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DISCUSSION OF RECENT DECISIONS

ASSAULT AND BATTERY — CIVIL LIABILITY — WHETHER CONSENT OF PARENT MUST BE OBTAINED WHEN OPERATION ON INFANT IS FOR BENEFIT OF ANOTHER — In Bonner v. Moran¹ the defendant surgeon, after procuring the consent of the infant plaintiff who was fifteen years of age, proceeded with a skin graft operation which was intended to aid a near relative of the plaintiff but was to be of no beneficial consequence to himself. The minor’s parent had not been apprised of the fact that the plaintiff was submitting himself to the operation, nor was any attempt made to communicate with her. Upon learning of the operation, the parent, as next friend, brought action against the surgeon for assault and battery. The trial judge instructed the jury that if they believed that the minor was capable of appreciating and did appreciate the nature and consequences of the operation and actually or impliedly consented thereto, then the verdict must be for the defendant. The jury so found. On appeal, it was held that, notwithstanding the fact that the infant was capable of appreciating the nature and consequences of such an operation, the consent of the minor could not insulate the doctor from liability.

It is elementary law that an unpermitted touching of another’s per-

¹ 126 F. (2d) 121 (1941).
son constitutes an assault and battery,² hence the performance of a surgical operation without the consent of the patient, or of someone legally competent to give consent for him, exposes the surgeon to civil liability for an assault and battery.³ Conversely, if the patient has consented to the surgery that is performed upon his person, the surgeon is free from civil liability because he who consents cannot receive an injury.⁴

The general rule of law with reference to minors is, however, that the consent of the parent is necessary before a surgical operation may be performed upon the minor if the surgeon is to be relieved of civil liability.⁵ This rule, of course, is subject to exceptions, as where the infant is in dire need of an operation designed to benefit his life or health and his consent cannot be obtained, nor can the consent of the parent or guardian be obtained because they are too distantly removed from the place of the operation that the attendant delay might further endanger the life of the infant.⁶ Logically, another exception should appear where emancipation of the infant has removed the disabilities attendant upon his minority,⁷ as where the minor has married;⁸ or has entered the armed services; or has been declared so emancipated by judicial proceedings.⁹

In addition, at least one jurisdiction has held that, where the minor is close to maturity, the surgeon may be justified in accepting his consent.¹⁰ Thus in Bishop v. Shurly,¹¹ where the infant was nineteen years of age, the court recognized that he could give a valid consent to a surgical operation upon his person. The court reasoned that the consent was valid in that the operation, being necessary, it fell into the category of "necessaries" for which the infant could become bound.

The Restatement of the Law of Torts also propounds the theory that: "if a child...though under guardianship, is capable of appreciating the nature, extent and consequences of the invasion, his assent prevents the invasion from creating liability, though the assent of the par-

² Blackstone Comm. 120; 6 C. J. S., Assault and Battery, 796 § 1.
⁴ Restatement of the Law of Torts § 53; Cooley on Torts, I, § 97.
⁷ 31 C. J. 1008 § 37.
⁹ Mark v. McElroy, 67 Miss. 545, 7 So. 408 (1890).
¹¹ 237 Mich. 76, 211 N.W. 75 (1926).
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ent, guardian or other person is not obtained, or is expressly refused. These doctrines were, however, expressly repudiated in the instant case.

The Bakker case, and the view expounded by the Restatement of the Law of Torts, proceed on the theory that an infant close to maturity and old enough to appreciate the imminence of danger in a surgical operation, should be able to give a valid consent. The problem for them, then, becomes one of factual determination. The court in the instant case, however, expresses the view that the age at which an infant attains such maturity as to appreciate the danger and consequences of an invasion of his person, is that age which is recognized by any given jurisdiction as being the time when the infant attains his majority. Prior thereto, ability to appreciate consequences does not exist. Moreover these views are distinguishable in that the former proceeds on the theory of benefit to the infant, whereas in the instant case no such benefit was present. No element of "necessity" can be found in subjecting a minor to an operation designed to aid another. It would therefore seem wiser to deny to an infant, though close to maturity, any opportunity for self-sacrifice which could result in ill effects without any chance of benefit to himself.

F. J. Pause

EMINENT DOMAIN—TAXATION OF PROPERTY IN PROCESS OF CONDEMNATION—LIABILITY FOR TAXES ACCRUING AFTER PROCEEDINGS INSTITUTED BUT BEFORE FINAL JUDGMENT—In 1926 the City of Chicago instituted proceedings under the Local Improvement Act1 to condemn certain property needed for the widening of a public street. The duly appointed commissioners, on May 26, 1926, filed their report as to the amount of just compensation for the property to be taken, but final judgment was not entered until June 30, 1929. In the meantime, general taxes for the years 1927, 1928, and 1929 were levied against the property but were not paid. In 1936 the amount of the condemnation judgment was deposited with the County Treasurer who insisted upon retaining the amount of these unpaid taxes from the fund before remitting to the property owner. Proceedings were thereafter instituted to compel the County Treasurer to pay over the amount retained. Judgment for the defendant on the ground that he possessed a deductible lien for such unpaid taxes was reversed by the Illinois Supreme Court in City of Chicago v. McCausland.2

The problem herein involved arises because, while the amount of compensation to be paid for the property is fixed as of the date of the filing of the commissioners' report, or of the petition filed in the proceedings,3 the title does not pass to the condemning authority until the

12 § 59, comment A.
1 Cahill Ill. Rev. Stat. 1931, Ch. 24, § 135, now III. Rev. Stat. 1941, Ch. 24, § 84-13. 2 379 Ill. 602, 41 N.E. (2d) 745 (1942), reversing 308 Ill. App. 538, 32 N.E. (2d) 336 (1941) transferred by 374 Ill. 34, 27 N.E. (2d) 824 (1940). 3 The amount of compensation to be awarded under the Local Improvement Act is fixed as of the date of filing the report of the commissioners: City of Chi-
compensation is actually paid. In many cases a considerable time may elapse between these two dates. The owner of the property is, in the meantime, entitled to the possession of the property until he has been paid, and, since 1933, no interest on the judgment or award is allowed until the condemnor takes possession of or damages the property. However, when these acts are completed the title is said to relate back to the date on which compensation was fixed, so that liens acquired after that date should not be charges on the property itself. Decisions prior to the instant case have presented the question of whether or not the subsequent lien holder was to be paid for his rights by the condemning authority, but in those cases the Illinois Supreme Court has used broad language which would seem to establish the rule that the title acquired through the condemnation proceedings relates back for all purposes to the date on which compensation was fixed. There is nothing, however, to require that condemnation proceedings, once instituted, may not be abandoned, in which case subsequent liens should be reinstated. Taxing authorities under the circumstances would scarcely be justified in failing to assess taxes on the property during the interim period until title was actually transferred.

The decision in the instant case holds that, since the title acquired relates back to the time when the commissioners made their report, "... only the liens that existed at that time ... are liens against the fund." Inasmuch as the Illinois Constitution requires that no property shall be taken without just compensation therefor, it naturally follows that to permit taxes for subsequent years to be charged as a lien against the

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5 People ex rel. Wieboldt Stores, Inc., v. City of Chicago, 368 Ill. 421, 14 N.E. (2d) 473 (1938).
7 See Chicago, Evanston and Lake Superior Railroad Co. v. Catholic Bishop of Chicago, 119 Ill. 525, 10 N.E. 372 (1887), and dicta in Mills v. Forest Preserve District of Cook County, 345 Ill. 503, 178 N.E. 128 (1931).
8 Compare the issues involved with the language in Hutchins v. Vandalia Levee and Drainage District, 217 Ill. 561, 75 N.E. 554 (1905).
9 The new Cities and Villages Act provides that the municipality shall have an election to enter judgment on the verdict or abandon the proceedings, but, once entered, the judgment is unconditional. See Ill. Rev. Stat. 1941, Ch. 24, § 84-32.
10 Although no assessment of real property shall be considered as illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof by reason of Ill. Rev. Stat. 1941, Ch. 120, § 511, condemned property would be eligible for tax exemption under Ill. Rev. Stat. 1941, Ch. 120, § 500. Prior to actual acquisition of such property, however, it does not appear that any basis for tax exemption exists.
11 379 Ill. 602 at 606, 41 N.E. (2d) 745 at 748.
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award for just compensation would infringe upon the constitutional rights of the property owner by giving him less than is his due.

In this respect, no fault can be found with the decision, but it does not determine the broader question of whether the former owner or the condemnor is to be held personally liable for subsequent taxes until the property becomes actually exempt. There is language in the case which would seem to indicate that the court feels that this tax burden should fall on the condemnor. It points out that the right of the tax collector to a personal judgment against one sued as the owner of real estate "... is not absolute, but the defendant is entitled to personal service of process and may in such suit make certain defenses that would defeat the judgment."13 Certainly in a suit at law brought against one for non-payment of taxes on real estate, his answer could disclose that he was not the owner of the property at the time the tax was imposed, if the passage of his title is presumed to have occurred on the date on which the value thereof, for condemnation purposes, was fixed. From that time on, he, in theory at least, ceases being an owner and hence no longer subject to taxation. It would, then, seem to follow that the personal obligation to pay the taxes accruing in the interim period should fall on the condemning authority, who, as owner of the property, ought to pay the same until exemption from taxation has been secured.

In the case of People ex rel. Stuckart v. Price,14 however, sixty-eight feet of a seventy-one foot lot were condemned. The proceedings were started in 1911 but final judgment was not entered until May 2, 1917. The property owner paid taxes for 1910 to 1915, but refused to pay taxes for 1916 on the part of the lot taken because, by then, most of his tenants had moved by reason of the condemnation proceedings. The tax collector sought an order to sell the property for the unpaid taxes on the entire lot, which had become a lien on May 1, 1916. The court there pointed out that, even though under the circumstances, the result might not be absolutely equitable, the title had remained in the taxpayer until after the taxes had become a lien and he was, therefore, required to pay them.15

The instant decision cannot be said to overrule the Price case but it has cast some doubt upon its validity. In the ordinary sale of real property, the vendor has the obligation to pay taxes levied while he still holds title in the absence of express provision in the contract, or unless the vendee is enjoying the possession of the premises.16 Since, in the ordi-

13 379 Ill. 602 at 606, 41 N.E. (2d) 745 at 748.
14 282 Ill. 519, 118 N.E. 759 (1918).
15 The Price case is distinguished from the present case on the ground that the issues presented are not the same. This distinction has been made previously in City of Chicago v. McDonough, 273 Ill. App. 392 (1934). On the other hand, in People ex rel. Carofiglio v. Gill, 291 Ill. App. 143, 9 N.E. (2d) 581 (1937), the Price case was held to be authority for permitting the County Treasurer to retain taxes which accrued after the filing of the petition for condemnation. In the light of the McCausland case, the latter decision can no longer be considered good authority.
16 Glancy v. Elliott, 14 Ill. 455 (1853), and Coombs v. People, 198 Ill. 586, 64 N.E. 1056 (1902).
nary condemnation proceeding, the owner is left in possession and is permitted to collect the income from the property until payment of the award is made, it would seem more fair to impose the liability for taxes accruing during the interim on him. Final determination of that problem must, however, await solution, though the instant case may foreshadow a result which would permit the owner to retain the benefits of occupancy without being charged with the usual attendant burdens.

R. C. Bartlett

MASTER AND SERVANT — DELEGATION OF POWER — WHETHER ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNDER FAIR LABOR STANDARDS ACT OF 1938, MAY DELEGATE THE POWER TO SIGN AND ISSUE A SUBPOENA DUCESS TECUM — By its decision in the recent case of Cudahy Packing Company of Louisiana v. Holland,¹ the Supreme Court of the United States has settled a question concerning the Fair Labor Standards Act which has bothered courts and lawyers since the date of its enactment. That question is whether or not the Administrator of the Wage and Hour Division of the Department of Labor has the power to delegate to regional directors, or other officials of the department, the authority to sign and issue subpoenas to compel the production of designated evidence. In that case, an application was made to the District Court for the Eastern District of Louisiana for an order on the company to show cause why it should not be compelled to obey a subpoena duces tecum issued by a regional director of the Wage and Hour Division which commanded the production of certain books and papers. The respondent moved to dismiss the proceedings, but the motion was denied and production of the demanded books was ordered. On appeal, the order was affirmed by the Circuit Court of Appeals for the Fifth Circuit. The Supreme Court of the United States granted certiorari on petition which presented, as a ground for reversal, the want of authority in the regional director to issue the subpoena. This challenge of the authority required the court to construe Section 4(c) of the Fair Labor Standards Act which provides: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any and all of his powers in any place."²

The same question had arisen in an earlier case in the District Court for the District of Massachusetts, which court, seemingly without hesitation, interpreted the section as allowing the delegation of the power. The court there said: "The Congress in allowing such a delegation, without question, relied upon the fact that the authority to delegate powers by the Administrator would be exercised in no unreasonable manner... All this seems reasonable. Congress evidently did not intend that the Administrator would perform all the duties that were

² 29 U.S.C.A. § 204(c).
required by the Act, and the language of Section 4(c) gives ample authority to permit the Administrator to delegate to an Acting Regional Director authority to sign such a subpoena. . . ." The question was also presented in Fleming v. Arsenal Building Corporation, in which case the District Court for the Eastern District of Pennsylvania likewise came to the conclusion that the Administrator did have the authority to delegate the subpoena power. In fact that court considered the question so well settled that it was content to overrule the objection and cite the language of the section as authority. A like result was also reached in a subsequent case.

Thus the matter stood until the decision of the United States Supreme Court, now under consideration, was handed down. The question was, thereby, answered in the negative though the court was divided five to four. A dissenting opinion was written by Mr. Justice Douglas in which Mr. Justice Black, Mr. Justice Byrnes and Mr. Justice Jackson concurred. The dissenting opinion proceeded upon the ground that because of the vast scope of the Act it was a practical necessity that the Administrator have the authority to delegate this subpoena power. The dissenting opinion stated: "So far as the subpoena power is concerned, it would seem that the Administrator has satisfied all statutory demands in this situation by his selection of the limited group which can issue subpoenas, by formulating the policy to guide them, and by ratifying a subpoena issued by his subordinate."

No doubt a great burden is placed upon the Administrator when he is forbidden to delegate the task of issuing the many subpoenas which must, in the course of ordinary investigations, issue from the department. But the language of the statute, when viewed in the light of other and prior enactments of the same or of a similar nature, leads to agreement with the statement made in the majority opinion that: "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power." Behind this statement lies the consideration of a number of acts wherein the subpoena power has been dealt with. In each act it is found that the power to delegate the subpoena power has either been withheld, expressly granted, or restrictively granted.

A more or less typical provision that has been construed as withholding the power to delegate the authority to issue subpoenas is found in the Interstate Commerce Act where the grant of the power is to the Interstate Commerce Commission alone in the following language: " . . . and for the purposes of this chapter the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and

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4 38 F. Supp. 675 (1940).
7 -U. S. - at -, 62 S. Ct. 651 at 655, 86 L. Ed. 654 at 658.
the production of all books, papers..." In a subsequent sub-section there is some similarity to the provisions of Section 4(c) of the Fair Labor Standards Act where it is stated that: "Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing." Other examples of acts which have been construed to withhold the power to delegate the authority to issue subpoenas are the Bituminous Coal Act,10 and the National Labor Relations Act,11 both of which do not expressly provide for a delegation of the power yet contain clauses permitting acts to be done from places other than the main offices of the agencies.

The acts which permit the delegation have used language such as is found in the Railroad Unemployment Act, to-wit: "(a)...the Board shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, documentary or otherwise, that relates to any matter under investigation or in question... (m) The Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this chapter, excluding only the power to prescribe rules and regulations."12 Like provisions, varying in manner of phrasing, are found in the Veterans' Administration Act,13 the Federal Power Act,14 the Walsh-Healey Public Contracts Act,15 the Merchant Marine Act,16 the Securi-

8 49 U.S.C.A. § 12 (1).
10 15 U.S.C.A. § 49. See also Bituminous Coal Act of 1937, 15 U.S.C.A. § 838: "...for the purpose of conducting its investigations, said Commission shall have full power to issue subpenas and subpenas duces tecum...."
11 29 U.S.C.A. § 161 (1): "Any members of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation... Such attendance of witnesses and the production of such evidence may be required from any place in the United States...."
12 45 U.S.C.A. § 362 (a) and (m).
13 38 U.S.C.A. § 131: "For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books...."
14 16 U.S.C.A. § 825f (b): "For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it is empowered to... subpoena witnesses... and require the production of any books, papers... Such attendance of witnesses and the production of any such record may be required from any place in the United States at any designated place of hearing."
15 41 U.S.C.A. § 39: "...Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath."
16 46 U.S.C.A. § 1124 (a): "For the purpose of any investigation which, in the opinion of the Commission, is necessary and proper in carrying out the provi-
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ties Act of 1933,\textsuperscript{17} the Securities Exchange Act of 1934,\textsuperscript{18} and the Public Utility Holding Company Act.\textsuperscript{19}

The third type of statute, wherein the power to delegate is restrictively granted is exemplified by the Communications Act,\textsuperscript{20} the Bureau of Marine Inspection and Navigation Act,\textsuperscript{21} the Civil Aeronautics Act of 1938,\textsuperscript{22} the Motor Carrier Act,\textsuperscript{23} and the Longshoreman's and Harbor Workers' Compensation Act.\textsuperscript{24} The typical provision is found in Section 409(a) of the Communications Act wherein it is provided that: "Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may... sign and issue subpenas... ."\textsuperscript{25}

From these examples it is apparent that Congress has been cognizant of the problem, and, in those instances where it was deemed necessary and proper, has given the authority to delegate the subpoena

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\item 17 15 U.S.C.A. § 77s(b): "... any member of the Commission or any officer or officers designated by it are empowered to... subpena witnesses, take evidence, and require the production of any books... . Such attendance of witnesses and the production... may be required from any place in the United States or any Territory, district, or possession thereof at any designated place of hearing."
\item 18 15 U.S.C.A. § 78u(b): "... any member of the Commission or any officer or officers designated by it is empowered to... subpena witnesses, compel their attendance... and require the production of any books... . Such attendance of witnesses and the production of any such records may be required from any place in the United States or any Territory at any designated place of hearing."
\item 19 15 U.S.C.A. § 79r(c): "... any member of the Commission, or any officer thereof designated by it, is empowered to... subpena witnesses... . and require the production of any books, papers... . Such attendance... may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing."
\item 20 47 U.S.C.A. § 409 (a): "Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may... sign and issue subpenas... ."
\item 21 46 U.S.C.A. § 239 (e): "In any investigation directed by this section a marine casualty investigation board or a marine board shall have power to summon before it witnesses and to require the production of books, papers, documents, and any other evidence."
\item 22 49 U.S.C.A. § 644 (a): "Any member or examiner of the Board, when duly designated by the Board for such purpose, may hold hearings, sign and issue subpenas... ."
\item 23 49 U.S.C.A. § 305 (d): "... the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books... ."
\item 24 33 U.S.C.A. § 927 (a): "The deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpenas... ."
\item 25 47 U.S.C.A. § 409 (a).
\end{itemize}
power. By examination of the acts set out above there appears to be a sound basis for the statement of the court in the principal case that: "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."26

J. H. Smith

Municipal Corporations—Use and Regulation of Public Streets—Validity of Ordinance Authorizing Switch Track to Private Plant To Be Laid in a Public Street—In Greenlee Foundry Co. v. Borin Art Products Corporation,1 the Illinois Supreme Court was called upon to decide whether a town ordinance permitting a switch track to be laid in a public street between a railroad right of way and a private plant wasvoid as allowing an unwarranted use of the street for a private purpose, and also to consider the further point whether or not such track, when laid, amounted to a purpresture which could be enjoined upon petition of an abutting owner who did not own the fee to that half of the street upon which the track was laid. The case was the culmination of three attempts by the defendants, and their predecessors in interest, to lay a switch track down a street in Cicero between the Baltimore and Ohio Chicago Terminal Company right of way and their own property, a distance of one city block. Each of these attempts produced litigation and in each case the decision was against the right to lay the track.

The first attempt was made in 1923 when Limits Industrial Railroad Company (later found to be no more than a private corporation), in reliance upon a certificate of convenience and necessity issued by the Illinois Commerce Commission and upon a town ordinance,2 sought to condemn a short strip for this track across the corner of private property with the intention of then having the track continue down the center of the street to the property in question which is now owned by the present defendants. Upon appeal, the court found that the company was not a public utility and, consequently, the certificate was of no effect and the petition was dismissed.3 The second attempt was made shortly after such adverse ruling. This time, the railroad company did, in fact, lay

1 379 Ill. 494, 41 N.E. (2d) 532 (1942). Farthing, J., wrote a dissenting opinion in which Murphy, C. J., concurred.
2 379 Ill. 494 at 495, 41 N.E. (2d) 532 at 533.
3 Limits Industrial Railroad Co. v. American Spiral Pipe Works, 321 Ill. 101, 151 N.E. 587 (1926). The Court found that the railroad had, for its secretary and general manager, the real estate operator who owned the option on the tract to be served. President of the company was the track-laying contractor, who had no office and could not be located at the time of trial. One director was a night watchman in a garage, while another was a salesman employed by the real estate operator. The sole assets of the company were the ordinance, the certificate, its capital stock, and a lease which one of its directors had given it.
the track down the center of the street. Thereupon one of the two owners, whose lands abut on opposite sides of the block, filed a suit in ejectment upon the theory that the fee to the street had remained in him; that the town had an easement only for street purposes; and that the track was an unwarranted servitude upon his fee title. The court so held and order of ouster was issued.

About ten years later, the certificate and the ordinance were amended to provide for locating the track wholly down the south side of the street and the rights therein were assigned to the present defendants. The owner of the abutting premises along the south side of the street also granted to the defendants a perpetual easement to lay and maintain tracks in this latest location. In contrast with former plans, this track was not, at any point, to touch or cross the north half of the street, being the half which the instant plaintiff owns in fee. After work had begun and a portion of the track had been laid, a complaint seeking an injunction was filed predicated on the theory that the town ordinance was void as it devoted a public street to a private use and upon the further ground that the track was a purpresture. At the hearing, the facts disclosed that the district involved in this litigation was entirely industrial. Traffic bound for plaintiff's plant is the only traffic which has occasion to use this particular block. In addition to leaving one-half of the street wholly free, the track was to be planked in to facilitate travel over it. The number of cars switched down this siding was not excessive. The Special Commissioner, to whom this case was referred, also found that access to plaintiff's property would remain the same after the proposed track was installed as it had been before. Despite

4 The work was completed between the hours of six p.m. Saturday and eight a.m. the following Monday: 379 Ill. 494 at 497, 41 N.E. (2d) 532 at 533.
5 Greenlee Foundry Co. v. Limits Industrial Railroad Co., 354 Ill. 11, 187 N.E. 805 (1933).
7 There are numerous private switch tracks in the vicinity, both on private property and in public streets. In fact, the plaintiff itself has one such track on its own property connecting with the Baltimore and Ohio Chicago Terminal Company line.
8 Fourteenth Street comes to a dead end at the railroad tracks. Forty-seventh Avenue, the next intersecting street west of the tracks, also comes to a dead end at Fourteenth Street.
9 The street is sixty-six feet wide at this point. The proposed switch track would occupy less than thirty-three feet of it, leaving a clear width equivalent to that of many other streets in the district.
10 At the trial defendant offered to prove that 88 cars had been shunted onto this track between June 15 and November 21, 1939, when the track was in use. Each car, it was said, had occupied the track for less than two minutes. See appellant's brief, p. 17, filed in Greenlee Foundry Co. v. Borin Art Products Corp., 379 Ill. 494, 41 N.E. (2d) 532 (1942).
11 See findings of fact by special commissioner referred to in appellant's brief, p. 4, filed in Greenlee Foundry Co. v. Borin Art Products Corp., 379 Ill. 494, 41 N.E. (2d) 532 (1942).
this, injunction was granted by the trial court and was affirmed on appeal in the instant case. 

It is a foregone conclusion that members of the general public enjoy equal rights to travel over public streets. Municipalities have the general power to regulate the use of streets, but they may not authorize anyone to exclude the public from any portion of a street, nor, in any manner, unreasonably interfere with their legitimate use. However, subject to these limitations, travel need not be by any particular mode of conveyance. On this basis, a general railroad track has frequently been held to be merely an improved highway and entitled to the use of public streets concurrently with other travelers. Some jurisdictions have held that a spur or switch track which terminates at a particular private industry is not a public railroad and is, therefore, not entitled to the use of public streets.

Illinois and some other states, however, have repeatedly held that such spurs are merely extensions of the railroad itself and, consequently, are public tracks. It has accordingly been held that, being public,

12 The question of whether plaintiff was the proper party to bring such action was not discussed in the majority opinion. The dissenting opinion notes that the court utterly ignored the contention that the validity of an ordinance granting the use of a public street for a switch track cannot be collaterally questioned by an adjacent lot owner whose fee is not encroached upon: 379 Ill. 494 at 501, 41 N.E. (2d) 532 at 535. That a proceeding to question its validity can only be maintained by the city or the people through the proper public official, see Doane v. Lake Street Elevated Railroad Co., 165 Ill. 510, 46 N.E. 520, 36 L. R. A. 97 (1897).

13 Ginter-Wardein Co. v. City of Alton, 370 Ill. 101, 17 N.E. (2d) 976 (1938); Gerstley v. Globe Wernicke Co., 340 Ill. 270, 172 N.E. 829 (1930); Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N.E. 256, 40 L. R. A. 976 (1898). Numerous other cases could be cited to the same proposition.

14 Moses v. Pittsburgh, Fort Wayne & Chicago Railroad Co., 21 Ill. 515 (1859), stated, at 522, that: "A street is made for the passage of persons and property; and the law can not define what exclusive means of transportation and passage shall be used." This language was quoted with approval in Ligare v. City of Chicago, 139 Ill. 46 at 63, 28 N.E. 934 at 935 (1891) and approved in several later cases.

15 While Ligare v. City of Chicago, supra note 14, concedes the general right of cities to allow railroad tracks in public streets, it denied the attempted exercise of the right therein because the tracks were fenced by a wall which would have prevented public passage over the tracks. Likewise conceding that general power, but again denying its application because the railroad was to occupy a street with numerous switches and tracks, is Chicago Rock Island & Pacific Railway Co. v. People ex rel. Dailey, 222 Ill. 427, 78 N.E. 790 (1906).

16 44 C. J. 985 states: "The authorities agree that, in the absence of . . . authorization a grant of the use of streets for a private railway cannot be sustained (citing cases), but they differ as to whether a switch or spur from a public railroad to a private business establishment is a private railroad within the meaning of the rule, the courts in most jurisdictions so holding it (citing cases from eleven jurisdictions), although there is authority to the contrary (citing cases from Illinois, Oklahoma and Ohio)."

17 McQuillan, Municipal Corporations (Callaghan & Co., Chicago, 2d Ed. 1928) Vol. 4, p. 160 says: "In Illinois, a municipality has authority to grant to private individuals the right to lay switch tracks in a street to connect manu-
these tracks are subject to regulation by the Illinois Commerce Commission. Likewise, in this state, any member of the public who wishes to do so may connect with and use such tracks upon payment of a proportionate share of the cost of construction thereof. The fact that the track was constructed with funds furnished by the industry to be served has been held immaterial. Furthermore, the fact that only one industry is so situated that it would wish to connect with a particular track has not detracted from its public character. These views are aptly summed up in the following quotation:

"If they (the tracks) are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment; yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." With the law in this condition, the court cited four cases to support the proposition that the use in the instant case was a private one. Of these cases, one involved an overhead bridge connecting two buildings on opposite sides of an alley and shutting out the light from abutting manufacturing plants located on private property with the main track of a railroad company, on the theory that the track thus permitted is merely an extension of the track of the railroad company itself, and is, in effect, a grant to the railroad company to lay its tracks in the street, through the individual presenting the application." In support thereof the author cites: People ex rel. Rinne v. Blocki, 203 Ill. 363, 67 N.E. 809 (1903); McGann v. People ex rel. Coffeen, 194 Ill. 526, 62 N.E. 941 (1902); Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N.E. 448 (1885); and Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561 (1882). The cumulative supplement to McQuillan, Municipal Corporations, reveals no further cases on this point to date. To the same effect is Lewis, Eminent Domain (3d Ed.) 532. St. Louis, Springfield & Peoria Railroad v. Commerce Commission, 309 Ill. 621, 141 N.E. 405 (1923); The Alton Railroad Co. v. Illinois Commerce Commission, 368 Ill. 584, 15 N.E. (2d) 508 (1938), affirmed in 305 U. S. 548, 59 S. Ct. 340, 83 L. Ed. 344 (1939). Von Oven v. Chicago Burlington & Quincy Railroad Co., 317 Ill. 334 at 342, 148 N.E. 32 at 35 (1925), stated: "This court has held that switch tracks built for industrial connections with railroads, whether built at the expense of the railroad or the owners of the industry, or at the joint expense of both, become, in legal contemplation, tracks of the railroad with which they are connected, open to public use and subject to public regulation."

A distinction has been made where the switch is wholly on private property. In those cases, the track is purely a private use. See: Litchfield & Madison Railway Co. v. Alton & Southern Railroad, 305 Ill. 388, 137 N.E. 248 (1922) and cases there cited. The very fact that the track is in a public street may, then, be a basis for treating the track as public.

property.\textsuperscript{23} Another involved an awning which extended out over a street contrary to a general ordinance.\textsuperscript{24} A third involved a concrete fill which a gasoline station proposed to locate in a street and which would have cut off the plaintiff from access to the river.\textsuperscript{25} The fourth case cited did involve a railroad track in a public street.\textsuperscript{26} In that case, however, the city had allowed a railroad company not only to build a single track down a street but also to occupy the street with several tracks, switches, etc., to the practical exclusion of other travelers.

It should be mentioned, also, that the court in the instant case evidently felt itself more or less bound by the previous holding in the condemnation suit.\textsuperscript{27} No pretense was made that the former case was res adjudicata, but the court did say that its opinion was largely based on that decision,\textsuperscript{28} and quoted from the earlier case as follows: "The terminal company could not have condemned the land either of the foundry company or the pipe works for a track from its railroad to the 10 acres in question for the exclusive use of the owners of the tract, for such a track would have been a mere spur track of the terminal company for a wholly private use."\textsuperscript{29} This quotation, as the dissenting judge pointed out,\textsuperscript{30} was based upon the false assumption that this track would have been used exclusively by the defendants. The line of cases holding to the contrary were neither mentioned in the earlier opinion nor in the majority opinion in the instant case.\textsuperscript{31}

Since the court did cite additional cases purporting to hold that the use herein involved was a private one, the instant case must be considered as in opposition to the previously established rule in Illinois. It is unfortunate that the court did not see fit to discuss those cases upon which grave doubt has now been cast.\textsuperscript{32}

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\textsuperscript{24} Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N.E. 256, 40 L. R. A. 621 (1898).
\textsuperscript{25} Ginter-Wardein Co. v. City of Alton, 370 Ill. 101, 17 N.E. (2d) 976 (1938).
\textsuperscript{26} Chicago, Rock Island & Pacific Railway Co. v. People, 222 Ill. 427, 78 N.E. 790 (1906).
\textsuperscript{27} Limits Industrial Railroad Co. v. American Spiral Pipe Works, 321 Ill. 101, 151 N.E. 567 (1926). Aside from obvious differences in parties and issues, it was not necessary to the decision to hold that this use was a private one. The court could have contented itself there with merely holding that the railroad was not a proper person to exercise the power of condemnation. In fact, by far the greater portion of the opinion was taken up by that holding.
\textsuperscript{28} In 379 Ill. 494 at 499, 41 N.E. (2d) 532 at 534, it states: "Under all the circumstances, as disclosed by the record, we are of the opinion, based largely upon the previous holding of this court . . . that the purpose is purely a private purpose and does not conform to a public use."
\textsuperscript{29} 379 Ill. 494 at 496, 41 N.E. (2d) 532 at 533, quoting from 321 Ill. 101 at 106, 151 N.E. 597 at 599.
\textsuperscript{30} 379 Ill. 494 at 499, 41 N.E. (2d) 532 at 534.
\textsuperscript{31} See such cases, supra notes 16 and 17.
DISCUSSION OF RECENT DECISIONS

TRIAL — IMPEANELLING OF JURY — PROPRIETY OF ESTABLISHING JUROR'S CONNECTION WITH INSURANCE COMPANY ON VOIR DIRE EXAMINATION —

The Illinois Supreme Court in the recent case of Kavanaugh v. Parret rendered a decision of practical significance to trial lawyers. In an action for personal injuries, the plaintiff's counsel in the trial proceeding had asked the jurors collectively on voir dire whether any of them were agents, employees, representatives, solicitors or policy holders, or if any were interested financially or otherwise in the insurance company which was defending the case, naming that insurance company. This question was allowed by the trial court after the plaintiff had filed with the judge in chambers an affidavit setting forth that defendant was insured with the company and that the company had agents, representatives and policy holders in the county. The defending insurance company filed a counter-affidavit to the effect that its policy holders were not subject to assessment and that none of the jurors, naming them, were interested financially or otherwise in the insurer. Judgment for the plaintiff was affirmed in the appellate court, but the Illinois Supreme Court reversed the decision on the ground that the foregoing question was improper under the circumstances.

The problem involved in the case had bothered our courts for some time, involving on one side the recognized right of counsel in qualifying jurors to question them as to any interest in the proceeding likely to prejudice their verdict, and on the other hand the feeling that knowledge by the jury that an insurance company will suffer the loss, if any, will prejudice the defendant's case.

It is an accepted and well established rule in this state as well as throughout the country that reference to an insurance company during the course of the trial is improper, and, if prejudicial, grounds for reversal. However, where the reference to the insurance company is made on voir dire, in good faith, and ostensibly to enable plaintiff's counsel to intelligently exercise his rights of peremptory challenge, and not merely for the purpose of informing the jury that an insurance company is defending, the great weight of authority holds that such a question as that asked in the instant case is proper, unless it can be shown that prejudice resulted in fact, as by an excessive verdict.

2 The counter-affidavit stated that: "... the company is not a mutual company but issued all its policies at a stipulated premium not subject to assessment, that an examination of the records of the company disclosed that none of the jurors, naming them, were policy holders, stockholders, agents, employees or in any way or manner interested financially or otherwise in the affairs of the insurance company." 379 Ill. 273, at p. 276, 40 N.E. (2d) 500, at p. 502.
4 56 A.L.R. 1418 and cases cited therein.
5 56 A.L.R. 1418, 74 A.L.R. 860, 95 A.L.R. 404, and 105 A.L.R. 1330. See also comment in 16 CHICAGO-KENT REVIEW 371 where the decisions of the various states on the issue presented have been cataloged.
Illinois, after a number of somewhat inconsistent decisions, conformed to the majority view by finally adopting it in the case of Smithers v. Henriquez decided in 1938. This case definitely decided that while, if possible, an examination of the jurors should be conducted so as not to disclose the existence of an insurance company, a direct inquiry to the jurors is proper if made in good faith and provided that no apparent prejudice results. That decision also established the technique to be used by counsel for the plaintiff in evidencing good faith, to-wit: proof in chambers by affidavit that there is a strong likelihood of one or more of the jurors being interested in the insurance company. Several cases since decided have followed this view as being the law in Illinois.

In only one subsequent Illinois Supreme Court case prior to the instant decision, that of Edwards v. Hill-Thomas Lime & Cement Company, was a similar question held improper, the court, though following the Smithers decision, holding that the question was not put to the jurors in good faith, and that its only purpose was to inform the jury of the existence of insurance.

The only distinguishing feature between the Smithers case, exemplifying the Illinois rule to date, and the instant case is the effect to be given to the counter-affidavit filed by the insurance company. It is apparent from the opinion that the case turned on the counter-affidavit, since the court felt that it showed that the plaintiff's rights to an unprejudiced jury were not in danger. The court said that: "The only effect of the question was to advise the jury that the insurance company was making the defense and was liable for the payment of any judgment rendered." When distinguished on this basis the instant case seems sound. Since the court feels, and the rule has been, that the good faith of plaintiff's counsel is the determining factor in deciding whether or not such a question should be permitted of the jurors, it follows that the question should not be allowed where the insurance company can establish positively that none of the jurors can be prejudiced, since in the latter situation the only purpose that would be served by putting such a question to the jurors would be to inform them of the insurance company's interest in the case.

It would seem then that the instant case is not a reversal of the prior rule laid down in the Smithers case, but results really in the recognition of a new device to be used by the defending insurance company whereby it can keep such a question from the jury. The use of such counter-affidavits is, of course, not unprecedented. It was tried

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6 368 Ill. 588, 15 N.E. (2d) 499 (1938). For a review of the earlier decisions in Illinois on this point see comment in 16 CHICAGO-KENT REVIEW 371.
8 378 Ill. 180, 37 N.E. (2d) 801 (1941).
at least once in Illinois in a case decided in 1940,\textsuperscript{10} but in that case the appellate court decided the issue squarely on the rule laid down in the Smithers case, either disregarding the counter-affidavit, or feeling it insufficient to negative the plaintiff's good faith.

In the instant case the counter-affidavit was positive in that it had been based on a search of the insurance company's books, and not merely upon information and belief of the counsel for the insurance company. The court, being satisfied that none of the jurors was interested in the insurance company, could say that plaintiff, even in good faith, had no need to ask the question. Though the Supreme Court has in no way reversed itself, it has, in effect, sanctioned a device which may result in a complete reversal of technique used by practicing attorneys in personal injury cases. Such attorneys will now hesitate to ask this type of question, and, if faced with a counter-affidavit in proper form, will have to forego the right to examine the jurors in regard to their possible interest in the defending insurance company.\textsuperscript{11}

As the law now stands, good faith of the plaintiff's counsel is the starting point for determining the admissibility of such a question. Such good faith is evidenced by the use of an affidavit or affidavits. Counter-affidavits furnished by the defendant may challenge either the good faith of the plaintiff or demonstrate the lack of necessity for such a line of questioning. Upon presentation thereof, a hearing before the judge in chambers becomes essential. Yet, no matter how positive the counter-affidavit may be, and even though it be based on an examination of the records of the insurance company, it does not exclude the possibility that one or more of the prospective jurors might have an interest in the company substantial enough to prejudice him though such interest might not appear on the records.\textsuperscript{12} A decision on so important a question from the mere inspection of affidavits in chambers is, to say the least, an unsatisfactory treatment of the problem.

\textsuperscript{10} O'Neal v. Caffarello, 303 Ill. App. 574, 25 N.E. (2d) 534 (1940).

\textsuperscript{11} It is interesting to note that the Illinois Appellate Court, Second District, came to the same conclusion, in a case with similar facts and where a similar counter-affidavit was filed, in a decision subsequent to but not relying on the instant case. See Handley v. Erb, 314 Ill. App. 207, 41 N.E. (2d) 222 (1942).

\textsuperscript{12} He might, for example, be the holder of an unrecorded transfer of shares in the company, or be related to one financially interested in its affairs.