that general administrative authority over all courts in the state was vested for the first time in the supreme court. Of equal significance was the creation of a new and independent intermediate court structure.³³ In contrast, the adoption of the 1970 constitution had an insubstantial effect upon this intermediate appellate court structure.³⁴ Except as indicated in footnotes, the constitutional provisions now relative to the appellate court have been in effect since 1964.

The new article VI vested the judicial power "in a Supreme Court, an Appellate Court and Circuit Courts."³⁵ Section 2 provided for "five Judicial Districts for the selection of Supreme and Appellate Court Judges."³⁶ This language is unambiguous, and makes quite clear that the purpose of the districts is for the selection of judges, not for the perpetuation of substates in Illinois, judicially presided over by autonomous appellate courts.³⁷ In addition, section 2 specifically created the boundaries of the first judicial district as Cook County, and delegated to the legislature the power to establish the boundaries of the other districts, with the only limitation that they be compact and composed of contiguous counties.³⁸

33. The appellate courts established by the legislature under the 1870 constitution were hybrid in character. Having neither a permanent constitutional status nor their own judiciary, they lacked the independence and prestige essential to a properly conceived judicial system. Though they served well, and often with distinction, there was little question among most proponents of judicial reform that a new and independent intermediate appellate court structure was a constitutional imperative. G. BRADEN AND R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 344 (1969).

34. Cohn, *The Illinois Judicial Department—Changes Effected by Constitution of 1970*, 1971 U. ILL. L.F. 355: "The structure of the Illinois judicial system as established by the 1962 constitutional amendment remains unaffected by the 1970 constitution." *Id.* at 355. See also H. FINS, *ILLINOIS APPELLATE PRACTICE UNDER THE NEW CONSTITUTION* 80-81 (1973), where the major features of the judicial article of 1962 as incorporated in the judicial article of the 1970 constitution are outlined.

35. ILL. CONST. art. VI, § 1. Section 1 represents no change from section 1, art. VI, of the 1870 constitution as amended in 1962.

36. ILL. CONST. art. VI, § 2. The 1962 amendment had provided, in article VI, § 3, for "five Judicial Districts for the selection of judges of the Supreme and Appellate Courts." ILL. CONST. of 1870, art. VI, § 3 (1962).

37. Subsidiary purposes, however, may well be the convenience of counsel and judges in representing parties on appeal and hearing cases in geographic areas smaller than the state as a whole. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 153 (1976).

38. The boundaries of districts two through five have been established by the legislature. ILL. REV. STAT. ch. 37, §§ 1.2-1.5 (1977).

The constitutional provision on "Appellate Court—Organization" gave the supreme court the authority to "prescribe by rule the number of Appellate divisions in each Judicial District."³⁹ This provision dictated that at least three judges be assigned to each division, and that a division majority was necessary to constitute a quorum and to give effect to a decision. Further, it required that each judicial district have at least one division, with the supreme court given the power to prescribe the times and places at which the various divisions are to sit.⁴⁰

Additional power to regulate the operation of the appellate court was granted to the supreme court in the constitution: "General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. . . . The Supreme Court shall provide by rule for expeditious and inexpensive appeals."⁴¹

Pursuant to this authority, the supreme court has promulgated rule 22, which provides that the court is to sit in divisions, each district having a single division except for the first district which has five, and the second district which has two. With the approval of the chief justice, these divisions may sit in any district in the state.⁴² The supreme court is to assign judges to the various divisions, and the chief justice may make temporary assignments, or changes in existing assignments.⁴³ The rule empowers the judges of each division to select a presiding judge,⁴⁴ and the presiding judges of all the divisions form the "Executive Committee of the Appellate Court of Il-

39. ILL. CONST. art. VI, § 5.

40. ILL. CONST. art. VI, § 5. The present section 5 is essentially the same as section 6 of article VI of the 1962 amendment, with the following exceptions:

1) Section 6 of the 1962 amendment began with the sentence: "The Appellate Court shall be organized in the five Judicial Districts." ILL. CONST. of 1870, art. VI, § 6 (1962). This sentence was deleted from the 1970 Constitution by the Committee on Style, Drafting, and Submission. RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE PROPOSALS Dec. 8, 1969—Sept. 3, 1970, 1228.

2) The sole organization change of the appellate court was the broadening of the supreme court's power to transfer appellate court judges between districts. Under the 1962 amendment, it was necessary that the consent of a majority of the appellate judges, in the district to which a judge was to be transferred, be obtained prior to a transfer. This consent requirement was deleted in the 1970 constitution, giving the supreme court full power to transfer judges between districts.

41. ILL. CONST. art. VI, § 16. The 1962 revision had provided: "General administrative authority over all courts in this State including the temporary assignment of any judge to a court other than that for which he was selected . . . is vested in the Supreme Court . . ." ILL. CONST. art. VI, § 2 (amended 1962).

42. Ill. Sup. Ct. R. 22(a), ILL. REV. STAT. ch. 110A, § 22(a) (1977). In 1969 a total of 72 cases were decided by downstate divisions sitting in the first district; in 1968, 76; and in 1967, 17. RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE PROPOSALS, Dec. 8, 1969—Sept. 3, 1970, 843.

43. Ill. Sup. Ct. R. 22(b), ILL. REV. STAT. ch. 110A, § 22(b) (1977).

44. *Id.* at 22(d), ILL. REV. STAT. ch. 110A, § 22(d).

linois.”⁴⁵ Meetings of the appellate court may be called by the executive committee.

These provisions, allowing for the crossing of district lines by a division and the establishment of an executive committee composed of judges from each of the ten divisions, indicate a single appellate court in Illinois. This position is further supported by the language of the judiciary article denominating the appellate court in the singular. Moreover, the stated constitutional purpose for the division of the state into districts is for the selection of supreme as well as appellate court judges, not for the creation of five autonomous courts.

2. Legislative View of the Structure of the Appellate Court

Thus, from the perspective of the 1962 constitutional revision, the 1970 Constitution, and the supreme court rules promulgated thereunder, only one appellate court, divided for administrative convenience, exists in Illinois. The relevant statutes, however, do not provide such a clear perspective. For example, in establishing the number of appellate judges to be selected from each judicial district,⁴⁶ the General Assembly in 1963 chose to amend, rather than to repeal, the 1877 Act to Establish Appellate Courts. It retained the title (with its plural form of appellate court) and used language unfortunately reminiscent of the old Act: “An appellate court is established in each of the 5 judicial districts as such districts are determined by law.”⁴⁷

The quoted sentence, gratuitously reestablishing the constitutionally-established appellate court, might be interpreted to indicate either: (1) that one appellate court was established to sit in the five judicial districts of the state; or (2) that five appellate courts were established, each of which was to be located in one of the judicial districts. The rest of the 1963 statute, enacted in preparation for the effective date of the 1962 revision of the judiciary article, used phrases in reference to “the appellate court” that would indicate a legislative position that but one appellate court was established.⁴⁸

45. *Id.* at 22(e), ILL. REV. STAT. ch. 110A, § 22(e).

46. The constitution provides that the number of appellate judges to be selected from each judicial district shall be “provided by law.” ILL. CONST. art. VI, § 6 (1962, amended 1970).

47. Act to Amend the Amended Act to Establish Appellate Courts, 1963 Ill. Laws, § 1, at 2643. The statute went on to establish the number of appellate judges to be selected from each judicial district. This statute, now ILL. REV. STAT. ch. 37, § 25 (1977), currently provides for the election of eighteen appellate judges in the first district, and four in the other districts. The additional judges sitting pursuant to assignment by the supreme court brings the totals to twenty judges sitting in the five divisions of the first district, six judges sitting in the two divisions of the second district, five in the third district, five in the fourth district, and five in the fifth district. *Directory Supreme and Appellate Courts State of Illinois*, 62 Ill. App. 3d v-vii (1978).

48. *E.g.*:

The Supreme Court may assign additional judges to service in the appellate court from time to time as the business of the appellate court requires. . . . Assignments to divisions shall be made by the Supreme Court and a judge may be assigned to a

On the other hand, sections of the statutes referring, for example, to "clerks of the appellate courts"⁴⁹ and writs of mandamus that may be issued by "said appellate courts respectively,"⁵⁰ arguably indicate a legislative belief that several appellate courts still exist in Illinois. One may observe that the statutes passed after the 1962 revision of the judiciary article tend to refer to the appellate court, singular (and often capitalized), and those carried over from before that revision often retain the plural (and uncapitalized) reference.⁵¹

In summary, repairing to the statutes for an indication of whether the appellate court is unitary or multiple is unrewarding. The constitution, and the supreme court through its rules, have clearly created, structured, and recognized one appellate court in Illinois. Only from grammatical minutiae could one argue that legislation even attempts to fragmentize this structure.

3. *Judicial Opinions Since 1964*

Despite this constitutional and judicial recognition that a single appellate court exists in Illinois, panels of judges inevitably found themselves in disagreement with their brethren sitting in other divisions. The *Medendorp-Bandy* rule has survived the revision of the judicial article, effective in 1964, as the method of dealing with these disagreements on substantive law.⁵²

a. *The Medendorp Branch of the Rule—Vertical Stare Decisis*

The 1964 unification of the appellate court should have fortified the vertical stare decisis established by *Hughes v. Medendorp*.⁵³ However, the doctrine has not been scrutinized in light of the revised judiciary article, although the supreme court has commented on the doctrine in passing, and the appellate court has grappled with it in some sticky situations.

(1) *Supreme Court Treatment of Vertical Stare Decisis*

The Supreme Court of Illinois recognized the existence of the *Medendorp* branch of the rule in *UMW Hospital v. UMW*.⁵⁴ The case involved a con-

division in a district other than the district in which such judge resides. *The organization of the appellate court and its divisions shall be prescribed by rule of the Supreme Court.*

ILL. REV. STAT. ch. 37, § 25 (1977) (emphasis added). See also similar use of "the appellate court" as a unitary reference in ILL. REV. STAT. ch. 37, §§ 32.1 and 32.2 (1977), relating to appeals, respectively to and from, the appellate court.

49. ILL. REV. STAT. ch. 37, § 27 (1977).

50. ILL. REV. STAT. ch. 37, § 35 (1977).

51. See notes 47-50 *supra*.

52. See discussion in Part I. B of text.

53. 294 Ill. App. 424, 13 N.E.2d 1015 (3d Dist. 1938). See notes 24-28 and accompanying text *supra*.

54. 52 Ill. 2d 496, 288 N.E.2d 455 (1972).

tempt order issued for the violation of a temporary restraining order. The propriety of the trial court's issuance of the contempt order and levy of fines upon the defendants hinged upon whether it had properly ascertained the law as it existed at the time of the issuance of the restraining order. On the day of the finding of contempt by the circuit court sitting in the fifth district, the supreme court reversed a decision of the first district appellate court, which had held that the peaceful striking and picketing of a not-for-profit hospital was against public policy and thus exempt from the Anti-Injunction Act.

The trial court had relied upon a decision of the first district in issuing the temporary restraining order, and on appeal to the supreme court the defendants contended that, based upon the supreme court's decision overruling the first district case, the trial court had no jurisdiction to issue the restraining order, that under such circumstances the order was void, and that a refusal to obey a void order could not serve as the basis for a contempt judgment. The supreme court, however, citing *Medendorp*, ruled that at the time of the issuance of the restraining order, the trial court sitting in the fifth district was bound by the decision of the appellate court sitting in the first district: "So far as we have ascertained, the . . . opinion [of the appellate court sitting in the first district] stated the law then applicable to the facts of this case and was *binding* upon the trial court."⁵⁵

The Supreme Court of Illinois mentioned the precedential effect of an appellate decision on only one other occasion; once again it affirmed the viability of the *Medendorp* rule, this time without citing it specifically. The opportunity to discuss the stare decisis issue arose out of a conflict between divisions sitting in the first and third districts. The substantive issue was whether recipients of nonprobate assets—specifically, persons who held property in joint tenancy with the deceased—might be required to share proportionately in paying federal estate taxes.

The first district had held, in *In re Estate of Van Duser*, that absent decedent's expressed intention to the contrary, the equitable contribution doctrine must be utilized so that nonprobate assets bear a portion of the federal estate tax burden.⁵⁶ The third district, however, disagreed. The trial court in *Roe v. Estate of Farrell*⁵⁷ had followed the *Van Duser* decision, and although the third district acknowledged that the circuit judge had acted properly, it nevertheless reversed his decision because it was "unpersuaded by the conclusions in *Van Duser* . . ." ⁵⁸ Apparently, the supreme court perceived *Roe* as the proper case in which to resolve the substantive conflict between the first and third districts, and granted leave to appeal in the face

55. *Id.* at 499, 288 N.E.2d at 457 (emphasis added).

56. 19 Ill. App. 3d 1022, 313 N.E.2d 228 (1st Dist. 1974).

57. 42 Ill. App. 3d 705, 356 N.E.2d 344 (3d Dist. 1976).

58. 42 Ill. App. 3d 705, 708, 356 N.E.2d 344, 347 (3d Dist. 1974), *rev'd*, 69 Ill. 2d 525, 372 N.E.2d 662 (1978).

of the third district's denial of a certificate of importance.⁵⁹ The court seemed to agree with the third district's acknowledgement of the propriety of the trial court's adherence to the first district decision.⁶⁰ The validity of the *Medendorp* rule holding all trial courts bound by a decision of the appellate court, regardless of district, was thereby supported. The supreme court found *Van Duser* to be the more sound of the two appellate court decisions, and therefore reversed the third district's decision in *Roe*.

The supreme court has said precious little about the binding effect of appellate court decisions: its only comments on the concept since the 1964 appellate court unification have come in *UMW Hospital* and *Roe*. Further, what has been said was limited to an affirmation of the *Medendorp* principle. In *UMW Hospital*, the court recognized that the trial court had acted properly in following a decision of another district even though the law followed turned out to be "bad" law. In *Roe*, the court's affirmation of the *Medendorp* principle was somewhat weaker, in that the law followed by the trial court was ultimately found to be the correct position. From its failure to address the issue comprehensively when the opportunity presented itself,⁶¹ it can be surmised that the Supreme Court of Illinois has been content to leave the determination of the stare decisis effect of appellate court decisions to the appellate court itself.

(2) Appellate Court Treatment of Vertical Stare Decisis

(a) *The Garcia Story: Geographical Stare Decisis*

The most extensive look at the stare decisis effect of appellate court decisions in Illinois to date was taken by the third district appellate court in *Garcia v. Hynes & Howes Real Estate, Inc.*⁶² The question was whether an implied warranty of habitability exists in a contract for the sale of a new home built by the seller. The contract for sale was signed by the Garcias in 1970, a time when there were conflicting decisions within the appellate court. In 1962, the first district, in *Weck v. A:M Sunrise Construction Co.*,⁶³

59. An appeal to the supreme court lies as a matter of right in a case decided by the appellate court upon certification by the appellate court that the case involves a question of such importance that it should be decided by the supreme court. ILL. CONST. art. VI, § 4(c); Ill. Sup. Ct. R. 316, ILL. REV. STAT. ch. 110A, § 316 (1977). Judge Alloy, dissenting in *Roe* at the appellate level, 42 Ill. App. 3d 705, 709, 356 N.E.2d 344, 348, believed the issue was of such significance. However, the appellate court denied the certification. 356 N.E.2d at 344. Fortunately, the supreme court chose to grant discretionary review, under Sup. Ct. R. 315(a), ILL. REV. STAT. ch. 110A, § 315(a) (1977).

60. The court stated: "The circuit court under the circumstances could properly invoke the holding in *In re Estate of Van Duser*." 69 Ill. 2d 525, 532, 372 N.E.2d 662, 665 (1978). Yet one wonders, does "under the circumstances" imply that had *Van Duser* ultimately turned out to be bad law, the trial court would not be deemed to have invoked its authority properly?

61. More likely, the attorneys failed to press the matter.

62. 29 Ill. App. 3d 479, 331 N.E.2d 634 (3d Dist. 1975).

63. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

had held that an implied warranty inhered in that type of contract. In the following year, the third district, finding in *Coutrakon v. Adams* that it was "not constrained to follow" the first district, refused to recognize that implied warranty.⁶⁴ At the time of the *Coutrakon* decision, Rock Island County, the place at which the *Garcia* trial court sat, was within the boundaries of the second district. Thus, the trial court in *Garcia* was not bound geographically by either *Coutrakon* or *Weck*.

The matter was further complicated by the 1972 decision in *Hanavan v. Dye*,⁶⁵ rendered by the appellate court sitting in a reconstituted third district that now included Rock Island County. *Hanavan* followed *Weck* and established the implied warranty in the third district. However, the trial court in the *Garcia* case ruled *Hanavan* inapplicable to the facts presented, because the Garcias' contract had been signed prior to the date of the *Hanavan* decision.

Under the circumstances as they appeared to the circuit court in *Garcia*, there was a conflict among the districts on the question of whether an implied warranty existed in Illinois, with no decision of an appellate court establishing the law in the district in which the trial court sat. Regarding the "uncertainty as to the applicable rule," the third district restated: "The opinions of any appellate court necessarily are binding on all circuit courts across the State, but not on the other branches of the appellate court . . ." ⁶⁶ The platitude was not responsive to the trial court's dilemma. But the appellate court went on to state its belief that the precedent of *Weck*, sustained in *Hanavan*, established that a warranty of habitability had been recognized at least since 1962⁶⁷ and that therefore its decision in *Hanavan* was applicable retroactively. The *Garcia* trial court was therefore bound to follow that case.

In reaching this conclusion, the court rejected the argument that, where a conflict exists among the appellate districts, a trial court may choose the law it believes to be correct:

While defendant contends that the trial court may reach its own conclusion in a given situation where there may be an isolated appellate court opinion from another district which supports a contrary conclusion, we do not believe that principle would be applicable here. Since *Weck* was in force and effect since 1962, there were no overruling decisions involved. To apply the principle of optional selectivity by a trial court in such situation could create an anomalous situation where the trial court one week would follow one principle and the following week, a contrary principle. . . . A trial court, located in an appellate district where a conclusion

64. 39 Ill. App. 2d 290, 302, 188 N.E.2d 780, 786 (3d Dist. 1963), *aff'd on other grounds*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964), by a supreme court that found the question "interesting" but not necessary to its affirmance. *Id.* at 190, 201 N.E.2d at 101.

65. 4 Ill. App. 3d 576, 281 N.E.2d 398 (3d Dist. 1972).

66. *Garcia v. Hynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 481, 331 N.E.2d 634, 636 (3d Dist. 1975).

67. *Id.*

on an issue is reached, should adhere to that conclusion and not to one promulgated in another district.⁶⁸

As was previously indicated, prior to the 1964 redistricting necessitated by the 1962 revision of the judiciary amendment, Rock Island County was not within the boundaries of the third district. Therefore, the *Garcia* appellate court concluded that it was not bound by the decision in *Coutrakon*, which was an appellate court opinion out of the old third district. Subsequent to the redistricting, the appellate court, sitting in the new third district comprising Rock Island and other counties, decided in *Hanavan* that there was an implied warranty, and thus bound the trial court in Rock Island County.

What then was the effect of *Hanavan* (new third district: implied warranty exists) upon *Coutrakon* (old third district: no implied warranty)? The *Garcia* court, which had decided *Hanavan*, said *Hanavan* "did not overrule prior law other than in the sense that it concurred in the original appellate court decision in *Weck* and rejected the conclusion in *Coutrakon*."⁶⁹ "Rejected" in context, implies that the *Hanavan* court merely found *Coutrakon* to be unpersuasive rather than that it overruled *Coutrakon*. But in the four counties that were within the old third district when *Coutrakon* was decided, and are now in the new third district where the *Hanavan* court sat, *Hanavan* must have overruled *Coutrakon*.⁷⁰ The *Garcia* opinion might have meant that in the remaining counties of the old third district, *Coutrakon* was not overruled by *Hanavan*.⁷¹

Interstices of the *Garcia* story occurred meanwhile in the fifth, fourth, and second districts. In 1964, in *Narup v. Higgins*,⁷² the appellate court sitting in the fifth district had decided that there was no implied warranty of fitness in the sale of a new house.⁷³ However, because the opinion was unpublished, it did not receive immediate state-wide attention.⁷⁴ In 1969, the

68. *Id.* at 482, 331 N.E.2d at 636 (emphasis added).

69. *Id.* at 480, 331 N.E.2d at 635.

70. These four counties are Hancock, McDonough, Fulton, and Tazewell. The court in *Garcia* twice emphasized that Rock Island County, where the *Garcia* trial court sat, was now within the borders of the old third district. *Id.* at 480-481, 331 N.E.2d at 635-636.

71. Most of these counties are now in the fourth district; three of them are in the fifth district. In the latter three counties, *Coutrakon* might well have been the law, on the basis of *Narup v. Higgins*, 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964), discussed in text accompanying note 72 *infra*. As for the other old third district counties, now in the fourth district, when *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977), aligned the fourth district with the divisions that had accepted the implied warranty, *Coutrakon* would have then been overruled.

72. 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964).

73. Judge Reynolds, who had concurred in the *Coutrakon* decision, now sat in the fifth district.

74. From the perspective of the ordinary lawyer reading the reporters it is difficult to discern the holding in *Narup*. The official reporter contains no opinion, only the notation, "Not to be published in full." The headnote in the official reporter offers no clue that implied warranty was even in issue in the case. *Narup v. Higgins*, 51 Ill. App. 2d 102 (5th Dist. 1964). However,

second district avoided the implied warranty fray by deciding the case of *Ehard v. Pistakee Builders, Inc.*⁷⁵ on grounds other than the implied warranty theory, and finding an express agreement to correct defects. It agreed, not surprisingly, that "some clarification on the point is needed in Illinois."⁷⁶ Finally, in 1977 the fourth district, in *Conyers v. Molloy*,⁷⁷ ruled in favor of the implied warranty.

The conflict among the districts persisted until 1979, when the *Garcia* saga was wrapped up on the substantive issue, but not on the stare decisis problems under consideration. The first opportunity for the supreme court

the North Eastern Reporter's key number headnote says: "There is no implied warranty of condition or quality in sale of new house or one in process of construction." 200 N.E.2d 922, 923. *Narup* was not mentioned in the *Garcia* opinion, and this omission may have been within the spirit of Uniform Appellate Rule 8, providing that opinions of the Illinois Appellate Court which have been published in abstract form only, shall not be cited in the briefs of litigants unless the entire text is appended. ILL. REV. STAT. ch. 110A, § 908 (1977). In *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977), the fourth district cited *Narup* as holding against the warranty. *Id.* at 19, 364 N.E.2d at 988. Indeed, the unpublished opinion in *Narup*, furnished the authors by the clerk for the fifth district, reveals the holding in the case to be: "There is no implied warranty of condition or quality in the sale of a new house, or one in the process of construction." *Narup v. Higgins*, No. 64-F-32, Slip op. at 7 (App. Ct. 5th Dist. Aug. 17, 1964). Why the *Narup* opinion, clearly on an issue of importance, was not published is a matter on which the authors do not speculate. A statute then in effect imposed a duty on the appellate court to designate which of its decisions should be published in full and which published by abstract, but further provided for publication in condensed form or by abstract if the appellate court failed to make the designation. ILL. REV. STAT. ch. 37, § 66 (1963). See generally Report of the Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice, *Standards for Publication of Judicial Opinions* (Aug. 1973).

75. 111 Ill. App. 2d 227, 250 N.E.2d 1 (2d Dist. 1969).

76. *Id.* at 232, 250 N.E.2d at 3.

77. 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977).

The third district had followed its *Hanavan-Garcia* position in *Elmore v. Blume*, 31 Ill. App. 3d 643, 334 N.E.2d 431 (3d Dist. 1975), and the first district struggled with detailing the content of the warranty in dicta in *Goggin v. Fox Valley Constr. Corp.*, 48 Ill. App. 3d 103, 365 N.E. 2d 509 (1st Dist. 1977).

Thus the warranty existed in the first, third, and fourth districts; it did not exist in the fifth, and the second had not decided the question. See generally Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. ILL. U.L.J. 178.

This study has not undertaken an enumeration of all the substantive areas, major and minor, in which the divisions of the appellate court are at odds. There are, however, examples other than the implied warranty in new house sales, well known to the bar. One example of major importance is whether a landlord has a general duty to mitigate damages upon the abandonment of the leasehold by a tenant. Compare *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959) (landlord has duty to mitigate damages) and cases cited therein, with *Reget v. Dempsey-Tegeler & Co.*, 96 Ill. App. 2d 278, 238 N.E.2d 418 (5th Dist. 1968) (landlord has no duty to mitigate damages). The conflict was still recognized in *Wanderer v. Plainfield Carton Corp.*, 40 Ill. App. 3d 552, 351 N.E.2d 630 (3d Dist. 1976), and the authors have found no decision resolving it. Another example of conflict is whether the *Jack Spring* implied warranty of habitability of leasehold premises, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), may be used affirmatively by a tenant, *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (2d Dist. 1972), or merely defensively, *Trice v. Chicago Housing Auth.*, 14 Ill. App. 3d 97, 103, 302 N.E.2d 207, 211 (1st Dist. 1973) (special concurring opinion of Judge Hayes).

to set precedent for the state in this important area where litigation recurs presented itself early—in the *Coutrakon* case in 1964—but the court declined the invitation.⁷⁸ After fifteen years of conflict, the supreme court took the next opportunity to decide the issue, and ruled, in *Petersen v. Hubschman Construction Co.*,⁷⁹ in favor of the implied warranty. However, the court did not address the issue of precedent within the appellate court. It merely noted, without perceptible signs of discomfort, that the results of the decisions of the “appellate courts of this state . . . have not been uniform.”⁸⁰

(b) *Thorpe: Temporal Stare Decisis*

If conflicts within the appellate court placed the trial judge in *Garcia* in a quandary about which decision to follow, they placed the appellate court in *People v. Thorpe*⁸¹ in a quandary about which decision the trial court presumably followed. The substantive issue was the standard of proof constitutionally required for civil commitment under the Sexually Dangerous Persons Act.⁸² The trial court, sitting in the second district, had made no reference to the standard of proof it followed in the non-jury proceeding culminating in the judgment on November 26, 1975, that Thorpe was a sexually dangerous person. However, because there was evidence in the record to establish the statutory elements beyond a reasonable doubt, the judgment would be affirmed unless the defendant could sustain his burden of showing that the trial court followed an erroneous standard of proof.

In 1974, the appellate court sitting in the first district had decided that the reasonable doubt standard did apply in *People v. Pembrock*.⁸³ The state's petition for leave to appeal the *Pembrock* decision was granted by the supreme court. Before the supreme court ruled, the appellate court sitting in the fourth district held, in *People v. Oliver* (filed October 16, 1975), that a preponderance of the evidence was the appropriate standard of proof.⁸⁴ After the judgment in *Thorpe*, but before it was reviewed by the second district, the supreme court decided the *Pembrock* appeal and resolved the conflict in favor of the reasonable doubt standard.⁸⁵ The appellate court in

78. See note 64 *supra*.

79. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

80. *Id.* at 38, 389 N.E.2d at 1157. The *Petersen* case came to the supreme court from the second district (53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977)). However, the appellate court did not address the issue of implied warranty but rather decided the case on alternative contract issues.

81. 52 Ill. App. 3d 576, 367 N.E.2d 960 (2d Dist. 1977).

82. ILL. REV. STAT. ch. 38, § 105-1.01 (1977).

83. 23 Ill. App. 3d 991, 320 N.E.2d 470 (1st Dist. 1974), *aff'd*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

84. 32 Ill. App. 3d 772, 336 N.E.2d 586 (4th Dist. 1975). Judge Trapp dissented “for the reasons stated in *People v. Pembrock*, . . . which holds that an individual must be proven to be a sexually dangerous person beyond a reasonable doubt.” *Id.* at 779, 336 N.E.2d at 591.

85. *People v. Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

Thorpe then rejected the defendant's argument that the trial court erroneously followed the preponderance standard of *Oliver*.

Apparently *Oliver's* binding authority on the trial court would have derived from its being the later in time of the two conflicting decisions of the appellate division, neither of which sat in the district embracing the trial court.⁸⁶ Presuming that the trial court had followed the correct, reasonable doubt standard of the earlier first district decision in *Pembrook*, there were two cogent reasons for rejecting the defendant's argument. First, the United States Court of Appeals for the Seventh Circuit had ruled prior to the hearing in *Thorpe* that proof beyond a reasonable doubt was constitutionally required for commitment as a sexually dangerous person.⁸⁷ That ruling would have particularly alerted a trial judge to the danger of applying a lower standard of proof because the federal action was for habeas corpus relief with the practical effect (although not binding precedent in Illinois courts) that a defendant could have secured his release if committed under a preponderance standard. Second, the fourth district *Oliver* opinion, upholding the preponderance standard, was filed a month before the trial court commitment of *Thorpe*, but it did not appear in advance publication form until fourteen days after the trial court's decision. In a practical sense, it was highly unlikely that the trial court would have been aware of *Oliver*.

Although it was unnecessary for the court, under the circumstances, fully to consider a rule that would give temporal guidelines to a trial judge faced with conflicting appellate decisions from districts other than his own, the *Thorpe* court did glance in that direction. Absent the special circumstances present in *Thorpe*, which are unlikely to recur, it will be necessary in the future for the appellate court to come to grips with the arguments for temporal guidelines.

Thus, the supreme court and appellate decisions since the 1964 unification of the appellate court have reaffirmed the pre-1964 principle that all trial courts in the state are bound by decisions of the appellate court. It can be seen from *Garcia* and *Thorpe* that the *Medendorp* principle of vertical stare decisis is easier stated than applied where decisions of divisions of the appellate court do not bind each other.

*b. The Bandy Branch of the Rule—No Horizontal
Stare Decisis: Effect of Denial of Leave to Appeal*

Whereas the 1964 unification of the appellate court should have fortified the vertical stare decisis established by *Medendorp*, it should have cast doubt on the lack of horizontal stare decisis established by *Hughes v.*

86. See generally *People v. Thorpe*, 52 Ill. App. 3d 576, 367 N.E.2d 960 (2d Dist. 1977), Reply Brief of Defendant-Appellant at 2.

87. *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976).

Bandy.⁸⁸ Recall that in 1949, when *Bandy* was decided under the constitution of 1870, there were four legislatively established appellate courts. Yet, after the 1964 restructuring of the judicial system to effectuate the unification of the Appellate Court of Illinois, the *Bandy* rule of no stare decisis effect of a decision of one division upon another persisted.⁸⁹ Once again, the doctrine has not been scrutinized by any court in light of the revision of the judiciary article, and has not been commented upon at all by the supreme court.

The appellate court, while refusing to defer directly to a decision of a coordinate division, has seemingly searched for a way to raise a coordinate decision out of the horizontal plane and accord it the effect of a supreme court decision. The supreme court's denial of leave to appeal has been the vehicle by which such a decision is elevated and then followed, thereby achieving the benefits of horizontal stare decisis without the necessity of bowing to a coordinate division. The post-1964 forays into ascribing precedent to the denial of leave to appeal are a continuation of the quest for precedent absent the horizontal deference that began when Illinois had four appellate courts. Our study will detour briefly from the rejection of horizontal stare decisis since 1964, and will explore the soundness of this device of creating vertical stare decisis between the supreme court and the appellate court.

In *Corbett v. Devon Bank*,⁹⁰ the first district ruled that where the supreme court had denied leave to appeal a prior decision of a coordinate appellate division, such stature was added to that decision that it would be followed. The first district recognized that denial of leave to appeal by the supreme court is "not precisely equivalent" to a decision by that court.⁹¹ But it reasoned that under supreme court rule 315(a), the denial of leave to appeal "means necessarily that the Supreme Court has scrutinized" the decision and the record below and has approved that decision.⁹²

The court's reliance on supreme court rule 315(a) for the proposition that the supreme court has scrutinized the decision of the appellate court and reviewed the record, and has therefore approved of the result of the appellate court decision, is unfounded. Under that rule,⁹³ a petition might be

88. 336 Ill. App. 472, 84 N.E.2d 664 (3d Dist. 1949), *aff'd on substantive issue*, 404 Ill. 74, 87 N.E.2d 855 (1949).

89. *Roe v. Estate of Farrell*, 42 Ill. App. 3d 705, 356 N.E.2d 344 (3d Dist. 1976), *rev'd on substantive issue*, 69 Ill. 2d 525, 372 N.E.2d 662 (1978); *Garcia v. Hynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 481, 331 N.E.2d 634, 636 (3d Dist. 1975). See also *Roby v. Illinois Founders Ins. Co.*, 57 Ill. App. 3d 89, 372 N.E.2d 1097 (1st Dist. 1978); *Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 299 N.E.2d 521 (1st Dist. 1973).

90. 12 Ill. App. 3d 559, 299 N.E.2d 521 (1st Dist. 1973). See *Stinson v. Edlen*, 27 Ill. App. 2d 425, 169 N.E.2d 682 (3d Dist. 1960).

91. *Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 567, 299 N.E.2d 521, 526 (1st Dist. 1973).

92. *Id.*

93. ILL. SUP. CT. R. 315(a), ILL. REV. STAT. ch. 110 A, § 315(a), provides:

Whether such a petition [for leave to appeal] will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the

denied because the supreme court considered the case of insufficient importance to warrant expenditures of its resources, or for reasons other than a belief that the appellate court had reached the correct decision or result. *Corbett's* reliance upon *McCann ex rel. Osterman v. Continental Casualty Co.*⁹⁴ was similarly misplaced. The *McCann* court had refused to follow the decision of the appellate court, in which leave to appeal had been denied, because it could find no definitive determination of the question presented to it merely from the circumstances of the supreme court's denial of leave to appeal.⁹⁵

court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

94. 6 Ill. App. 2d 527, 128 N.E.2d 624 (1st Dist. 1955).

95. However, *McCann* did state, as did *Corbett* (12 Ill. App. 3d at 567, 299 N.E.2d at 526), that the denial of leave to appeal is "merely an approval of the decision," though not necessarily an approval of the reasons therefor. 6 Ill. App. 2d at 534-535, 128 N.E.2d at 627-628.

The three cases relied on by *McCann* do not support even that conclusion. The first, *Bartosik v. Chicago River & Ind. R.R.*, 266 Ill. App. 28 (1st Dist. 1932), *cert. denied*, 288 U.S. 609 (1932), involved an argument that the appellate court was compelled to follow a prior appellate case in which certiorari had been denied by the Supreme Court of the United States. The court rather cautiously accepted this argument: "We are aware that [the denial of certiorari] does not mean that the court approved of the opinion. . . . [B]ut it does mean that the decision in [that] case was approved and we know of no reason why a different decision should be reached upon a state of facts which cannot be distinguished upon any material point." *Id.* at 41. This position is clearly wrong. See *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950), quoted from in text at note 97 *infra*.

The *McCann* court also relied on *Marks v. Pope*, 289 Ill. App. 558, 7 N.E.2d 481 (1st Dist. 1937), wherein appellee asserted that the court was bound by a decision of a coordinate branch of the appellate court by reason of the Supreme Court's denial of certiorari in the prior case. However, the *Marks* court rejected the argument. Clearly, *Marks* does not support the proposition of the *Corbett* court that a denial of a petition for leave to appeal by the Supreme Court of Illinois "adds to the stature and to the effect of a decision of the appellate court." 12 Ill. App. 3d at 567, 299 N.E.2d at 526.

Finally, *McCann* cited the case of *Kelly v. Retirement Board*, 292 Ill. App. 390, 11 N.E.2d 220 (1st Dist. 1937). However, in that case, as in *McCann* itself, the court chose not to follow the decision of the appellate court to which the appellant claimed that the court was bound by reason of the supreme court's denial of leave to appeal. The *Kelly* court concluded that the supreme court's denial of the petition could have been wholly based on an issue other than the one currently before the court.

It thus seems that the conclusion reached by the *Corbett* court was unfounded. Although the statement was not relied upon by the *Corbett* court, the supreme court has said: "The denial of leave to appeal . . . attests that this court thought the result was correct and proper under the facts there presented." *Walters v. Walters*, 409 Ill. 298, 305, 99 N.E.2d 342, 346 (1951). However, in making this statement, the court preceded the quoted language with the following statement: "A denial of leave to appeal is merely authority for the correctness of the result reached and in no way adopts or certifies to the language stated in the opinion." *Id.* These words would require severe straining to attach the weight to a denial of leave to appeal implied

It is worthy of note that the Illinois method for supreme court review by leave to appeal is nearly identical to certiorari practice in the Supreme Court

even in the negative phrase "not precisely equivalent to a decision by that court," as was asserted by the *Corbett* court. 12 Ill. App. 3d at 567, 299 N.E.2d at 526.

Additional support for the proposition that a denial of leave to appeal does not add to the stature of an appellate court decision may be gleaned from the case of *People ex rel. Hoyne v. Grant*, 208 Ill. App. 235 (1st Dist. 1917), *aff'd*, 283 Ill. 391, 119 N.E. 344 (1918). Appellant in that case argued that the appellate court was bound to follow a decision of another division of the first district which had previously decided one of the key issues in the case. Under normal circumstances the court would clearly not have been bound by the decision of its sister court, in that at the time of decision, the section 17 sentence denied appellate court decisions any precedential value. *See* text accompanying footnotes 16-17 *supra*. However, appellant asserted that because the supreme court had denied a writ of certiorari in the circuit case, the supreme court had passed upon the merits of that case, and, by denying certiorari, had affirmed the conclusion reached by the appellate court. To this argument, the appellate court responded:

This contention, in our judgment, involves an entire misconception of the purpose and effect of the statutory provisions in regard to writs of certiorari. Those provisions are substantially identical with a section of the United States statute providing for the issuance of writs of certiorari to the Circuit Court of Appeals

The conditions which led to the enactment of the State statute were also substantially similar to those which brought about the provision for writs of certiorari to the United States Circuit Court of Appeals

It seems a conclusive answer . . . to say . . . there does not appear to be a case in which counsel have suggested that the Supreme Court, by denying the writ of certiorari, stamped the conclusions of the court of appeals with its approval, and impliedly made a declaration in regard to what was the law. The language of the statute does not require our Supreme Court to issue a writ of certiorari in any case, but merely provides that it shall be competent for it to do so; nor does it require the court to pass upon the merits of the controversy presented, but leaves that to the discretion of the court, to be exercised in every case.

Id. at 239-41.

The first district also recognized that the supreme court may have denied the petition based upon an issue or factor other than the conclusion the appellate court had reached on the issue currently pressed by appellant:

Any inference, therefore, as to the opinion of the Supreme Court in regard to the correctness of the conclusion reached by the Appellate Court must necessarily rest upon speculation and conjecture. The function of finally declaring the law of the State rests with its Supreme Court, and is accomplished by means of its opinions, in which it speaks through its justices. The only safe rule would, therefore, appear to be that its conclusions in regard to the law are to be found in its reported opinions, and not decided inferentially from its action in denying writs of certiorari.

Id. at 242. Upon appeal, the supreme court spoke to the question of stare decisis affect of an appellate court case following a denial of certiorari:

One question not insisted on in this court but which was urged in the Appellate Court and is extensively treated in the opinion of that court we think should be referred to here. . . . The denial of the writ of *certiorari* . . . meant nothing more than that we approved the conclusion of the Appellate Court It did not mean that we approved the reasons set out in the opinion of that court and its determination of the merits of the case and of the rights of the parties

People ex rel. Hoyne v. Grant, 283 Ill. 391, 396-97, 119 N.E. 344, 346 (1918).

of the United States for purposes of the point currently under discussion.⁹⁶ Denial of leave by one has no more meaning than denial of certiorari by the other. In regard to the latter, hear Mr. Justice Frankfurter's admonition:

Inasmuch . . . as all that a denial of a petition for writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.⁹⁷

In conclusion, the *Corbett* position is wrong in light of the purpose, language, and history of rule 315(a); the authorities cited by the *McCann* decision on which *Corbett* relied; and the impracticalities of treating a denial of leave to appeal as substantive authority.⁹⁸ However, the detour in this study, to demonstrate that error, was not to disparage one appellate division's following a decision of another division. To the contrary, this effort to raise a coordinate decision to a higher pinnacle, as Sisyphus did the rock, is not necessary or judicious. The appellate court could follow that decision merely by according it the deference that it is due—horizontal stare decisis.

D. *The Present: An Attempt at Application*

Examination of the development of principles governing the stare decisis effect of appellate court decisions is invaluable to an understanding of the present status of those principles in Illinois. Under *Medendorp*, all inferior courts in the state are bound by decisions of any of the ten divisions of the appellate court. However, based on *Bandy*, no appellate court is bound to follow a decision of another division, despite the fact that the Illinois constitution, supreme court rules, and relevant legislative authority prescribe that there is but one appellate court in this state. On the other hand, if the *Corbett* rule persists, an appellate court may submit to being bound by a decision of a coordinate branch when the supreme court has denied leave to appeal in a case embracing similar questions of law. Additionally, *Garcia* establishes that appellate court decisions of the district in which a trial court sits are of greater weight than those of "foreign" districts, and the *Thorpe* situation suggests that the date of conflicting decisions may be a relevant consideration where a trial court is bound to follow neither decision under the *Garcia* rule, or perhaps more correctly, where it is bound to follow both decisions under the *Medendorp* rule.

96. The committee comments to supreme court rule 315, "Leave to Appeal from the Appellate Court to the Supreme Court," state: "The practice is similar to the certiorari procedure in the United States Supreme Court, and the considerations are in the main the same, though adopted to the needs of the state court." ILL. ANN. STAT. ch. 110A, § 315 (Smith-Hurd 1968).

97. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for certiorari).

98. See discussion in note 95 *supra*.

These cases, taken in the aggregate, indicate that a trial judge faced with a question requiring the determination of the stare decisis effect of appellate court decisions upon his court, may be presented with perplexing problems. Consider the following situations:

(1) *There may be an appellate case from a district other than that in which the trial judge sits, and no further authority on the point.* In this situation, the trial judge should have little difficulty determining the proper course of action. There is but one decision of the Appellate Court of Illinois, and under the *Medendorp* doctrine he is bound to follow that decision: “[A]n opinion of the Appellate Court is binding authority . . . upon all inferior courts in this State.”⁹⁹

(2) *There may be several appellate court decisions which are or are not in conflict, and one such decision is from the appellate court in the district in which the trial judge sits.* Clearly, if there is no conflict among these decisions, the trial court should have no difficulty determining the applicable rule. If, however, the decisions are in conflict, the *Medendorp* rule creates problems; each decision binds all inferior courts in this state. Thus, conversely, each trial court may be said to be bound to follow the decisions of all the district appellate courts. Under the circumstances presently posed, the appellate court has resolved the difficulty of the trial court’s position by stating that where the appellate court sitting in the district in which the trial court is located has reached a conclusion on an issue before the trial court, the trial court should “adhere to that conclusion and not to one promulgated in another district.”¹⁰⁰

(3) *There may be no decision of the appellate court in the district in which the trial judge sits, but decisions in other districts which are in conflict.* Three possible guidelines could be established for the trial judge faced with such a problem.

a. Follow the most recent appellate decision. Last in time prevails. He would take this course only in the absence of the special circumstances that occurred in *Thorpe*, which are not likely to recur. This guideline would mean, in effect, that the latest decision of the appellate court overruled prior conflicting decisions as to all trial courts in the state except in the district of the prior conflicting decision.

b. Follow the earliest appellate decision.¹⁰¹ First in time prevails. This would mean that the later conflicting decision of the appellate court overrules the earlier decision only in the district of the later conflicting decision.

99. *Hughes v. Medendorp*, 294 Ill. App. 424, 427-28, 13 N.E.2d 1015, 1017 (3d Dist. 1938).

100. *Garcia v. Hynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 482, 331 N.E.2d 634 (3d Dist. 1975); *see also* *People v. Thorpe*, 52 Ill. App. 3d 576, 376 N.E.2d 960, 963 (2d Dist. 1977) (dicta).

101. *Accord*, *Sowell v. Sowell*, 212 Ga. 351, 92 S.E.2d 524 (1956) (“Where there is conflict existing in the decisions of this court, the correct rule must be determined from the earliest

c. Reach his own conclusion as to which appellate decision to follow. It may seem at first blush that the trial judge's chances of being affirmed would be improved by this guideline. The trial judge usually knows the propensities or philosophies of appellate judges in his district, even when there is no case on point. Yet in the first district, where twenty judges sit in the five divisions,¹⁰² the chances of correctly guessing which particular three judges might review his decision are negligible. And even in the second, third, fourth, or fifth districts, the trial judge would be second guessing as to five or six judicial minds, any three of which might review the case.¹⁰³ Moreover, if ultimate affirmance were the goal of the trial judge, he would follow whichever decision he thought the supreme court would approve.

This pick-and-choose approach seems to have been suggested in *Garcia* and found not "applicable." The court's comment on that suggestion is interesting: "To apply the principle of optional selectivity by a trial court in such situation could create an anomalous situation where the trial court one week would follow one principle and the following week, a contrary principle."¹⁰⁴

At present, there are no real guidelines to assist the trial judge in selecting the last in time, first in time, or pick-and-choose course of action where conflicts exist in divisions sitting in districts other than his own.

(4) *There may be conflicting decisions among the divisions of a district where more than one division sits, or among the panels within any district.* By the authority of *Garcia*, the trial court in such a situation is bound by all appellate court decisions within his district, a geographical guideline impossible to apply. There is no established temporal guideline and the pick-and-choose approach is of no practical value here, for the trial judge does not know to which division or panel in the district his case will be assigned for review if appeal is sought.¹⁰⁵ At any rate, for the great majority of trial judges to whom precedent means something loftier than "how do I get affirmed," geographical and temporal guidelines make little jurisprudential sense.

(5) *There may be conflicting decisions among the districts, and the supreme court has denied leave to appeal in one such case.* Under *Corbett*,¹⁰⁶ a prin-

decisions on the subject, and unless overruled, they are controlling." *Id.* at 353, 92 S.E.2d at 526); *Richmond County v. Sibert*, 105 Ga. App. 581, 125 S.E.2d 129 (1962) ("[T]he Court of Appeals is bound by the principles enunciated by the *oldest Supreme Court decision*, and not by the *latest* expression of the Supreme Court which does not overrule, modify, or distinguish its oldest case." *Id.* at 582, 125 S.E.2d at 131).

102. See note 47 *supra*.

103. *Id.*

104. *Garcia v. Hynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 482, 331 N.E.2d 634, 636 (3d Dist. 1975); see text at note 68 *supra*.

105. *E.g.*, Rule 2, Rules of the Appellate Court of Illinois, First District, ILL. REV. STAT. ch. 110A, § 802(d) (1977). For a discussion of several such situations which have arisen see, AFTERWORD of text, at 605.

106. 12 Ill. App. 3d 559, 299 N.E.2d 521 (1st Dist. 1973).

ciple established in a case in which the supreme court has denied leave to appeal prevails regardless of the precedential value of other decisions as determined by the "guidelines" just discussed. The magnitude of the dilemma presented to a trial judge attempting to apply *Corbett*, in addition to the inherent difficulty he faces in determining just what the denial of leave to appeal means,¹⁰⁷ can be illustrated by an example. Suppose in case X the appellate court sitting in the first district has adopted a certain principle of law. No leave to appeal is sought. The second district subsequently rejects this principle in case Y, and the supreme court denies leave to appeal case Y. Thereafter, a trial judge sitting in the first district deciding analogous case Z might follow *Corbett*, and view case Y as precedent on the strength of the denial of leave to appeal. On the other hand, the trial judge might believe that the *Garcia* rule commands that he follow case X, since he sits in the geographical district of the appellate division that decided case X. Or, moreover, he might believe that the case later in time, case Y, should prevail.

If this situation seems a stare decisis nightmare, it is hardly more so than *Garcia*, or for that matter, *Thorpe*. It illustrates not so much a gap in the Illinois approach, as a failure of appellate courts—supreme and intermediate—to appreciate the problems faced by trial judges attempting to apply the glib and sometimes inconsistent rules of stare decisis as enunciated in Illinois. A retreat from the *Bandy* rule of no horizontal stare decisis would inevitably solve most of the problems of vertical stare decisis, so that trial courts would have fewer gaps and more precedential guidelines. It is somewhat surprising that the rule of *Bandy*, based on the 1877-1964 structure of multiple appellate courts, survived. As yet, it has not been reexamined by any court in view of the unitary structure of the appellate court established by the constitutional revision of the judicial system. How the retreat from the *Bandy* rule should come to pass is addressed in part II.

II. EVALUATION OF ALTERNATIVE APPROACHES AND RECOMMENDATION

If the Illinois approach to stare decisis within and among the appellate court and circuit courts has proved less than completely satisfactory, it is not because the Illinois judicial system lacks structural soundness.¹⁰⁸ On the contrary, the 1962 judicial article was

the culmination of many years of education and effort. . . . The result has been a complete reorganization of [the] entire judicial system in Illinois, with the establishment of an adequate system of administrative control. It

107. See text at notes 90-98 *supra*.

108. See excerpts of accolades on the subject of the judiciary article reform of 1962, collected in H. FINS, ILLINOIS APPELLATE PRACTICE UNDER THE NEW CONSTITUTION 28, n. 7 (1973).

has generally been hailed as a landmark achievement in needed judicial reform throughout the United States.¹⁰⁹

Since the legislature repealed the section 17 "no binding effect" sentence, the Supreme Court of Illinois has had little to say about the stare decisis effect of decisions of appellate courts. The two supreme court references, in *UMW Hospital*¹¹⁰ and *Roe*,¹¹¹ support what we have denominated the vertical or umbrella stare decisis effect of a decision of the appellate court. The rather limited aspect where improvement is needed is on the horizontal plane. Because the various divisions of the appellate court do not view themselves as bound by each other, the trial courts are necessarily in a quandary when conflicts arise.

Examination and criticism of the alternative approaches to stare decisis, sketched in the introduction to this study, are useful before recommending refinements in the Illinois approach.

A. Evaluation of Alternative Approaches

1. Precedentless Appellate Court Decisions

The precedentless approach to decisions of intermediate appellate courts assumes that the function of those decisions is simply to assure justice in the particular case, "like a kadi under a tree dispensing justice according to considerations of individual expediency."¹¹² There is no precedential value in the decisions, either vertically on lower courts, or horizontally on the other intermediate appellate courts, or even on the deciding court itself should the same issue be presented in a subsequent case.¹¹³ In summary, under this theory, decisions of intermediate appellate courts are given no stare decisis effect at all.

The Oklahoma judicial system serves well to demonstrate this approach. Under the Oklahoma constitution, there is a legislatively established Court of Appeals of the State of Oklahoma, which sits in two divisions.¹¹⁴ The unique feature of the Oklahoma system derives from the statute providing that opinions of the court of appeals are not binding, and may not be cited as precedent unless a majority of the justices of the supreme court approves the opinion for publication in the official reporter.¹¹⁵ Thus, under this ap-

109. *Romiti v. Kerner*, 256 F. Supp. 35, 39 (N.D. Ill. 1966) (Judge John S. Hastings, former chief judge of the United States Court of Appeals for the Seventh Circuit, speaking for a three judge district court) (footnote omitted).

110. 52 Ill. 2d 496, 288 N.E.2d 455 (1972).

111. 69 Ill. 2d 525, 372 N.E.2d 662 (1978).

112. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1948) (Frankfurter, J., dissenting). On Kadi (Khadi) justice, see generally M. WEBER, ON LAW IN ECONOMY AND SOCIETY 351 (1954).

113. This situation prevails absent a binding decision by the supreme or high court on the issue.

114. OKLA. CONST. art. 7, § 1; OKLA. STAT. ANN. ch. 20, §§ 30.1, 30.2 (West 1977 Supp.).

115. OKLA. STAT. ANN. ch. 20, § 30.5 (West Supp. 1977). Opinions of the Court of Appeals of the State of Oklahoma are not precedent and do not announce principles of state law that

proach, the intermediate appellate court plays no role in building a cohesive body of prescriptive law in the judicial system. That leaves the supreme court as the only authoritative judicial institution to perform that task.

The precedentless intermediate court approach, negating as it does any institutional or stare decisis function at the middle level, may be suited to a judicial system where the volume of litigation is low, the geographical jurisdiction is homogeneous, or the work load of the high court allows it to give ample attention to the institutional function of resolving conflicts. However, the precedentless approach was tested in Illinois from 1877 to 1935, and then repudiated by the repeal of the legislation that had denied binding effect to appellate court decisions.¹¹⁶ With the unitary appellate court structure adopted in 1962, Illinois moved even further from the precedentless approach. Finding no beneficial application of that approach to Illinois, it is discussed merely to emphasize that whatever hangover lingers from it should be physicked.

2. *Geographical or Territorial Approach to Stare Decisis*

Where there is more than one intermediate appellate court in the judicial structure it is not illogical that the decisions of those courts lack horizontal stare decisis effect and have vertical stare decisis only in the geographic area in which the deciding court sits.

The federal judicial structure furnishes the most familiar example of the geographical approach, with a United States Court of Appeals for each of the eleven judicial circuits.¹¹⁷ It is well established that the decisions of the eleven separate courts of appeals bind federal district courts (trial courts) only in the circuit over which the respective court of appeals presides.¹¹⁸ Thus, there is geographically limited vertical stare decisis. A decision of the court of appeals for one circuit is merely persuasive authority when cited to the court of appeals for another circuit; there is no horizontal stare decisis.¹¹⁹

The incapacity for nationally binding precedent is one of the most pressing problems in the federal judicial system.¹²⁰ Yet the federal judicial system

federal district courts must follow in diversity cases. *Russell v. Atlas Van Lines, Inc.*, 411 F. Supp. 111 (E.D. Okla. 1976).

116. See text accompanying notes 15-23 *supra*.

117. U.S. CONST. art. III, § 1; 28 U.S.C. §§ 41, 43 (1976).

118. 1b MOORE'S FEDERAL PRACTICE ¶ 0.402[1], at 61-62 (2d ed. 1974).

119. *Id.* at 62-63.

120. Along with the incapacity for nationally binding precedent, a second problem most often identified and studied is the overburdening caseload of the federal judiciary at all levels. These two related problems have brought forth an abundance of scholarly criticisms, and suggestions for the insertion of an additional rung in the federal appellate ladder, between the court of appeals and the Supreme Court. Extensive citations to the wealth of literature on these issues are in Comment, *An Intermediate National Appellate Court: Solution or Diversion?*, 22 VILL. L. REV. 1022 (1977). The major proposal advanced in the prestigious Freund Report, which focused on the overburdened docket of the Supreme Court, called for the creation of a National

embraces a large geographical area comprising substantial diversity in historic, economic, social, and political arenas. If conflicts in decisions between or among coordinate courts is undesirable in the larger federal system, the undesirability of conflicts is intensified within a state judicial system, embracing a smaller geographical area, with presumably less diversity.

The Florida judicial structure illustrates the geographical approach on a state level, with a separate district court of appeal for each of the four judicial districts of Florida.¹²¹ The district courts of appeal agree that their decisions do not bind each other, but are merely persuasive.¹²² Florida's neat constitutional and legislative structuring of the judiciary¹²³ has not, however, automatically answered Florida's vertical stare decisis problems. In a case of first impression the fourth district court of appeal was surprised at the suggestion that there was "confusion and uncertainty abroad among the circuit [trial] courts as to whether they are bound to follow the decision of a foreign District Court of Appeal."¹²⁴ In a thoughtful opinion, (then) Chief

Court of Appeals which would decide, on the merits, many cases of conflicts between the circuits. *Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 590 (1972). The felt and demonstrated need for nationally binding precedent was ably presented by the Commission on Revision of the Federal Court Appellate System (Hruska Commission) formed by Congress in 1972. The Hruska Commission listed a sampling of twenty specific points on which there were conflicting federal court decisions that had not been resolved by the Supreme Court. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATION FOR CHANCE 76-90 (1975). The Commission determined that the paucity of nationally binding decisions often bred uncertainty, forum shopping, and relitigation of issues previously decided in a different circuit. See also Justice Schaeffer's Foreword in this issue of the DEPAUL LAW REVIEW, for comments calling for stare decisis among the federal courts of appeals.

121. The judicial power is "vested in a supreme court, district courts of appeal," and trial courts. FLA. CONST. art. 5, § 1. One district court serves each appellate district. FLA. CONST. art. 5, § 4(a). The districts are designated by the legislature. *Id.* at § 1. The chief judge for each court of appeal is responsible for the administrative supervision of the court. FLA. CONST. art. 5, § 2(c). There is statutory recognition of separate courts of appeal: four courts of appeal are created, "to be named District Court of Appeal, _____ District." FLA. STAT. ANN. § 35.06 (West 1978 Supp.). Each district court makes its own regulations for the internal government of the court, and each has its own official seal. FLA. STAT. ANN. §§ 35.07, 35.09 (West 1974).

Florida authorities often emphasize that its courts of appeal are not intermediate courts, but rather are courts of last resort, except for cases specifically made reviewable by the supreme court. These cases include any court of appeal decision in direct conflict with another court of appeal decision. FLA. CONST. art. 5, § 3(b)(3). In the context of this study then, it is not erroneous to consider them as "intermediate" appellate courts. See generally Freidin, *Conflict Certiorari: Is the Supreme Court of Florida Following Its Constitutional Mandate?*, 32 U. MIA. L. REV. 435 (1978).

122. *State v. Hayes*, 333 So. 2d 51 (Fla. 4th Dist. Ct. App. 1976), citing *Spencer Ladd's, Inc. v. Lehman*, 167 So. 2d 731 (Fla. 1st Dist. Ct. App. 1964), modified on different grounds, 182 So. 2d 402 (Fla. 1966). "Within their sphere . . . [Florida's] District Courts of Appeal are courts of last resort. . . . As such, they draw for precedent on their own prior decisions and on decisions this Court handed down before they were in existence." *Morgan v. State*, 337 So. 2d 951, 953 n.6 (Fla. 1976) (citation omitted).

123. See note 121 *supra*.

124. *State v. Hayes*, 333 So. 2d 51, 54 (Fla. 4th Dist. Ct. App. 1976).

Judge Walden, speaking for the court, held that where the only case on point is from a district other than the one in which the trial court is located, the trial court is required to follow that decision.¹²⁵ Thus, the fourth district court of appeal attempted to establish the umbrella type vertical stare decisis in a state with four appellate courts, just as was done in Illinois at a time when it had four appellate courts.¹²⁶ Six months later, Florida's first district court of appeal addressed the vertical stare decisis issue and came to a different conclusion. It rejected as "novel," and "without merit," the contention that a trial court within the "jurisdiction" of the first district court of appeal is bound by decisions of any other district courts.¹²⁷ Thus, Florida, like the federal system, views the decisions of its appellate courts as having no binding effect on coordinate courts, and as binding the trial courts only in the geographical area over which the particular appellate court presides. (Or, if Judge Walden's opinion is accepted, a Florida appellate decision that does not conflict with another binds all trial courts in the state.)

The organizational model of appellate courts in the Florida and federal systems is that of multiple courts sitting in defined geographical regions. The lack of horizontal stare decisis among these courts is at least consistent with this structure. The geographical method of organization has both advantages and disadvantages. Principal of the advantages is that it accommodates the convenience of lawyers and judges by reducing the amount of travel time required for personal contact, an advantage the Illinois system also provides. A second potential advantage, where the number of judges in regional courts is small, is that it offers more ready identification of the judges who will decide the appeal. As Professor Llewellyn emphasized, a known bench is a useful means to "reckonability."¹²⁸ A third advantage, assuming the federal approach recognizing limited vertical stare decisis is followed, is less confusion on the trial court level. If the trial courts have only one superior to follow, their own regional appellate court, many of the quandaries posed in part I.D. of this Article will not arise.¹²⁹

125. *Id.*, citing *Garcia v. Haynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 331 N.E.2d 634 (3d Dist. 1975), as well as New York and California decisions. The Florida opinion went on to state that if the court of appeal of a district in which the trial court is located has decided the issue, the trial court is bound to follow it.

126. See *Hughes v. Medendorp*, 294 Ill. App. 424, 13 N.E.2d 1015 (3d Dist. 1938). See notes 15 and 16 *supra*.

127. *Smith v. Venus Condominium Ass'n., Inc.*, 343 So.2d 1284 (Fla. 1st Dist. Ct. App. 1976), *quashed and remanded*, 352 So.2d 1169 (Fla. 1977) (in an opinion that never touched the stare decisis point). The district court stated that binding a trial court by decisions of a court of appeal outside its district "could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district. Also, an anomalous situation would result were we to reverse a trial court in this district for failing to follow a decision of one of our sister courts with which we disagreed." *Id.*, 343 So.2d at 1285.

128. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 17, 34 (1960).

129. The quandaries will persist, however, if there are several divisions within the regional appellate court.

On the other hand, a substantial disadvantage inheres in the geographical approach. Close reading of a comment on this disadvantage by eminent appellate justice scholars is warranted:

This [substantial disadvantage] is its tendency to reinforce the instinct for autonomy of the intermediate court judges and to promote a form of territorialism which can be debilitating to the system. Territorialism is a problem both theoretical and practical. Its theoretical fault is that it is fundamentally inconsistent with the idea of law because it accepts differences resulting solely from differences in place with no basis in reason for such divergences. In a pure form, territorialism in the administration of the law is a denial of equal protection in the classical sense. There is confusion in the minds of some observers about this; the confusion mistakes territorialism for federalism or for legitimate regionalism. It leads those who are thus mistaken to suppose that territorialism is an instrument of democracy, making the legal system more responsive to differences between regions. It is, however, hard to imagine a less effective instrument of democratic government than an intermediate court; these institutions are of such low public visibility and their judges are so utterly unknown to any constituency that it is quite inaccurate to think of them as representatives of anything except the whole legal system of which they are part, and of their own consciences. Moreover, if it were important to respond to regional differences in the formulation of any aspect of the law, there are both constitutional and legislative means for assuring that such decisions are made by regionally democratic means; generally when these means are not employed, it can be inferred that a democratic legislature has determined that a system-wide uniformity is needed. Beguiling as it may be to do so, territorialism should not be mistaken for healthy regionalism; it is, in any legal system, a mark of weakness, a lapse in the pursuit of evenhanded justice.

The practical disadvantages of this theoretical flaw of territorialism are notable. It rewards and encourages appellate forum-shopping. The possibility of forum-shopping, in turn, promotes uncertainty about the law applicable to particular transactions and thus discourages legal planning. It is economically wasteful and undermines the effectiveness of the law as a means of regulating conduct.¹³⁰

The evils that flow from conflicts of coordinate divisions, which have racked the federal system, are exacerbated on a state scale. Any argument that the state of Illinois is so diverse that different prescriptive laws should apply in, for example Chicago, from those in Cairo, are adequately answered in the quoted discussion of Professors Carrington, Meador, and Rosenberg. Whether or not political or economic differences within a state call for different laws is a matter for the legislature, not the appellate courts.

The organizational model of appellate courts in Illinois is a unitary court sitting in defined geographical regions. The substantial disadvantage of territorialism that inheres in the geographical organization should be minimized in the Illinois system, for the same reasons that it should be in multiple

130. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 154-55 (1976).

appellate court systems. Additionally, the substantial disadvantage should be minimized in Illinois because territorialism is inconsistent with its unified appellate court structure. What is needed is the recognition that the Appellate Court of Illinois, institutionally a single body, sits in ten divisions in order to do the work necessary to perform the function for which it was established. Accordingly, the political delineation of districts within politically defined geographical areas serves only to provide a base from which the electorate may choose its judges, who may nonetheless sit in any division, and perhaps serves the additional purpose of convenience in minimizing travel. Districts were not established to divide the state into five feudal dukedoms. Complete disregard for horizontal stare decisis is a manifestation of territorialism. The conditions created by territorialism, then, can be ameliorated by a stronger, more positive acceptance of horizontal stare decisis.

3. "Absolute Binding" Model

One final approach to the stare decisis effect of decisions of intermediate appellate courts remains to be discussed. The "absolute binding effect" model contemplates a system in which all divisions of the appellate court are bound by the decisions of coordinate branches of the court, as well as by their own prior decisions. In effect, there is truly but one appellate court, and that court is bound by its prior decisions.

An example of such an approach may be found in the English judicial system. England's Court of Appeal serves as the intermediary court between the nation's trial courts (the County Courts and the High Courts) and England's highest judicial body (the House of Lords).¹³¹ The court is divided into a civil division and a criminal division and is composed of fourteen lord justices and the Master of the Rolls (the chief justice). In civil cases the court normally sits in panels or divisions of three judges, although the presiding judge on a panel has the authority to adjourn a case for argument before a full court, normally consisting of five judges.¹³²

In *Young v. Bristol Aeroplane Co.*,¹³³ it was stated that a decision of a division of the court of appeal binds the court of appeal in its entirety, as well as other divisions of the court.¹³⁴ The court of appeal has no power to

131. F. MORRISON, COURTS AND THE POLITICAL PROCESS IN ENGLAND 40-41 (1973).

132. R. CROSS, PRECEDENT IN ENGLISH LAW 113-14 (3d ed. 1977).

133. [1946] C.A. 163.

134. [I]f the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed . . . [and] this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted.

Id. at 169.

Lord Greene, speaking for the court of appeal in the *Young* case, explained the rationale behind this concept of horizontal stare decisis as it is applied by the English judiciary:

deviate from strict adherence to this rule of stare decisis, except out of necessity when conflicting decisions of the court of appeal do arise, or a court of appeal decision conflicts with a decision of the House of Lords, or when the decision of the court was given per in curiam.¹³⁵

The English model demonstrates horizontal stare decisis at its apex. The advantage that could be ascribed to this model over a more flexible stare decisis approach is, of course, consistency of decisions. However, like any other virtue, consistency may be carried to an extreme, and under this model justice in the individual case may be completely disregarded. Indeed, even the stability held so precious by proponents of an absolute, binding model may not truly materialize. Although the courts of England have claimed to hold steadfastly to the rules laid down in prior adjudications, it has been observed that they carry "the technique of distinguishing to a very high pitch of ingenuity."¹³⁶ Thus, the stability of such a system may be solely cosmetic: the theory, apparently, is that the outward appearance of stability is what is important. Such a policy has been aptly criticized by Mr. Justice Douglas: "A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe."¹³⁷ The English approach affects either stagnation of the law or else judicial gamesmanship; it should thus be rejected as too rigid an application of stare decisis.

To be sure, a satisfactory median can be found between the Oklahoma system, in which no precedential value is assigned an appellate court decision, and the English system, in which a decision of the appellate court, once finalized, is irrevocably the law of the land until the issue is reviewed by a higher court. Such a compromise is the topic of discussion in the following section.

B. *Recommended Refinements in the Illinois Model*

The current structure of the Illinois judiciary, in particular the Appellate Court of Illinois, is the result of a century of development, and serves well as a base upon which a satisfactory, even excellent, appellate process may

The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions. Each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court: . . . [I]n the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor . . . in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect . . . what can be done by a full court can equally well be done by a division of the court.

Young v. Bristol Aeroplane Co., 1 K.B. 718, 725 (1944).

135. *Id.* at 729-30.

136. Radin, *The Trail of the Calf*, 32 CORN. L.Q. 137, 143 (1946).

137. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).

function. The only major flaw in the system is the confusion and lack of uniformity caused by the numerous rules and "guidelines" for the determination of the stare decisis effect of the decisions of the appellate court. Thus, our recommendations shall center upon improvement at this point, rather than upon structural changes in the system.

One of the causes of conflicts among the divisions may well be an excess of independence—each division refuses to admit that a coordinate division can bind by precedent¹³⁸ but too much deference to presume to overrule a coordinate division. What is needed is a recognition by the members of the appellate court that they are but a single court, "a judicial alliance," and that, based on such allegiance, substantial precedential weight should be attached to the decisions of their brethren sitting in the other divisions and districts. Judge George N. Leighton,¹³⁹ when sitting on the Appellate Court of Illinois, followed a point of law established by a coordinate appellate division¹⁴⁰ with the judicious comment: "Absent compelling differences of controlling precedent to the contrary, the decision of another appellate division should be followed."¹⁴¹

More specifically, a two-pronged solution would ameliorate the problems caused by lack of horizontal stare decisis, and thereby extricate trial judges from dilemmas imposed by vertical stare decisis. First, the appellate court should recognize, or, if necessary, the supreme court should declare, that a decision by the appellate court binds the appellate court in all of its divisions. Except in rare instances, for compelling reasons (not merely preference for an alternative rule), where circumstances require a departure from the established rule, the decision should be followed. Second, in those rare instances when a division does depart from an earlier ruling of the appellate court, the later conflicting decision should specifically overrule the former, and, with or without a declaration by the deciding court to this effect, the later decision should be deemed by all Illinois courts to have overruled the former. In all situations where the decisions involve an issue of such importance that it should be finally decided by the supreme court (and most such cases will), the overruling appellate court should certify to the supreme court for mandatory review.¹⁴²

138. See quotation from P. CARRINGTON at text accompanying note 130 *supra*.

139. Presently a Judge for the United States District Court, Northern District of Illinois.

140. *Campbell v. Dept. of Public Aid*, 9 Ill. App. 3d 962, 294 N.E.2d 698 (1st Dist. 1973), *modified*, 61 Ill. 2d 1, 329 N.E.2d 225 (1975).

141. *Cornue v. Weaver*, 29 Ill. App. 3d 546, 553 n.1, 331 N.E.2d 148, 154 n.1 (1st Dist. 1975), *rev'd, sub nom Cornue v. Dept. of Public Aid*, 64 Ill. 2d 78, 354 N.E. 359 (1976). That the point of law in *Campbell*, followed in *Cornue*, was later rejected by the supreme court, and *Cornue* accordingly reversed on the point, does not detract from the significance or wisdom of Judge Leighton's accepting the coordinate decision as precedent until it was rejected by the supreme court.

142. *Contra, Roe v. Estate of Farrell*, 42 Ill. App. 3d 705, 356 N.E.2d 344 (3d Dist. 1976), *rev'd on merits after leave to appeal granted*, 69 Ill. 2d 525, 372 N.E.2d 662 (1978), where certification was denied despite conflict with another division. See also note 59 *supra*.

The approach advocated has been adopted by other judicial systems without carrying the concept of horizontal deference to the extreme of the English courts. The attitude taken by the Arizona Court of Appeals may serve as a model for the Appellate Court of Illinois. The following language from an opinion of the Arizona court is demonstrative of this attitude:

Having found no prior Arizona Supreme Court decisions [on the] question pending before this Court, we now consider prior decisions of the Court of Appeals As a threshold matter, we note that while we would not be absolutely bound by prior Court of Appeals decisions, the principle of *stare decisis* and the need for stability in the law in order to have an efficient and effective functioning of our judicial machinery dictate that we consider the decisions of coordinate courts as highly persuasive and binding, unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.¹⁴³

Additionally, a division of the Arizona court has said: "We believe that this division sits as an independent division, being part of a single court, and that we should not disagree with our own decisions or those of the other divisions unless presented with the most cogent of reasons."¹⁴⁴

In sum, our recommendation for the refinement of the appellate process in Illinois is that divisions of the appellate court recognize that decisions of coordinate branches of that court do cast a *stare decisis* net upon the tribunal as to all its parts. However, the "*stare decisis*" of which we here speak is not that which was recognized by Shakespeare as being unbending:

143. *Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 520 P.2d 1142, 1148 (1974). *Contra*, *Martinez v. Cardwell*, 25 Ariz. App. 253, 542 P.2d 1133 (1975), *Williams v. Garrett*, 4 Ariz. App. 7, 417 P.2d 378 (1966).

144. *Streenz v. Streenz*, 11 Ariz. App. 10, 461 P.2d 186, 187 (1969). The Arizona court described its view of the *stare decisis* effect of decisions of the coordinate branches of the court in the following words:

The appellees in the case now before us urge that the Judges of Division One of the Court of Appeals are bound by [the decision of Division Two]. Even though the Court of Appeals sits in two independent Divisions, it is, nevertheless, a single Court and the argument that we are bound by [the decision of Division Two] is one of great merit. When we disagree with a prior decision of our Court whether rendered by our own Division or by our fellow Judges in Division Two, we should do so only upon the most cogent of reasons being presented.

Neil B. McGinnis Equip. Co. v. Henson, 2 Ariz. App. 59, 406 P.2d 409, 412 (1965). *See Baker v. Lorillard*, 4 N.Y. 257, 261 (1850); *Leavitt v. Morrow*, 6 Ohio St. 72, 78, 67 Am. Dec. 334, 337 (1856). Perhaps the best articulation of the concept we suggest here came from the Supreme Court of Appeals of West Virginia:

Stare decisis is not a rule of law but is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. However, *stare decisis* is not an inflexible policy. In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.

Adkins v. St. Francis Hospital, 143 S.E.2d 154, 162 (W.Va. 1965) (citation omitted).

There is no power in Venice
 Can alter a decree established.
 'Twill be recorded for a precedent,
 And many an error by the same example
 Will rush into the state.¹⁴⁵

Rather, the stare decisis here advocated is a more flexible doctrine designed to introduce uniformity and stability into a legal system without introducing rigidity. It preserves the laudable vertical stare decisis that was established even before the unification of the appellate court. But it recognizes the implication of that court's unification which calls for horizontal stare decisis. The Illinois system presents an excellent model for the advantageous utilization of geographically based divisions of the appellate court without the substantial disadvantage of territorialism that rears its head in models featuring multiple appellate courts.

AFTERWORD

Three sets of conflicts recently created by the Appellate Court of Illinois supply an appropriate afterword to this study. In each of the three situations the appellate court filed conflicting opinions on the same day. Thus, the reach of stare decisis as discussed in this Article—that a decision of one court binds it in its later decisions—was evaded.

On May 26, 1978, two panels of the appellate court sitting in the fourth district filed decisions involving the constitutionality of the statute of limitations governing medical malpractice suits.¹⁴⁶ In one decision, the court held the statute unconstitutional;¹⁴⁷ in the other decision, the court held the statute constitutional.¹⁴⁸

On September 29, 1978, three panels of the appellate court sitting in the fourth district filed decisions involving the issue of per se conflicts of interest of criminal defense attorneys also employed as special assistant attorneys general on a part-time basis. In two decisions, the court held that a per se conflict of interest rule did not exist where the defense attorney in a burglary case was a special assistant attorney general for workers' compensa-

145. W. SHAKESPEARE, *MERCHANT OF VENICE*, Act 4, Scene 1.

146. ILL. REV. STAT. ch. 83, § 22.1 (1977), provides that no action for damages for injury or death against any physician or licensed hospital may be brought more than four years after the act, omission, or occurrence complained of, regardless of the discovery date.

147. *Woodward v. Burnham City Hospital*, 60 Ill. App. 3d 285, 377 N.E.2d 290 (4th Dist. 1978) (Craven, J. & Mills, J., concurring; Trapp, J., dissenting). The majority found that the granting of immunity for hospitals and physicians while denying immunity to others in the health care profession was clearly a special privilege in violation of Article IV, § 13, of the Illinois constitution. *Id.* at 288, 377 N.E.2d at 292.

148. *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (4th Dist. 1978) (Reardon, J. & Trapp, J., concurring; Mills, J., dissenting). The majority in *Anderson* found that § 22.1 was constitutional and thus barred plaintiffs cause of action. *Id.* at 832, 378 N.E.2d at 812.

tion matters,¹⁴⁹ or where the defense attorneys in an Illinois Antitrust Act case were members of firms that had partners who were special assistant attorneys general for condemnation and public aid matters.¹⁵⁰ These decisions purported to overrule a 1975 fourth district decision which held a lack of proof of actual prejudice irrelevant in that the conflict of interest exists per se by reason of a criminal defense attorney's association with the attorney general's office.¹⁵¹ In a third decision, filed on September 29, 1978, the court followed the 1975 opinion in finding a per se conflict of interest where a defense attorney in a cannabis case was a special assistant attorney general for workers' compensation matters.¹⁵²

On July 13, 1978, two panels of the appellate court sitting in the fifth district filed decisions involving Illinois' prohibition against eavesdropping. A statutory exception applies when the surveillance is done "with the consent of any one party to such conversation and at the request of a State's Attorney . . ." ¹⁵³ In one decision the court held that the statute did not require that a written request specifically naming a particular individual to be the subject of the proposed surveillance, be filed by the state's attorney.¹⁵⁴ In the other decision the court held that the statute required that state's attorney authorizations of eavesdroppings specifically identify the person to be the subject of surveillance.¹⁵⁵

149. *People v. Rogers*, 64 Ill. App. 3d 290, 382 N.E.2d 1236 (4th Dist. 1978) (Mills, J. & Green, J., concurring; Craven, J., dissenting).

150. *People v. Crawford Distributing Co.*, 65 Ill. App. 3d 790, 382 N.E.2d 1223 (4th Dist. 1978) (Green, J. & Mills, J., concurring; Trapp, J., dissenting).

151. *People v. Cross*, 30 Ill. App. 3d 199, 331 N.E.2d 643 (4th Dist. 1975).

152. *People v. Fife*, 65 Ill. App. 3d 805, 382 N.E.2d 1234 (4th Dist. 1978) (Reardon, J. & Trapp, J., concurring; Green, J., dissenting).

153. THE CRIMINAL CODE OF 1961, 1961 Ill. Laws § 14-2(a), at 1983, as amended by P.A. 76-1110 of June 24, 1969, Laws 1969 at 2239.

Subsequent to the surveillance in the cases here under consideration, the statute was amended to read: "A person commits eavesdropping when he: (1) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all the parties to such conversation or (2) with the consent of any one party to such conversation and in accordance with Article 108A of the 'Code of Criminal Procedures of 1965' . . ." Article 108A of the Code of Criminal Procedure, "Judicial supervision of the use of eavesdropping devices," also empowers state's attorneys merely to authorize applications to circuit judges for orders approving the use of eavesdropping devices. ILL. REV. STAT. ch. 38, § 108A-1 (1977).

154. *People v. Mosley*, 63 Ill. App. 3d 437, 379 N.E.2d 1240 (5th Dist. 1978) (Jones, J. & Wineland, J., concurring; Moran, J., dissenting). The court held all that need be shown to allow an instance of eavesdropping to fall within the exception was (1) that one of the parties consented to the surveillance, and (2) that a request for the surveillance was made by a state's attorney.

155. *People v. Kezerian*, 63 Ill. App. 3d 610, 379 N.E.2d 1246 (5th Dist. 1978) (Moran, J. & Eberspacher, J., concurring; Jones, J., dissenting). The court believed that the statute required that state's attorney's authorizations of eavesdropping specifically identify the person to be the subject of the surveillance. Absent such specificity, the requests were believed to be too broad, amounting to delegation of the state's attorney's authority to agents of the Illinois Bureau of Investigation.

Several points should be noted in regard to these three sets of conflicts. First, interestingly enough, since the panels involved filed the conflicting decisions in each set of cases on the same day, any application of stare decisis on the horizontal plane has technically been avoided. Second, these decisions place trial judges in the untenable position of having to decide cases directly contrary to one or more "controlling" appellate decisions. Moreover, the filing of the conflicting decisions within one district does nothing to soften the state-wide impact of the conflict. Recall that under *Medendorp*,¹⁵⁶ decisions of the appellate court bind all trial courts in the state. Third, the almost cavalier creation of these conflicts demonstrates that the values sought to be protected by stare decisis weigh too lightly in the minds of some appellate judges as against strong preferences for one rule of substantive law over another. If it is thought that "resolving conflicts is what the supreme court is there for," it must be remembered that occasion for the supreme court to resolve substantive conflicts is totally fortuitous. Litigants often refrain from seeking further review of adverse decisions because of financial, strategic, or other considerations.

Fortunately, leave to appeal has been granted in two of the sets of cases discussed in this afterword.¹⁵⁷ It is hoped that the supreme court will utilize the opportunity to revitalize the values of stare decisis within the Appellate Court of Illinois.¹⁵⁸

156. 294 Ill. App. 424, 13 N.E.2d 1015 (3d Dist. 1938). See discussion in text accompanying notes 24-32 *supra*.

157. Just prior to the publication of this Article, the Supreme Court of Illinois upheld the constitutionality of the medical malpractice statute of limitations, affirming *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (4th Dist. 1978). The court recognized the existence of the conflict without commenting on the evasive practice utilized by the fourth district. *Anderson v. Wagner*, Nos. 50880, 50980, 50981 consol (Ill., filed Oct. 2, 1979).

158. *But see* note 157 *supra*.

