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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ASSAULT AND BATTERY—CIVIL LIABILITY—WHETHER OR NOT A SURGEON WHO EXTENDS SCOPE OF OPERATION BEYOND THAT CONSENTED TO BY PATIENT THEREBY SUBJECTS HIMSELF TO CIVIL TORT LIABILITY—The Kentucky Court of Appeals, in a case of first impression for that jurisdiction, recently found itself faced with the question as to the liability, if any, incurred by a surgeon who extended the scope of an operation beyond that given by the consent of the patient. The question arose in the case
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of Tabor v. Scobee\(^1\) wherein it appeared that the patient, a twenty-year old minor, had submitted to an operation for appendicitis at the hands of the defendant surgeon. He, during the operation and while the patient was unconscious, discovered that the patient's fallopian tubes were infected and ought to be removed, but the condition was not serious enough to constitute an emergency. Without obtaining the consent of the minor's step-parents, who apparently were on the premises, the surgeon removed the infected tubes as well as completed the intended appendectomy. On restoration to health, the plaintiff sued the surgeon for an assault and battery based upon his alleged unauthorized act. The jury rendered a verdict for the surgeon and judgment was entered thereon in the trial court. On appeal to it, the Kentucky Court of Appeals reversed on the ground that, except in emergency cases, a surgeon is required by law to obtain the consent of a patient\(^2\) before performing any operation. As a consequence, the doing of an unauthorized act was said to constitute a trespass upon the body of the patient sufficient to subject the surgeon to civil liability.

The general rule governing this type of tort was well stated by Judge Cardozo, in the case of Schloendorf v. Society of New York Hospital,\(^3\) when he wrote: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages . . . This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained."\(^4\) In general application, this rule has become well established and has received unanimous support.\(^5\)

It applies with equal force to any unauthorized operation, whether the unauthorized act is performed in connection with an operation consented to by the patient or is performed independently. It does not lose any of its force because the unauthorized act is of minor character\(^6\) for the law considers every organ of the human body of some value, notwithstanding the fact that medical science may not yet have discovered the part it plays in the performance of bodily functions.\(^7\)

\(^1\) Ky. - , 254 S. W. (2d) 474 (1953).
\(^2\) The court indicated that, in a case where the patient is a minor, the consent of the parent would be sufficient to protect the surgeon. If the parent withholds consent, especially in emergency situations, the state may act: People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769 (1952).
\(^3\) 211 N. Y. 125, 105 N. E. 92, Ann. Cas. 1915C 581, 52 L. R. A. (N.S.) 505 (1914).
\(^4\) 211 N. Y. 125 at 129. 105 N. E. 92 at 93.
\(^6\) Jones v. Peterson, 44 Ore. 161, 14 P. 661 (1903).
\(^7\) In Hively v. Higgs, 120 Ore. 588, 253 P. 363, 53 A. L. R. 1052 (1927), for example, the defendant surgeon was held liable for removing the tonsils of a patient in the course of an operation for the removal of the septum from the patient's nose, which latter operation was authorized.
While the general rule has been so recognized and supported, differences have arisen over the interpretation thereof. For instance, although courts will require the proof of consent to avoid liability, there has arisen a divergence of opinion as to who may be entitled to give consent. In addition, there is lack of agreement concerning the circumstances under which consent can be implied. In the first of these situations, it is the generally accepted rule that where the patient is an adult of sound mind, the consent must come from the patient himself. Where the patient is insane or otherwise incapable of giving consent, the consent of the guardian will usually be sufficient. Where the patient is a minor, most courts will require that the consent of the parent or person standing in loco parentis be obtained. Exceptions may be noted, however, for a Michigan court has held that, where the patient is close to maturity, the consent of the minor patient will be sufficient. It has also been indicated that if the minor is married, or has otherwise emancipated himself from parental control, the consent of the parent would be unnecessary, particularly so if it could be said that the operation was a matter of necessity. The Restatement has adopted the position that, where the minor is capable of understanding the nature and the consequence of the act, his consent alone should be sufficient, and a few scattered decisions have agreed therewith, subject to the qualification that the operation be one for the benefit of the patient and not for the benefit of someone else.

Consent need not always be expressed for it may be implied from the surrounding circumstances. Where the patient places himself in the hands of a surgeon, trusting that the surgeon will exercise his discretion and do what the situation requires, the patient impliedly consents to all

8 See, for example, King v. Carney, 85 Okla. 62, 204 P. 270 (1922).
13 It was said, in Mark v. McElroy, 67 Miss. 545, 7 So. 408 (1890), that where the minor entered the armed forces consent was automatically given to any future operation which might become necessary.
15 See Restatement, Torts, § 59, comment A.
16 In Bonner v. Moran, 126 F. (2d) 121 (1941), for example, the court recognized the rule but refused to apply it where the minor, a boy of fifteen years, accompanied by close relatives, gave blood to his aunt. In the case of Luke v. Lowie, 171 Mich. 122, 136 N. W. 1106 (1912), the court held that a father could not be allowed to complain when his son was operated on for a tumor without the father's consent in the absence of a showing that the father would have objected if he had known of the intended operation, particularly where the boy was capable of understanding the nature and consequences of the operation. This case was later overruled by the holding in Zosky v. Gaines, 271 Mich. 1, 260 N. W. 99 (1935), which reverted to the general rule that parental consent was necessary. On this point, see note in 20 CHICAGO-KENT LAW REVIEW 357.
acts done by the surgeon which, in the latter’s judgment, are necessary to
cure the patient. The patient may not, thereafter, complain as for an un-
authorized act. Likewise, where a person voluntarily submits to a
dangerous operation, consent may be said to be implied by the fact of
voluntary submission. It would seem, however, that where a minor is
involved some express consent of the parent or persons standing in loco
parentis should be shown to the placing of the child under the control of
the medical practitioner before the doctrine of implied consent could arise
to exonerate the doctor.

All courts seem to be in agreement on the point that a surgeon, faced
with an emergency, is excused from the necessity of obtaining the consent
of the patient, especially if the patient is then unconscious. This excep-
tion is well illustrated in the case of Jackovach v. Yocom, one relieving
a surgeon from liability, where the court indicated that, when confronted
with an emergency which tends to endanger the life or health of the
patient, the surgeon has a duty to do that which the occasion demands,
provided it is within the usual and customary practice among physicians
and surgeons in the same or similar localities. The emergency exception
is likely to be given a strict interpretation, however, as is indicated by the
Oklahoma case of Rolater v. Strain, one which refused to relieve a
surgeon from liability when, during the course of the operation, he re-
moved a minor bone, which seemed to serve no purpose, from the patient’s
toe, even though the removal thereof was necessary in order to complete
the authorized operation. The court pointed to the fact that a delay, in
order to obtain the necessary consent, would not have endangered the
patient’s life or health, hence no emergency existed.

At first glance, it might appear that the law serves to place stringent
requirements on physicians and surgeons in connection with the per-
formance of their duties, with a few cases producing what might seem to
be unjust results. It can only be noted, in contrast, that most cases in-
volving an application of the rules here discussed have achieved a proper
solution, for the law undoubtedly serves to protect both the public and

340, 2 L. R. A. 587 (1889).
19 No cases have been found supporting or disaffirming this point, but the con-
clusion would appear to follow from the fact that, until the relationship of patient
and doctor has been shown to exist, there is no basis for any implication whatever.
20 A typical case is that of King v. Carney, 35 Okla. 62, 204 P. 270 (1922), where
the surgeon, during the course of an operation, discovered that a condition existed
which constituted an emergency and, without waiting for consent, removed the
infected condition.
21 212 Iowa 914, 237 N. W. 444, 76 A. L. R. 551 (1931).
22 390 Okla. 572, 137 P. 96 (1913).
23 The strict rule of interpretation has been applied in Beringer v. Lackner, 331
Ill. App. 691, 73 N. E. (2d) 620 (1947); Mohr v. Williams, 95 Minn. 261, 104 N. W.
12, 1 L. R. A. (N.S.) 439, 5 Ann. Cas. 303 (1905); Wells v. Van Nort, 100 Ohio St.
101, 125 N. E. 910 (1919).
the medical profession, with enough flexibility woven into the applicable legal doctrines to meet any situation which might arise. In the light thereof, the decision reached in the instant case is one well supported both in law and in common sense.

A. D. Weaver

Contracts—Performance and Breach—Whether Arbitration Provision in Stockbrokerage Agreement Supersedes Customer's Right to Pursue Judicial Remedy for Violation of Securities Exchange Act—Recently, in Wilko v. Swan, a purchaser of securities brought suit against the defendant broker for an alleged violation of the federal Securities Exchange Act on the ground that the defendant had effected a sale by a misrepresentation of material facts and by an omission to state material facts which would have prevented the defendant's statements from being misleading, thereby causing the plaintiff to suffer a loss. Before answering the complaint, the defendant, pursuant to the federal Arbitration Act, filed a motion for an order staying all proceedings until an arbitration had been had in accordance with the terms of the margin agreement existing between the plaintiff and the defendant. The trial court denied that motion. The defendant then appealed to the Court of Appeals for the Second Circuit where a majority of that body reversed the order of the lower court, declaring it to be the law that the policy of the federal Securities Exchange Act did not override the policy in favor of arbitration as evidenced by the federal Arbitration Act. On certiorari, the United States Supreme Court reinstated the trial court order when it declared the contract provision for arbitration to be void in view of the express condemnation in the federal Securities Exchange Act against stipulations intended to waive compliance with the provisions thereof.

The development of the law pertaining to arbitration has traversed a controversial course since it first found a degree of recognition in the days of Lord Coke. Even at that early date, the proverbial thorn had

1—U. S. —, 74 S. Ct. 182, 98 L. Ed. (adv.) 114 (1953), reversing 201 F. (2d) 439 (1953). Mr. Justice Jackson wrote a concurring opinion. Mr. Justice Frankfurter, with whom Mr. Justice Minton joined, wrote a dissenting opinion.
3 9 U. S. C. § 1 et seq.
4 A dissenting opinion in the Court of Appeals had been based on the premise that fine print restrictions in a margin agreement, particularly one imposed on the purchaser, should not be permitted to have the effect of nullifying the benefits bestowed on the investing public by the federal Securities Exchange Act. Only passing mention was given to this point in the dissenting opinion of Mr. Justice Frankfurter, who pointed out that the case was not one in which the purchaser, in opening the account, had no choice but to accept the arbitration stipulation.
5 15 U. S. C. § 77n states: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."
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been thrust into the flesh of arbitration, and the vestiges thereof are still apparent in the modern legal system for, while the principle of arbitration has received recognition, at least under certain circumstances, both the scope and the enforcibility of the process has been hindered to a great degree. In the first place, a rule of revocability developed which found expression in the general principle that either party to an arbitration agreement could revoke the submission at any time before the award was made, thereby depriving the arbitrator of the power to make a binding award. Upon such revocation, the net situation was simply one in which, the parties having entered into an agreement covenanted to submit a controversy to arbitration, the one guilty of a breach of the covenant became exposed to no more than a suit at law for such breach in the same fashion as for breach of any other contract. To complement this attitude, it was established, in equity, that specific performance could not be compelled with respect to an agreement to arbitrate. Once, however, the arbitration had been consummated in the form of an award, revocation was no longer possible.

The second big stumbling block came with the development of a theory, allegedly based upon considerations of public policy, to the effect that an executory contract to submit to arbitration any controversy which might arise would amount to an attempt to oust the courts of their jurisdiction. The virtue of this position was first opened to criticism by Lord Campbell when he advanced the suggestion that the doctrine was more the product of jealousy on the part of earlier courts than one based on judicial reasoning. Notwithstanding this, the doctrine has received widespread recognition, although one court was prompted to remark that it "can hardly be said that the decisions as to the validity of provisions


8 In Skinner v. Gaither Corp., 234 N. C. 385, 67 S. E. (2d) 267 (1951), the court reiterated the proposition that breach of an arbitration agreement gave rise merely to damages, emphasizing the fact that the arbitration agreement afforded no defense to a suit based on the cause of action which the parties had agreed to arbitrate.

9 See, for example, Hurst v. Litchfield, 39 N. Y. 377 (1868).


11 Miscellaneous objections to arbitration have, for the purpose of this paper, been omitted.

12 Illustrative of this view are the cases of Chamberlain v. Connecticut Cent. R. Co., 54 Conn. 472, 9 A. 244 (1886); Cocallis v. Nazlides, 308 Ill. 152, 139 N. E. 95 (1923); Lakube v. Cohen, 304 Mass. 156, 23 N. E. (2d) 144 (1939); Fox v. Masons' Fraternal Accident Assoc'n, 86 Wis. 390, 71 N. W. 363 (1897).


14 See annotation in 135 A. L. R. 80. Although not the objective of the decision, the doctrine was recognized in the case of White Eagle Laundry Co. v. Slawek, 296 Ill. 240, 129 N. E. 753 (1920), one which passed on the constitutionality of the Illinois statute bearing on arbitration, to-wit: Ill. Rev. Stat. 1933, Vol. 1, Ch. 10.
in contracts for arbitration of disputes between the parties thereto are in a very satisfactory condition.  

Without doubt, this history has had some bearing upon the fact that by far a majority of the states, as well as the federal government, have adopted statutes pertaining to arbitration. It should be noted, however, that most of the existing statutes do not deal directly with executory agreements to arbitrate future controversies, they being generally limited to validate only those agreements intended to submit to arbitration controversies already existing between the parties. Thus, in the absence of a statute to the contrary, it is quite likely that the old doctrine of ouster of jurisdiction will be applied to any attempt to enforce an executory agreement to arbitrate future controversies. To the extent these statutes relate to existing controversies, however, the effect thereof has been to abrogate the common-law rule which permitted the revocation of submission before award.

The importance of the case at hand becomes clear when this past and present judicial attitude toward arbitration has been ascertained for, in the face of an almost hostile history, the court was called upon to put arbitration to a new test. By its ultimate decision, the court could have placed arbitration on a never before attained level. Conversely, by maintaining the degree of jealousy previously displayed, it could perpetuate the generally accepted attitude. The problem developed from a contest between the desirability of providing for public protection in the form of newly-created statutory rights on the one hand and the legal efficacy of arbitration as a means of giving force to those rights on the other. Its immediate solution has been noted, but the question still remains as to whether that solution was the proper one or not.

The Securities Exchange Act, providing for a statutory cause of action in favor of the purchaser to be brought in a court of competent jurisdiction, but without expressly forbidding the possibility of arbitration, also

16 Williston, Contracts, Rev. Ed., Vol. 6, § 1920, makes reference to some forty-six states in which submission agreements are made enforceable by statute. The applicable federal statute is cited in note 3, ante.
17 Ill. Rev. Stat. 1953, Vol. 1, Ch. 10, § 1, in part, states: “All persons having legal capacity may . . . submit to one or more arbitrators . . . any controversy existing between them.” Italics added.
18 This probability appears to be indicated by the case of White Eagle Laundry Co. v. Slaweck, 293 Ill. 240, 129 N. E. 753 (1920). In Skinner v. Gaither Corp., 234 N. C. 385, 67 S. E. (2d) 267 (1951), the court held that, since the North Carolina statute applied only to existing controversies, the common law rule would apply to all others. But see Park Construction Co. v. Independent School Dist., 209 Minn. 182, 296 N. W. 475, 135 A. L. R. 59 (1941), where the ouster-of-jurisdiction theory was discarded despite the fact that neither the statutory nor common law of Minnesota gave direct support to agreements to arbitrate future controversies.
21 Ibid., § 77v, defines the courts of “competent jurisdiction.”
established a shift in the burden of proof from the plaintiff-purchaser to the defendant-seller. Prior decisions had noted the thought that merely because a cause of action had been created by statute was not sufficient reason to preclude arbitration of a controversy pertaining thereto. For that matter, the privilege of bringing a suit in a court of competent jurisdiction affords no argument to support a belief of an intention to exclude the possibility of arbitration, particularly since the parties to the dispute could settle without reference to any mediatory body at all. It is apparent then that the prime reason for the decision to bar arbitration, absent specific statutory denial on the point, has to rest upon the statutory provision relating to the burden of proof. That Congress intended to benefit the purchaser of securities, on whom normally would fall the duty of establishing culpability, is evident from the language used. The majority of the justices of the United States Supreme Court have expressed a belief that, under a provision for arbitration the purchaser would relinquish this vital right accorded to him by the statute. The question naturally generated is one as to whether or not a submission to arbitration would, in fact, so operate.

It may be conceded that it is not incumbent upon arbitrators to adhere to technical rules of law in relation to the manner in which the proceeding is conducted, and it has even been stated that a failure on the part of arbitrators to regard technical requirements concerning satisfaction of the burden of proof would not warrant vacating an award. However, as was the situation in the instant case, rules may be made to condition the submission and, if made, the arbitrators would be bound to abide thereby. Despite this, it is not clear that such conditions would be of practical value in assuring that an award would be based upon the weight of evidence and, since an award may be vacated only for specified

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22 See, for example, Watkins v. Hudson Coal Co., 151 F. (2d) 311 (1945), and Donahue v. Susquehanna Collieries Co., 138 F. (2d) 3, 149 A. L. R. 271 (1943). In the last mentioned case, the court expressed the feeling that if Congress had intended to remove claims arising under the Fair Labor Standards Act from the operation of the federal Arbitration Act it would have done so by the use of express language on the point.

23 15 U. S. C. § 77(1) reads, in part, as follows: “Any person who ... (2) sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact ... and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable” in damages.


25 Koepke v. E. Liethen Grain Co., 205 Wis. 75, 236 N. W. 544 (1931).

26 See cases cited in note 24, ante. In the instant case, the agreement stated that all transactions were to be subject to the provisions of the Securities Exchange Act, hence did, in that fashion, incorporate the section dealing with burden of proof.

27 Much would depend on the competence of the arbitrators, many of whom are not legally trained. Mr. Justice Frankfurter, in a note to his dissenting opinion, provides useful statistical data in that respect. See — U. S. — at —, 74 S. Ct. 182 at 189, 98 L. Ed. (adv.) 114 at 121.
causes, it is questionable whether a failure to comply fully with conditions attached to the submission would fall within the enumerated grounds. If not, it would appear that, under a submission to arbitration, it would be possible, if not probable, that certain valuable rights might indeed be relinquished.

Nevertheless, it is to be remembered that, prerequisite to the actual process of arbitration, there must be an agreement to submit the controversy to arbitration. Assuming such an agreement to have been voluntarily made, it would not seem unreasonable to give to it the degree of respect accorded to any other enforcible contract. Perhaps the more feasible view, therefore, would be one which would allow the parties to determine the matter for themselves. Such a view would permit the courts to take both a consistent and a positive attitude toward arbitration and might lead them to abandon the doctrine "that it is wrong or wicked to agree to stay away from the courts when disputes arise."

F. C. Visser

CRIMINAL LAW—FORMER JEOPARDY—WHETHER FORMER JEOPARDY EXISTS WHERE JUDGE DECLARES MISTRIAL BECAUSE OF INABILITY OF PROSECUTION TO ESTABLISH CASE AT FIRST TRIAL—A vital issue regarding the doctrine of double jeopardy was presented to the Supreme Court of the United States through the medium of the case of Brock v. State of North Carolina. In that case, the accused had been held for trial before a jury on a charge of assault with a deadly weapon. After the prosecution had introduced the testimony of three witnesses, it then called two alleged co-conspirators of the defendant to corroborate such testimony. These witnesses, already found guilty of the same crime and awaiting sentence, refused to answer questions put to them on the ground that their answers might tend to incriminate them in the event they should appeal from the anticipated adverse judgment. The trial court upheld their right to refuse to answer. The prosecution then represented to the court that the testimony of these witnesses was necessary to completely make out a case and moved for a mistrial. This motion was granted. Following affirmance of the conviction of the co-conspirators, the instant defendant, over objec-

28 9 U. S. C. §10, in essence, provides that an award may be vacated for corruption, fraud, undue means, evident partiality, misconduct in refusing to hear evidence which is pertinent and material to the controversy, or for an imperfect execution of arbitral powers.
29 Some courts, at least, have adopted this attitude: American Almond Prod. Co. v. Consolidated Pecan S. Co., 144 F. (2d) 448, 154 A. L. R. 1205 (1944); In re Canadian Gulf Line, 98 F. (2d) 711 (1938); River Brand Rice Mills v. Latrobe Brewing Co., 305 N. Y. 36, 110 N. E. (2d) 545 (1953).
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One of the recalcitrant witnesses then testified on behalf of the prosecution and the accused was found guilty. The Supreme Court of North Carolina affirmed this conviction, and, on writ of certiorari, although two justices dissented, the Supreme Court of the United States also affirmed.

Reliance was placed, in the majority opinion, on four grounds, to-wit: (1) that the common law of North Carolina allowed a trial judge the right to exercise discretion to declare a mistrial, when required in the interest of justice, to place the defendant on trial a second time; (2) that any prohibition with respect to double jeopardy contained in the Fifth Amendment applied only to federal courts; (3) that nothing in the Fourteenth Amendment was violated by requiring a defendant to stand trial for a second time; and (4), that the majority favored the use which had been made of the permitted discretion in order that the ends of justice might best be served. By contrast, a vigorous dissenting opinion, after examining into the common law of North Carolina, concluded that the law of that state had not always allowed a trial court to exercise discretion in such matters for earlier cases from that jurisdiction were to the contrary.

It was also there pointed out that the alleged federal precedents relied upon were, in fact, clearly distinguishable from the situation at hand, and that the granting of a mistrial merely because of the prosecutor's failure to have his case well in hand violated commonly accepted ideas of due process of law.

Since the majority and minority opinions agree with respect to the

3 The objection was based on the Fifth and Fourteenth Amendments to the United States Constitution.
8 In Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288 (1937), the court had held that a second trial, after a successful appeal by the state pursuant to an applicable statute, would not be in conflict with the due process requirements of the Fourteenth Amendment.
9 In that respect, the court relied on Wade v. Hunter, 336 U. S. 684, 89 S. Ct. 834, 33 L. Ed. 974 (1948), and Thompson v. United States, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 148 (1894).
10 See State v. Speir, 12 N. C. 491 (1828), and State v. Garrigues, 2 N. C. 276 (1795).
11 The Palko case turned on the presence of a statute. No statute was involved in the instant case. The Wade case actually concerned a court-martial proceeding where the trial officers were needed to carry on tactical operations in time of war, leading to a dissolution of the tribunal before decision had been obtained. That case is closely analogous to the situation projected by the death of the trial judge. In the Thompson case, a trial juror was found to be disqualified by reason of the fact that he had served on the grand jury which had returned the indictment. On the point of the effect to be given to a late discovery of disqualification on the part of a juror, see Maddox v. State, 230 Ind. 92, 102 N. E. (2d) 225 (1951), noted in 30 Chicago-Kent Law Review 261.
general application of the Fifth and Fourteenth Amendments, the basic
difference between the two views lies in the area as to whether or not the
surprise refusal by a prosecution witness to testify is such a circumstance
as would warrant a judicial declaration of a mistrial without violating
concepts of due process. In that connection, the history of the effect to
be given to the discharge of a jury because of an inability on the part of
the prosecutor to present testimony has been one of constant change. It
would appear that, under the earlier common law, a jury in a capital case
could not be discharged without first giving a verdict. Later on, during
the period of the absolute monarchs, there was indication that a jury might
be discharged for the purpose of having better evidence offered against
the defendant at a later date. Lord Holt is said to have formulated the
rule that, in criminal cases other than capital, the jury could be withdrawn
if both parties consented, but not otherwise. After a time, this rule came
to be construed as a rule of practice rather than a rule of law, calling for
the exercise of a proper discretion and for the breach of which the de-
fendant would be entitled to plead double jeopardy.

In the United States, the courts of some nine states appear to have
been called upon to decide the particular issue with a majority view, held
in six states, tending to indicate that a second trial, after the prosecution
proved to be unable to present evidence at the first trial, would violate the
prohibition against double jeopardy. The minority view, which would
permit a second trial, appears to find some support in cases arising in
Alabama and North Carolina. The cases from Alabama involved factual
situations of an extreme nature, so North Carolina is probably the only
state that possesses any degree of clear precedent for the allowance of a
second trial in the event the prosecutor fails to have his evidence ready.

12 Although principles with respect to double jeopardy are not precisely mentioned
in the Fourteenth Amendment, they have been held to be included in the phrase
"due process of law," hence control state action: Snyder v. Massachusetts, 291
13 3 Co. Inst., 110. Originally, the defendant was entitled to plead only autrefois
acquit or autrefois convict as a bar to a second prosecution and would be unable to
do so if no verdict had been taken. The modern plea of double jeopardy, encom-
passing these points and other grounds, did not develop until a later time.
16 See 15 Am. Jur., Criminal Law, § 409, p. 78. The following cases support the
majority view: Allen v. State, 52 Fla. 1, 41 So. 593 (1906); State ex rel. Meador
v. Williams, 117 Mo. App. 364, 22 S. W. 151 (1906); People v. Barrett, 2 Caines 304,
2 Am. Dec. 239 (New York, 1805); State v. Richardson, 47 S. C. 166, 25 S. E. 220,
(1886); State v. Little, 120 W. Va. 213, 197 S. E. 626 (1938).
17 In State v. Nelson, 7 Ala. 610 (1845), the jury was irregularly sworn too
early, following which the proceedings then revealed other issues which should
have been disposed of prior to the time the jury had been impaneled and sworn.
In Hughes v. State, 35 Ala. 351 (1860), the defendant had agreed, before trial, to a
declaration of mistrial in the event a certain witness should prove to be too
intoxicated to testify, but objected to the calling of a mistrial when the agreed
condition occurred.
18 In addition to the case cited in note 6 ante, see State v. Guice, 201 N. C. 761,
161 S. E. 533 (1931).
The list is completed by including therein the state of Iowa, which has conflicting decisions on this point.\(^{19}\)

There may be something significant in the degree of infrequency in which cases of this nature have arisen, but no small part of the answer probably lies in the emphasis which has been given to the "manifest necessity" rule enunciated by the United States Supreme Court in the case of *United States v. Perez*,\(^{20}\) a decision which has been cited frequently with respect to double jeopardy questions generated by the discharge of a jury. It was there said that "the law has invested courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated."\(^{21}\)

Without taking into account all the varied situations wherein "manifest necessity" has been found present,\(^{22}\) it might be noted that the cases were generally ones wherein circumstances arose which could not have been foreseen or controlled and which were of such nature as to force the trial judge to declare a mistrial since nothing could be done to obviate the fortuitous defect. In direct contrast thereto, the prosecutor in the instant case knew, or should have known, of the prior conviction of his witnesses and the fact that they were awaiting sentence. He had opportunity to investigate their willingness to testify before he placed them on the stand. As a lawyer, he could have anticipated the possibility of objection and should have been armed with other means to establish his case. The only conclusion that can be reached, then, is that the prosecutor was negligent in his preparation, hence not entitled to the benefit of any "manifest necessity" doctrine, and such would probably have been the holding if it had not been for the isolated precedents to be found in North Carolina.

If, in the name of "manifest necessity," a prosecutor is to be allowed a second trial because of an inability to present the best testimony the first time, the law should, in fairness, allow a defendant the correlative right to seek a mistrial in order that he might strengthen his defense.\(^{23}\) That prospect is, to say the least, not an inviting one and, carried to its ultimate conclusion, could operate to nullify the concept of double jeopardy entirely.

S. Zun

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\(^{19}\) Compare State v. Calendine, 8 Iowa 288 (1859), with State v. Parker, 66 Iowa 586, 24 N. W. 225 (1885).

\(^{20}\) 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165 (1824).

\(^{21}\) 22 U. S. 579 at 580, 6 L. Ed. 165.

\(^{22}\) Common illustrations exist with respect to the illness, disability, or death of a juror, the accused, the judge, or counsel; the expiration of the term of court; the discovery of serious defects in the indictment; the disqualification of jurors; and, in some cases, the absence of the accused.

\(^{23}\) Recognition is accorded to the fact that, through a writ of error coram nobis or some statutory counterpart, the defendant possesses a limited theoretical advantage not enjoyed by the prosecution. Cases involving the successful use thereof, however, are few and far between.
CRIMINAL LAW—JUDGMENT, SENTENCE, AND FINAL COMMITMENT—
WHETHER CONSECUTIVE SENTENCES MAY BE IMPOSED ON CONVICTION FOR
INDEPENDENT FELONIES AGAINST THE SAME VICTIM CHARGED IN ONE INDICT-
MENT—In the Illinois case of People v. Stingley, the defendant stood
convicted at a bench trial, jury having been waived, of an assault with
intent to rape and also of an assault with intent to murder, as charged in
separate counts of a single indictment. Two consecutive penitentiary
sentences were imposed following upon a finding that the two crimes, while
distinct, actually arose out of a single series of acts committed upon the
same victim at the same time and place. On writ of error, the defendant
claimed that he had been exposed to double jeopardy in violation of the
state constitution and had been denied the due process guaranteed to him
by the Fourteenth Amendment to the United States Constitution in that the
trial court lacked authority to impose consecutive sentences under such an
indictment. While the Illinois Supreme Court affirmed the convictions,
it nevertheless ruled that the sentences had to run concurrently, rather
than consecutively, for the reason that the state was entitled to but one
satisfaction in a case of this nature and on an indictment in this form.

The court, in its opinion in the instant case, admitted having affirmed
consecutive or successive sentences in cases involving misdemeanor convic-
tions arising upon charges based on separate counts in a single informa-
tion, but pointed out that, in at least two of the three cases cited, express
power for this purpose had been found to exist under an interpretation
given to the applicable statute while, in the third, the charge dealt with
repeated, hence necessarily successive, offenses under the Occupational Tax
Act. It also recognized the doctrine, enunciated in People v. Wolf, that
a defendant may not be tried for separate and totally unrelated felonies
at the same time but may compel an election with regard thereto, pointing
out, in that respect, that where, as in the instant case, the distinct offenses
arise from one transaction, an election will not be required. Since two
or more offenses growing out of the same transaction may properly be
charged in different counts in one indictment without involving any vio-

1 414 Ill. 398, 111 N. E. (2d) 548 (1953). It is worth noting that the defendant argued the case in his own behalf.
3 People v. Rettich, 332 Ill. 49, 163 N. E. 367 (1928); People v. Elliott, 272 Ill. 592, 112 N. E. 300 (1916).
4 See the interpretation provided by the case of People v. Franklin, 341 Ill. 499 at 504, 173 N. E. 697 at 609 (1930).
5 People v. Player, 377 Ill. 417, 36 N. E. (2d) 729 (1941).
6 353 Ill. 334, 193 N. E. 211 (1934).
7 There must be a clear showing that the offenses are distinct to require an election: People v. Pulliam, 352 Ill. 318, 185 N. E. 599 (1933); People v. Bernstein, 220 Ill. 63, 96 N. E. 50 (1911).
8 West v. People, 137 Ill. 189, 27 N. E. 34 (1891); People v. Gray, 251 Ill. 431, 96 N. E. 268 (1911).
9 People v. Barrett, 405 Ill. 188, 90 N. E. (2d) 94 (1950); People v. Dougherty, 249 Ill. 458, 92 N. E. 929 (1910).
DISCUSSION OF RECENT DECISIONS

lation of the rule against duplicity, the claim of double jeopardy necessarily had to fail.

The case is particularly significant, however, with respect to the point as to whether or not sentences for distinct offenses arising out of a single transaction, properly charged in a single indictment, may be made to run consecutively. In that connection, no earlier Illinois cases have been found squarely deciding the point either way so far as felony charges might be concerned, hence it is necessary to search elsewhere for controlling principles. Because it would be impractical to make an exhaustive review of all cases in which consecutive sentences for felony have been imposed, the field has been narrowed to cover only those situations wherein (1) consecutive sentences have been upheld, (2) have been specifically denied, or (3) where, although concurrent sentences were imposed, the issue of the permissibility of consecutive sentences was involved.

In that regard, sentencing procedure in the federal courts provides the strongest authority for the imposition of consecutive sentences. The first problem which confronted these courts was one concerning whether or not the distinct and separate offenses were committed in a general or a specific single transaction. The problem appears to have been most acute in those cases where a combination of acts of burglary and larceny, or of entry involving force accompanied by a subsequent larceny, were involved. The federal courts apparently lean toward the view that separate offenses would be involved in these situations although there has been some qualification depending upon the factual situation. In the case of Ex Parte Peters, a defendant charged with breaking into a post office with the intent to steal and with an actual larceny therein was ordered to serve consecutive sentences on the theory that two offenses had been committed but, in two later cases, based on similar factual situations, it was held to be error to impose consecutive sentences inasmuch as only a single criminal intent was present, hence only one crime had been committed.

The matter eventually came before the Supreme Court of the United States in the form of the case of Morgan v. Devine. The court there formulated a principle which could be used as a test for such situations by saying: "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes . . . the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and

10 People v. McMullen, 400 Ill. 253, 79 N. E. (2d) 470 (1948).
11 12 F. 461 (1880).
12 See Munson v. McClaughry, 198 F. 72 (1912), and Halligan v. Wayne, 179 F. 112 (1910). Compare with Anderson v. Moyer, 193 F. 499 (1912), allowing consecutive sentences under separate but not the same counts of an indictment.
are such as are made punishable by the act of Congress.'14 Acting on the basis of this test, consecutive sentences have been affirmed in at least three cases.15

In addition, the federal courts, upon analysis of various types of crimes committed in a single, general or specific transaction, have found separate and distinct offenses to exist and have imposed consecutive sentences in other cases. In *Colson v. Aderhold,*16 for example, the defendant had been indicted under a multi-count indictment with assault with intent to rob and robbery, and consecutive sentences had been imposed. The defendant sought relief by habeas corpus after the first sentence had been completed but his application was treated as being premature. Similarly, in the case of *Kerr v. Johnston,*17 the defendant was indicted for an assault upon a carrier of mail bags with intent to steal and with the actual stealing of the mail bags and consecutive sentences based on the two counts of the indictment were approved. Nevertheless, a discretionary power as to sentencing may be seen reflected in the case of *United States v. Harris*18 where the defendant, indicted under counts charging robbery by simple force and armed robbery endangering the life of a person, pleaded guilty and was sentenced to fifteen years of imprisonment under each count, with the sentences to run concurrently. The defendant thereafter moved the court to re-sentence on one count only, asserting that no more than a single transaction was involved. The motion was denied on the basis that, as separate crimes had been committed, it would have been permissible for the court to have imposed sentences designed to run consecutively.19


15 United States v. Lynch, 159 F. (2d) 188 (1947); Ammons v. King, 136 F. (2d) 318 (1943); Macomber v. Hudspeth, 115 F. (2d) 114 (1940), cert. den. 313 U. S. 558, 61 S. Ct. 833, 85 L. Ed. 1153 (1941). In the Lynch case, although the maximum penalty for each count of the indictment was five years of imprisonment, the court approved a single sentence of seven years on the ground that two consecutive sentences for five years each could have been imposed. See also Durrett v. United States, 107 F. (2d) 438 (1939), wherein a defendant was charged, in a single indictment, with entering a bank with intent to commit larceny and with putting the life of the president thereof in jeopardy by use of a bomb. On conviction, consecutive sentences to imprisonment for twenty years on each offense were imposed.16

16 5 F. Supp. 111 (1933), affirmed in 73 F. (2d) 191 (1934).


19 Consecutive sentences have been imposed, or expression has been given to an opinion that consecutive sentences could have been imposed, in the following multiple count indictment situations: (1) impersonating a government official and obtaining property fraudulently under the guise thereof, in *Ekberg v. United States,* 167 F. (2d) 380 (1948); (2) stealing goods from interstate freight and having possession of goods known to be stolen, in *Carroll v. United States,* 174 F. (2d) 412 (1949), cert. den. 338 U. S. 874, 70 S. Ct. 136, 94 L. Ed. 536 (1949); (3) transporting, and also receiving, a known stolen vehicle moving in interstate commerce, in *Record v. Hudspeth,* 126 F. (2d) 215 (1942), cert. den. 316 U. S. 706, 62 S. Ct. 1310, 86 L. Ed. 1731 (1942); (4) transporting a known stolen motor vehicle and holding therein, for purpose of robbery, a person kidnapped, in *Langston v. United States,*
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It should be noted, in evaluating the strength of the federal court position as to consecutive prison sentences that, in addition to the distinction between offenses arising out of a single transaction, the United States Supreme Court, in *Albrecht v. United States*, has said there "is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." While that statement was made in connection with a criminal case involving the possession and sale of intoxicating liquor, the principle has been applied to other situations. In the case of *United States v. Bruce*, for example, consecutive sentences were imposed under an indictment charging the defendant with travelling in interstate commerce for the purpose of avoiding prosecution for a felony and also charging a transportation, in interstate commerce, of money known to have been stolen.

In comparison to the number of federal decisions on the point, there is a relative lack of state authority. Much of the disagreement has been on the question as to whether a combination of burglary and larceny in a single transaction constitutes separate and distinct offenses for which consecutive prison sentences could be imposed or amounts to no more than a single crime. At least five states have clearly adopted the first of these positions, with Massachusetts straddling the fence and Pennsylvania concluding that there would be a merger but providing for consecutive prison sentences in the event additional counts charged the use of actual force and physical violence after the felonious entry. New York, by statute, has permitted the imposition of a single prison sentence exceed-
ing the maximum allowed for each offense where there is a conviction under separate counts of an indictment charging burglary and grand larceny\(^2\) and the Washington case of *Grieve v. Smith*,\(^2\) also involving a statute,\(^2\) turns on the point that, while sentence would be discretionary, there is specific statutory authority for the imposition of concurrent sentences.\(^3\)

Aside from the burglary-larceny situations, a few states have approved consecutive sentences where more than one offense was found to exist in a single sexual relation between the parties involved. Examples of this may be found in connection with indictments charging incest and sodomy,\(^3\) statutory rape and sodomy committed by successive acts on the same victim,\(^3\) and bigamy and adultery.\(^3\) In the case of *People v. Palacio*,\(^3\) consecutive sentences were upheld as being within the discretion of the trial court under indictments charging each defendant involved with the taking of a person by force, menace and duress against her will, thereby compelling her to be defiled, and rape. However, in the case of *People v. O’Moore*,\(^3\) consecutive prison sentences were rejected under an indictment charging the defendant with several misdemeanor counts of contributing to the delinquency of a minor and also charging felonies based on certain acts with the particular minor because the court was of the opinion that, the same acts and transactions being involved, the result would be to impose a double penalty for the same offense. In addition to the sex offense cases, consecutive sentences based on distinct offenses arising from the same transaction have been upheld under indictments charging assault and battery with intent to kill and carrying a deadly weapon, plus attempted robbery;\(^3\) unlawful possession of burglar’s tools and attempted burglary;\(^3\) perjury and conspiracy to commit perjury, plus subornation of perjury;\(^3\) manslaughter and leaving the scene of an accident;\(^3\) ownership, sale, lease and transportation of slot machines, and operation and possession of the

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\(^2\) 53 Wash. (2d) 156, 173 P. (2d) 168 (1946).


\(^2\) See also *In re Sanford*, 10 Wash. (2d) 686, 118 P. (2d) 179 (1941).


\(^3\) *United States v. West*, 7 Utah 437, 27 P. 84 (1891).

\(^3\) 85 Cal. App. (2d) 778, 195 P. (2d) 439 (1948).

\(^3\) 83 Cal. App. (2d) 556, 189 P. (2d) 554 (1948).


\(^3\) *Wright v. State*, 139 Neb. 684, 298 N. W. 685 (1941). Defendant was released on parole on the second count but, on committing another motor vehicle violation, the sentence was reimposed, though reduced.
same machines;\textsuperscript{40} unlawful possession of intoxicating liquor and the sale thereof;\textsuperscript{41} and forgery of a note and the possession of a forged note.\textsuperscript{42}

Despite this array of cases generally permitting consecutive sentences in situations of the kind in question, the court in the instant case relied on three Illinois decisions. In two of them, the cases of \textit{People v. Griffin}\textsuperscript{43} and \textit{People v. McMullen},\textsuperscript{44} the indictments charged the respective defendants with burglary and larceny and sentences were imposed to run concurrently which were upheld on the ground no prejudice to the defendant existed, although there is some indication therein that the court apparently believed separate penalties would not lie. Rather than operating to serve as authority for a holding against consecutive prison sentences, these cases would more nearly serve in an argument as to whether or not a burglary and a larceny committed in a single transaction would constitute different offenses. In the third case, that of \textit{People v. Quidd},\textsuperscript{45} the defendant, an official of a state hospital, was indicted under one count for embezzlement while acting as a public officer and, under the second count, for embezzlement while acting as agent for a public institution. Sentences to imprisonment on each count were ordered to run concurrently and, again, were upheld under a belief that no prejudice existed. This case, therefore, adds little weight to support a view contrary to the one adopted generally elsewhere, particularly since the two counts of the indictment charged only one offense, that of embezzlement. About the only case which could be said to be fairly comparable to the one at hand is the New York case of \textit{People v. Savarese}\textsuperscript{46} wherein consecutive sentences had been imposed for kidnapping and robbery arising out of the same transaction but were reversed because the court believed, from the facts and circumstances, that the intent of the defendant was merely to commit a robbery and the kidnapping was no more than an integral and necessary part of the carrying out of this single intent.

Although little legal support can be found for the holding of the Illinois court, the view taken appears to be an understandable one when examined from the angle of its motives. There would, no doubt, be general agreement as to a judicial reluctance to impose punishment in excess of that prescribed for the particular crime, which reluctance is to be found not only in this country but also in England where, with statutory authority for the imposition of consecutive sentences,\textsuperscript{47} the courts have, as a matter of policy, seemed hesitant to impose consecutive sentences despite

\textsuperscript{40} State v. Calcutt, 219 N. C. 545, 15 S. E. (2d) 9 (1941). Two consecutive sentences were imposed, but the second was suspended.

\textsuperscript{41} State v. Moschoures, 214 N. C. 321, 199 S. E. 92 (1938).

\textsuperscript{42} State v. Phares, 120 Kan. 172, 243 P. 266 (1926).

\textsuperscript{43} 402 Ill. 247, 88 N. E. (2d) 746 (1949).

\textsuperscript{44} 400 Ill. 253, 79 N. E. (2d) 470 (1948).

\textsuperscript{45} 403 Ill. 15, 85 N. E. (2d) 179 (1949).


\textsuperscript{47} 7 & 8 Geo. IV, c. 28, § 10.
the existence of indictments with several counts or the presence of several indictments.\textsuperscript{48} Where, however, as in the instant case, distinct and separate offenses are present, involving separate criminal intents, there should be no room for a claim of prejudice to a defendant if he is punished for both of his crimes so long as double jeopardy is not involved.\textsuperscript{49} In order the better to promote the aims of justice, no strict rule of law ought to be imposed limiting the discretion of the trial judge, the one best able to determine the merit of the sentence in matters of this kind, other than a rule designed to prevent abuse in the exercise of that discretion.\textsuperscript{50}

G. A. LOWENTHAL

\textbf{LABOR RELATIONS — LABOR CONTRACTS — WHETHER SUCCESSOR EMPLOYER IS BOUND BY UNION CONTRACT WITH PREDECESSOR WHEN HE STARTS A NEW BUSINESS USING MOST OF THE EQUIPMENT AND RETAINING MOST OF THE EMPLOYEES OF THE PREDECESSOR—} The attention of those interested in labor law is hereby drawn to the Idaho case of \textit{Tarr v. Amalgamated Association of Street Electric Railway & Motor Coach Employees of America, Division 1055}\textsuperscript{1} wherein an interesting problem of labor law arose when a city bus company ceased operations in the midst of negotiations with the defendant union for a new labor contract. A new bus company was immediately formed, with the plaintiff as owner, and he proceeded to hire some of the old employees as drivers, operating used equipment acquired from the former owner under both lease and purchase agreements. The defendant union then pressed the new owner for a settlement of the several grievances which had led it to notify the former owner that the union contract would soon be terminated. After the plaintiff had operated his business for one day under a new city franchise, he was asked to attend a meeting with union officials and, when the new employer refused to accede to one of the union’s demands, a strike was voted. Plaintiff thereupon hired new employees and continued to operate but, being hampered by picketing and other union activities, he then sought and was granted an injunction from the trial


\textsuperscript{49}The identity of the offenses is the important test in double jeopardy cases: \textit{United States v. Higgins}, 184 F. (2d) 866 (1950), and \textit{Hensley v. United States}, 82 App. D. C. 14, 160 F. (2d) 257 (1947).

\textsuperscript{50}People v. White, 100 Cal. App. (2d) 836, 224 P. (2d) 868 (1950); People v. Finkel, 94 Cal. App. (2d) 813, 211 P. (2d) 888 (1949); People v. Palacio, 86 Cal. App. (2d) 778, 195 P. (2d) 439 (1948).

\textsuperscript{1}Ida. 223, 250 P. (2d) 904 (1952). Porter, J., wrote a dissenting opinion, concurred in by Thomas, J. See also the more recent case of \textit{National Labor Relations Board v. Birdsall-Stockdale Motor Co.}, 208 F. (2d) 284 (1953), denying enforcement to an administrative ruling after a bona-fide sale of the employer’s business.
court on the theory that no labor dispute existed between plaintiff and
the defendant. The Supreme Court of Idaho, upon review, affirmed this
ruling when it decided that the labor contract of the predecessor, although
made binding upon its successors and assigns, in no way bound the plain-
tiff. The majority of the court, two judges dissenting, regarding the plain-
tiff as being the owner of a new business under a new franchise, also found
an absence of mutuality of obligation under the old contract.

In holding that an injunction may be granted in a proper case where
no labor dispute, as defined by statute, exists without violating the First
and Fourteenth Amendments to the United States Constitution, the court
in question did no more than follow a previous Idaho decision to the same
effect. It also answered a claim made by the defendant union that the
plaintiff had, by accepting the benefits of the contract for one day, brought
himself within a rule of estoppel, by pointing to a trial court finding that,
on the facts presented, the plaintiff had not so accepted the benefits of the
contract. This discussion, therefore, will be confined to those questions
raised by the decision and which fall outside of these two issues.

The Idaho court arrived at its decision chiefly by following a line of
New York cases, starting with Paul v. Mencher, which have supported
the right of an employer to close all or part of his business without liability
to anyone notwithstanding the fact that he might have done so to avoid
a labor dispute. The doctrine established therein was followed in Wishny
v. Jones, wherein a cigar manufacturer was permitted to enjoin a union
from attempting to interfere with the closing of a particular department
of the business, and the case of Uneeda Credit Clothing Company v.
Briskin has been cited as possessing a corresponding effect, but actually
the point was a form of dicta because the injunction there issued was
based on the fact that an arbitration clause in the collective bargaining
agreement had been breached. Perhaps the strongest of the cases relied
on is the decision in M. Mittman & Company v. Sirotas, one strikingly
similar in that the assets of the vendor corporation were leased to a new

2 Ida. Code, § 44-712, states the term “labor dispute” means “any controversy
between an employer and the majority of his employees in a collective bargaining
unit concerning the right or process or details of collective bargaining or the
designation of representatives.” See also Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 2a,
which was given a similar interpretation in the case of 2063 Lawrence Ave. Bldg.
3 State v. Casselman, 19 Ida. 237, 205 P. (2d) 924 (1949). Holden, C. J., wrote a
dissenting opinion.
4 21 C. J. S., Estoppel, § 207(b), at p. 1206, states that “where one having the
right to accept or reject a transaction takes and retains benefits thereunder, he
ratifies the transaction, is bound by it, and cannot avoid its obligations or effects
by taking a position inconsistent therewith.”
5 169 Misc. 637, 7 N. Y. S. (2d) 821 (1939), affirmed in 279 N. Y. 813, 17 N. E.
(2d) 684 (1939).
6 169 Misc. 459, 8 N. Y. S. (2d) 2 (1938).
7 14 N. Y. S. (2d) 964 (1939).
8 111 N. Y. S. (2d) 100 (1952).
owner who was none other than a nephew of the controlling shareholder in the vendor corporation. A claim that the deal was no more than a sham transaction was rejected under a finding that no proprietary or financial tie with the former owner was shown to exist.

In opposition thereto, the defendant relied on several cases concerning industries not subject to the jurisdiction of the National Labor Relations Board to show the rights of a labor union are not extinguished by a change in ownership. The case of Newark Ladder & Bracket Sales Company v. Furniture Worker's Union9 was properly rejected as not being analogous for no actual change of ownership occurred there. An argument based on the holding in the case of Sutter v. Amalgamated Association10 might have been persuasive but for the fact that (1) the vendor corporation, also a bus company, had sold no more than its terminal facilities, being a minor part of the business, and (2) a strike was there already in progress. Cases based on the National Labor Relations Act,11 although disregarded in the majority opinion, reveal that a more energetic attempt has been made in that area to prevent the avoidance of a labor dispute by a transfer of ownership.12 Thus, in National Labor Relations Board v. Adel Clay Products Company,13 the court, holding that a partnership would be bound to a contract obligation despite a change in organization from a corporation to a partnership, said the "purpose of the Act is to prevent, in the public interest, industrial strife which has a tendency to burden interstate commerce, and is not to enforce private rights."14 In much the same way, in the leading case of National Labor Relations Board v. Colten,15 where the death of a partner was said not to cause a discontinuation of the business for this purpose, the court said: "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace."16 In general, therefore, the National Labor Relations Board will hold that the act of closing the business, or removing the place of employment, for the purpose of evading obligations under the statute will amount to an unfair labor practice.17

The decision here noted should provide sufficient basis for the observation that each case must be limited to its particular facts,18 but it is clear

9 125 N. J. Eq. 99, 4 A. (2d) 49 (1939).
10 252 Ala. 364, 41 So. (2d) 190 (1949).
12 See, for example, the board determination in L. B. Hosier Co., Inc., 88 N. L. R. B. 1000 (1950), but compare with National Labor Relations Board v. Birdsall-Stockdale Motor Co., 208 F. (2d) 234 (1953).
13 134 F. (2d) 342 (1943).
14 134 F. (2d) 342 at 346.
15 105 F. (2d) 179 (1939).
16 105 F. (2d) 179 at 183.
17 See annotation in 152 A. L. R. 149. The mere discontinuance itself is not an unfair labor practice but it may become such in the light of the employer's purpose for so doing.
18 173 A. L. R. 675.
that there is a public policy opposed to the closing or removal of factories, and the like, to effectuate purposes of the kind here considered.\textsuperscript{19} The Supreme Court of Idaho, accordingly, wisely refrained from extending the holding of the instant case beyond the facts thereof, expressly stating that the decree was affirmed because bad faith had not been alleged,\textsuperscript{20} treating the allegation of purchase with full knowledge of the existence of a labor dispute as not being the equivalent of a charge of bad faith. It would seem, however, that a further examination into the facts of the case should have been made. One of the dissenting judges viewed the entire transaction as a sale of the business, not simply a sale of the assets, thereby making the plaintiff a successor to the corporation and bound by the collective bargaining agreement. Closer adherence to the maxim that equity gives regard to substance rather than to form\textsuperscript{21} could well have changed the result. True it is that the predecessor company had been losing money and might justifiably have desired to discontinue the business entirely for that reason alone, but it did not wind up the operation nor go out of business.

Accepting the validity of the transfer for purpose of argument, the question remained whether any obligation was owed to the union by virtue of the fact that the contract was to be binding upon the "successors and assigns" of the company. This clause had originally been inserted in the contract to give the union members a greater sense of security and the terms agreed upon by the union undoubtedly incorporated that belief. In addition, it was undoubtedly to the advantage of the employer to have a collective bargaining agreement which would be freely transferable while binding the union to its successors. It is doubtful law, however, to say that, when the clause became detrimental to the company, it should be allowed to unfetter itself of its contractual obligations by selling the whole of its business and blithely informing the buyer that it had no outstanding obligations. Certainly, creditors of mercantile establishments are protected in this respect by the presence of Bulk Sales Acts,\textsuperscript{22} as well as by provisions against fraudulent conveyances in the reorganization of corporations,\textsuperscript{23} for it has long been the policy of the law to protect third persons against sales directly tending to injure or defraud.\textsuperscript{24} While the term "successor" may not yet have been explicitly defined in relation to collective bargaining agreements, it is clear that the right of an individual to liquidate his business at will should be limited to those cases where, in so

\textsuperscript{19} Abrams v. Allen, 297 N. Y. 52 and 604, 74 N. E. (2d) 305 and 75 N. E. (2d) 274 (1947). Lewis, Thatcher, and Dye, JJ., dissented.

\textsuperscript{20} See Sutter v. Amalgamated Association, etc., 252 Ala. 364, 41 So. (2d) 190 (1949). In Rithols v. Andert, 303 Ill. App. 61, 24 N. E. (2d) 573 (1939), the court said it would apply the applicable statute where it found a fraudulent sale, one made to remove from the case any question of a labor dispute.

\textsuperscript{21} 19 Am. Jur., Equity, § 459, and cases there cited.

\textsuperscript{22} 24 Am. Jur., Fraudulent Conveyances, §§ 237-63.

\textsuperscript{23} 13 Am. Jur., Corporations, § 1240.

\textsuperscript{24} 46 Am. Jur., Sales, § 121.
doing, he does not disturb any rights possessed by others, whether those others be creditors or employees. If clearer determination of the meaning of the term "successor-employer," as used in collective bargaining agreements, needs to be developed, the instant decision would seem to be about as far from the point as a court could possibly go without finding the presence of direct evidence of an intent to evade the basic precepts for industrial amity.

A. FEREN

VENDOR AND PURCHASER—REQUISITES AND VALIDITY OF CONTRACT—
WHETHER OR NOT AN OPTION TO PURCHASE BECOMES A NULLITY WHEN THE
LAND IS EXPROPRIATED PRIOR TO EXERCISE OF THE OPTION—Certain of the
rights of an optionee in real property were discussed recently in the case of Brooks v. Yawkey.¹ The plaintiff-optionee had there been granted a ninety-day option to purchase some real property located in Canada. During the term of the option, the most valuable portion of the land was expropriated by the Canadian government pursuant to eminent domain proceedings brought for that purpose. On the date of expropriation, the plaintiff was informed by the owner that the option had, thereby, been revoked but the optionee, treating the option as being still in force, tendered the agreed amount within the time stipulated, which tender was refused, and then sued for damages. Using a federal district court sitting in Massachusetts because of diversity of citizenship, the plaintiff claimed that, as he had exercised the option in accordance with its terms and had a valid contract of purchase, the defendant was under a legal obligation to convey whatever land remained and to assign the amount awarded as compensation for that part of the land so taken. A motion by defendant for summary judgment was granted by the trial court and, on plaintiff's appeal, the Court of Appeals for the First Circuit affirmed the decision,² indicating the law to be that parties to an option are absolved from their contractual liabilities thereunder whenever the property subject to the option has been wholly or substantially expropriated.³

Inasmuch as both sides conceded that the law of New York should apply, the contract having been made there, the court, while recognizing that there seemed to be cases elsewhere favoring the plaintiff, decided the problem on the basis of what it considered the New York law to be. Quot-

² Final determination was withheld because the plaintiff had not made sufficient allegation to demonstrate the necessary diversity of citizenship. Leave to amend with respect thereto was, however, granted.
³ The power commission of Ontario had expropriated approximately 85 acres, or about forty per cent., of the tract including all of the river frontage, being the most valuable part thereof. The award granted by the government must have exceeded the stipulated purchase price or any appropriate portion thereof because if it had not the plaintiff would certainly not have wished to exercise the option in the face of an automatic loss. The opinion does not, however, make this fact clear.
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from Reife v. Osmers as authority for the proposition that if there had been an actual contract of purchase and sale, mutually binding and enforceable, the purchaser would not have been relieved of his contract by the condemnation, but would have been required to accept whatever land remained unexpropriated and look to the award to compensate him for the remainder; the court nevertheless felt that the matter had to be treated differently where no more than an unexercised option existed at the time of the condemnation. In that connection, the case of Matter of City of New York was cited to support the view that an optionee, as such, has no interest in the property which is the subject of the option. In that case, however, the option to purchase at a stipulated price had appeared in a lease. The lower court had awarded the optionee-lessee the difference between the condemnation award and the purchase price but, on appeal, the decision was reversed not only because the “option gave the tenant no interest in the land” but also because the lease provided for an automatic termination upon the taking of the demised premises by eminent domain proceedings. It is clear, therefore, that while the court did use the phrase referred to, the decision was based on actual contractual provisions designed to meet the particular event. Any unreasonableness in the tenant’s position could afford little support for the particular result, nor should the decision serve as a guide to situations wherein contractual provisions of the kind mentioned were not present.

In contrast thereto, the Ohio case of Cullen & Vaughn Company v. Bender Company, mentioned in the opinion as giving weight to the contentions of the plaintiff, directly held that, where an option to purchase land, subsequently taken by an exercise of eminent domain, existed the optionee, although no longer able to buy the land itself, had an election to buy the fund into which the land had equitably been converted. The Ohio court not only held the doctrine to be a sound one, which could not result in injustice to any one, but even went so far as to say that, in the event the option should be contained in a lease, the option would become an “interest in the land” much the same as any other covenant in the lease. An even more recent federal case takes the same view, treating an option to purchase as an interest in the land, constituting a form of

4 252 N. Y. 320, 169 N. E. 399 (1929).
5 The rule there announced had been promulgated on the basis of a decision by Lord Eldon, in Paine v. Meller, 6 Ves. Jun. 350, 31 Eng. Rep. 1088 (1801), to the effect that, where houses are destroyed by fire before conveyance, the purchaser is bound to take the property and pay the price and is not relieved because the vendor may have allowed the insurance on the property to lapse.
6 246 N. Y. 1, 157 N. E. 911 (1927), cert. den. 276 U. S. 626, 48 S. Ct. 320, 72 L. Ed. 738 (1928).
7 The lease provided that “should the whole of the demised premises be taken by the government . . . under the right of eminent domain . . . that then and in that event this lease shall cease and come to an end . . . and in no event shall the tenant receive any portion of any award made to the landlord.”
8 If successful, the tenant would have cleared a difference of $100,000 between the option price and the amount of the award.
9 122 Ohio St. 82, 170 N. E. 633 (1930).
equitable ownership, entitling the optionee to claim the compensation awarded.\textsuperscript{10}

In the face of this conflict, the court concerned with the instant case turned to other doctrines to support the view taken. It noted that a series of cases existed in which parties to an option had been absolved from their potential contractual obligations in the event a substantial part of the property had been destroyed by fire or other hazard.\textsuperscript{11} Cases of this nature usually involve the problem of the person entitled in law to the proceeds of existing insurance coverage and it has been held that it would be inequitable to require an owner of the property to apply, for the benefit of the option holder, the proceeds of insurance which the owner’s prudence and money had procured for the owner’s own protection, particularly so when the option holder had not acted to accept the option until it became apparent that it would be profitable to do so.\textsuperscript{12} It is doubtful whether doctrines of this nature are applicable to situations like the one in the instant case. Proceeds of insurance may, in some measure, be compared to condemnation awards, but there is an important difference. The insurance policy, paid for by the vendor, represents an outlay from his pocket made under a free choice to insure or not. On the other hand, an award for condemnation, comparable to a forced sale of the property, may bear no relation whatever to the diligence or foresight of the parties.

Another purported analogy pursued dealt with the idea that, in those instances where the very thing concerning which the parties have contracted has gone out of existence due to circumstances beyond their control, the contract is to be regarded as at an end. The analogy would seem to fail for an inconsistency would result unless the doctrine, as applied to an option, would produce the same result as that achieved in the case of a contract to purchase. It has been noted that the case of \textit{Reife v. Osmers}\textsuperscript{13} held that a contract to purchase would not be ended by an intervening condemnation proceeding, but there is a lack of unanimity of opinion among the several states as to the effect to be given to a condemnation. At least one state holds that it would be inequitable to grant specific performance to the vendor,\textsuperscript{14} but other courts allow the vendee a choice of pursuing

\footnotesize{\textsuperscript{10} See 23 Tracts of Land v. United States, 177 F. (2d) 967 (1949). But see People v. Ocean Shore R. Co., 90 Cal. App. (2d) 464, 203 P. (2d) 579 (1949), a case which turned on a question of construction, that is whether the document was a contract to purchase or an option, but which indicated that an optionee would not have an interest in the land.

\textsuperscript{11} See, for example, Caldwell v. Frazier, 65 Kan. 24, 68 P. 1076 (1902) ; Clark v. Burr, 85 Wis. 649, 55 N. W. 401 (1893) ; and annotation in 23 A. L. R. 1225.


\textsuperscript{13} 252 N. Y. 320, 169 N. E. 399 (1929).

\textsuperscript{14} In Blockdel Realty Co., Inc. v. Doyle, 125 N. J. Eq. 528, 6 A. (2d) 670 (1939), the vendor was denied specific performance. It should be noted, however, that the buyers had agreed they were to have no interest in the property until they had paid the full purchase price.
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the award or rescinding the contract\textsuperscript{15} while Minnesota upholds the contract as made on the basis it had to be presumed the parties made their contract contemplating the possibility that the sovereign power of the state might interfere and substitute value for the land.\textsuperscript{16} Looking again to the law of New York, if that is what the court wished to follow, it should have noted the leading case of Clarke v. Long Island Realty Company,\textsuperscript{17} one which holds that a contract of purchase is not abrogated when the state has intervened and, under its right of eminent domain, has substituted value for the land. It was there held that the award became the subject of the conveyance, the parties being treated as if they had contemplated the possibility that the land might be taken for public use.\textsuperscript{18} The only rationale offered for a contrary holding has been based on the idea that the award for the taking of the land by eminent domain was not, \textit{per se}, the subject of the contract, being neither what the purchaser intended to buy nor what the vendor intended to sell.\textsuperscript{19} The answer would seem to lie in the fact that the parties could have so stipulated had they wished to do so but that, in the absence of stipulation, they should be treated as if they dealt with respect to a parcel of land or its substitute.

Going deeper into the problem, and recognizing that courts talk about reasonableness in cases of this nature, it is appropriate to consider equitable factors. The essence of a suit of the kind in question takes the form of specific performance even when not seeking that actual type of relief. While specific performance is an equitable remedy which will not be granted where it would result in injustice, inequity or hardship, even though these factors do not appear until after the contract has been entered into,\textsuperscript{20} it is usually held that a mere change in the value of the land is not such a subsequent event as would bar specific performance at the instance of a vendee.\textsuperscript{21} Where a change in the value of the land has been accompanied by delay or default on the part of the vendee, however, specific performance will be denied, particularly where it can be shown that the purpose of the delay was to give the plaintiff an opportunity to speculate as to future changes in the value of the land\textsuperscript{22} for courts of equity do not like the idea of speculation.\textsuperscript{23} In that regard, the remedy

\begin{itemize}
\item \textsuperscript{15}The case of Ogren v. Inner Harbor Land Co., 83 Cal. App. 197, 256 P. 607 (1927), will serve as an illustration of this view.
\item \textsuperscript{16}Summers v. Midland Co., 167 Minn. 453, 209 N. W. 323 (1926). The vendor, having received the award, was held to be a trustee thereof for the vendee’s benefit.
\item \textsuperscript{17}126 App. Div. 282, 110 N. Y. S. 697 (1908). Gaynor, J., wrote a dissenting opinion.
\item \textsuperscript{18}See, however, the nisi prius decision in Golden v. Aldell Realty Corp., 70 N. Y. S. (2d) 341 (1947).
\item \textsuperscript{19}Miller v. Calvin Phillips & Co., 44 Wash. 226, 87 P. 264 (1906).
\item \textsuperscript{20}Pomeroy, Equity Jurisprudence (Lawyers Co-operative Publishing Co., Rochester, New York, 1941), § 1405.
\item \textsuperscript{21}See Brubaker v. Hatjimanolis, 404 Ill. 342, 88 N. E. (2d) 843 (1949), and annotation in 11 A. L. R. (2d) 407.
\item \textsuperscript{22}Standiford v. Thompson, 135 F. 991 (1906).
\item \textsuperscript{23}Gladstone v. Warshovsky, 332 Ill. 376, 163 N. E. 777 (1928); Stuckrath v. Briggs & Turivas, 329 Ill. 555, 161 N. E. 91 (1928).
\end{itemize}
has been denied to holders of options where enforcement would be unreasonablere.

It has also been urged that, for a contract to be specifically enforced, the agreement must be mutual in character, since it would be unfair to allow one who could not himself be compelled to perform to hold the other party. This rule, however, should not be applied in option situations for the parties have waived mutuality by stipulation and, much as mutuality may be one of the prime essentials to a contract, the absence thereof is no defense to specific performance of an option if the option is supported by adequate consideration. For that matter, there is no reason to deny the optionee the right to specific performance merely because the land has increased in value in the meantime.

In the light of this analysis, it would appear that, to grant the plaintiff-optionee in the instant case the right to specific performance, would result in no injustice or inequity. The vendor, having been willing at one time to sell the land at the stipulated price, cannot claim he is injured if, on condemnation, the government evidences a belief that his property is worth more than the owner did. Granting the award to the optionee certainly gives him an automatic profit, but the fact remains that he would have been entitled thereto if he had completed a purchase of the property and should be entitled to the same privilege if he furnished consideration at the time he entered into the option. To deny him an election, as was done in the instant case, is to deny him the very right for which he stipulated.

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24 In Marsh v. Lott, 156 Cal. 643, 105 P. 968 (1909), the optionee, who had paid a consideration of twenty-five cents for an option to purchase land worth $100,000, was deemed to be making an unreasonable demand.

25 Pomeroy, op. cit., § 1405.


27 Keogh v. Peck, 316 Ill. 318, 147 N. E. 266 (1925).

28 Note the words of Chief Justice Lawrence in Stevenson v. Loehr, 57 Ill. 509 at 512, 11 Am. Rep. 36 at 37 (1871). He said: "Suppose the land has doubled in value between the sale and the condemnation. Suppose it has been bought at $100 per acre, and has risen to $200, and the railway takes five acres and pays $1000. Here is a profit of $500, and certainly no one would pretend that the vendor would be entitled to it. He could not, by remitting the vendee the purchase money at the rate of $100 per acre, claim the right to receive the condemnation money at double that rate."