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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ATTORNEY AND CLIENT—THE OFFICE OF ATTORNEY—WHETHER OR NOT PERSON NOT LICENSED TO PRACTICE LAW MAY APPEAR IN A REPRESENTATIVE CAPACITY BEFORE AN ADMINISTRATIVE TRIBUNAL—The perplexing question of whether the conduct of a layman engaged in handling proceedings before an administrative tribunal involved him in the unauthorized practice of law was the problem before the Nebraska Supreme Court in the case of State ex rel. Johnson v. Childe. The defendant therein, charged with contempt of court for practicing law

1 — Neb. —, 23 N. W. (2d) 720 (1946).
without a license, had on various occasions appeared on behalf of interested parties before the state railway commission. It was shown that such appearances necessitated the preparation of pleadings, the examination and cross-examination of witnesses, as well as the discussion of legal questions raised at the hearings, all of which services were performed by the defendant without the aid of a regularly admitted member of the bar. The defendant was adjudged guilty of contempt by a divided court, the majority stating: "It is the character of the act and not the place where it is performed that constitutes the controlling factor." A dissenting opinion, however, was based on the idea that the act of initiating, as well as that of conducting, hearings before an administrative body charged with the sole function of aiding the legislature to fix transportation rates was not to be considered as falling within the realm of legal practice.

While courts at an early date may have felt that the practice of law required appearance, on behalf of a party, before a judicial tribunal of record, the modern view, at least as to matters other than those which involve appearance before administrative tribunals, takes into consideration the nature of the act performed. Thus it has been said that the giving of legal advice, the preparation of legal instruments, the soliciting, settling, or adjusting of personal injury or other claims, and the doing of other acts customarily performed by lawyers, constitute the practice of law. The latter would seem the more logical view since it is universally known that the greater portion of the attorney's work is, of necessity, done outside the courtroom. The search for applicable law, the drafting of pleadings, and the preparation for argument are all done in the attorney's office or library while only the culmination of these labors is presented to the court of which he is an officer.

Logical reasoning of this character, however, has been disregarded when it has become necessary to decide the character of similar acts performed before administrative tribunals. The legislatures of certain of the states, for example, have enacted that laymen may appear in a representative

2 — Neb. — at —, 23 N. W. (2d) 720 at 723.
5 People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); State v. Richardson, 125 La. 644, 51 So. 673 (1910).
capacity before some of these bodies. The Federal government, in much the same way, has given laymen the privilege of appearing before the Interstate Commerce Commission, the Commissioner of Patents, the Treasury Department, and the Board of Tax Appeals. Attempts to criticize such statutes have been rejected, at least as to appearances before the Interstate Commerce Commission, on the ground that it has rules of procedure distinct from those followed in courts even though its proceedings involve legal questions and its decisions are published much like those attained by courts.

Statutory provisions of this character can hardly be said to provide the answer to the problem for they consider only the fact that the administrative tribunal may have a different modus operandi and completely disregard the nature of the acts to be performed by laymen. They may also be of doubtful constitutionality for it was indicated, in People v. Goodman, that neither the legislature nor the administrative tribunals could bestow privileges on one not duly licensed if, to do so, permitted him to engage in activities which the judicial department had declared to be encompassed within the practice of law, hence falling under the control of the judicial rather than the legislative department.

Other attempts to arrive at a solution to the problem have been made by classifying administrative agencies according to their function or character. Bodies such as the Interstate Commerce Commission, the Commissioner of Patents, the Treasury Department, the Board of Tax Appeals, the Federal Trade Commission, the Securities and Exchange Commission, public service commissions, minimum wage boards and the like have been said to be of legislative or executive character, while industrial boards or workmen's compensation commissions have been said

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14 366 Ill. 346 at 352, 8 N. E. (2d) 941 at 945 (1937).
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to possess judicial or at least quasi-judicial functions. The inference to be drawn from any such system of classification is that questions relating to the unauthorized practice of law can only arise in connection with work done before the latter institutions.

A review of the decisions goes far in upholding such a view, for the cases treating the layman’s conduct before administrative tribunals as amounting to the practice of law all concerned appearance before workmen’s compensation boards, while the opposing cases involved activity before bodies whose character or function might well be designated as legislative or executive. As the latter cases give no consideration to the nature of the acts being performed, being content to hold that the agencies were “administrative” ones, they imply that it is impossible for a layman to be engaged in the practice of law when appearing before them. In only one case, that of Public Service Traffic Bureau v. Haworth Marble Company, is there any recognition of the possibility that the layman might be engaged in the practice of law if he contemplates more than merely appearing before the agency. In that case, a contract for services was held void not so much because the plaintiff corporation had appeared before the Interstate Commerce Commission but rather because the compensation for the services was to be based on a percentage of the “recoveries.” As the court concluded that an “award” by the Commission was not the proper subject for a “recovery” of money, it deemed that the contract contemplated suit before the courts as well as appearance before the commission, hence involved the practice of law.

Neither the enactment of statutes purporting to authorize the appearance of laymen nor the classification of tribunals according to their character or function provide a satisfactory solution. Both present an arbitrary means of hurdling the vital question, for they turn a blind eye and a deaf ear to the basic issue, i.e. just what is the layman doing before the agency. While there is every reason to support the view that administrative bodies should not be tied to methods of procedure which


would curtail their efficacy, it should be remembered that administrative adjudication takes two phases, to-wit: the informal and the formal. In the first of these phases, decisions are reached upon inspections, conferences, tests, correspondence or by consent. Perhaps the great mass of the cases are so terminated and the utility of such procedures, to both the government and the claimants, cannot be disputed. The second or formal phase is reached only if the informal methods do not dispose of the problem or, for some reason, are not utilized. Here formal pleadings are found, testimony is taken subject to cross-examination, briefs on law and fact are submitted, arguments are heard, and a record is prepared which may eventually reach the courts.

No practice of law by a layman could be found in the first phase for the acts there involved are not those performed solely by attorneys nor do they require special skill or training. But, as applied to the second phase of administrative procedure, courts could well find the conduct of the layman to be within the realm of the practice of law regardless of the nature of the tribunal, hence laymen properly should be excluded from the performance of the acts there required. One case, that of Goodman v. Beall, bears out this analysis. The court there held that appearance on behalf of a claimant before an industrial commission did not constitute the practice of law up until the claimant first received notice of the disallowance of his claim. It can be assumed that such was the "informal" phase of adjudication. Thereafter, the court said, rehearing proceedings "do constitute the practice of law and must be conducted exclusively and personally by an attorney or attorneys at law duly admitted to practice." Inasmuch as the proceedings thereafter depend on the contents of the rehearing record, the "formal" phase of the proceeding must have been reached and effective representation would require the skilled services of a lawyer. Viewed in the light thereof, the holding in the instant case is amply justified even though the tribunal involved would ordinarily be placed in the legislative rather than the judicial category.

The passage of the recent Federal Administrative Procedure Act has been made the occasion for expressions of concern because of the unfortunate wording of Section 6A thereof. That section declares that a claimant before any administrative agency has the right to be represented

21 130 Ohio St. 427, 200 N. E. 470 (1936).
22 130 Ohio St. 427 at 434, 200 N. E. 470 at 473.
24 5 U. S. C. A. § 1011 et seq.
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by counsel or, if permitted by the agency, by any other "qualified representative." While it adds that nothing contained therein shall either grant or deny to a layman the right to appear for or represent others before any agency or in any agency proceeding, a perusal of the statute renders it difficult to ascertain wherein any positive change in this regard has been accomplished save to guarantee to a claimant the right to be represented by counsel. If courts were encouraged to adopt the nature of the acts to be performed as a test, laymen could still be barred from practicing law before the federal administrative agencies despite the ineffectual wording of the statute.

I. D. FASMAN

CRIMINAL LAW—FORMER JEOPARDY—WHETHER OR NOT ACQUITTAL ON LESSER CHARGE OF ASSAULT WILL PREVENT SUBSEQUENT PROSECUTION FOR MURDER BROUGHT ABOUT BY DEATH OF VICTIM AFTER THE EARLIER ACQUITTAL—The recent case of People v. Harrison1 presented not only a rather rare factual situation but also evoked a decision of first impression in the law of Illinois. The deceased victim therein had been wounded in a tavern fracas. The defendant had been indicted for an assault with a deadly weapon with intent to murder but had been acquitted thereof during the lifetime of the victim. Approximately eight months after the wounding, the assaulted person died from the effects thereof so the state caused the defendant to be indicted for murder. Defendant urged upon the trial court, both by motion and by offer of evidence, that the former acquittal was a bar to such prosecution but the contentions were denied and he was found guilty upon a verdict. On appeal taken directly to the Illinois Supreme Court,2 it was held that the conviction should be affirmed.

It would appear, from the statement of facts and the opinion in the instant case, that the sole theory of the defendant's plea rested upon the doctrine of double jeopardy. The common-law prohibition against trying a party twice for the same offense3 is now embodied in both federal4 and state constitutions.5 When seeking to determine whether a second indictment is based upon the same offense as the first, courts uniformly test the situation by seeing whether or not the evidence necessary to obtain

1 395 Ill. 463, 70 N. E. (2d) 596 (1947).
3 4 Bl. Com. 336.
4 U. S. Const., Amend. 5.
5 See, for example, Ill. Const. 1870, Art. 2, § 10. There is variation in the language used in the several state constitutions, but all give some recognition to the general idea.
and support a conviction under the second indictment could have been sufficient to procure a conviction at the first trial and, if so, will hold that to prosecute on the second indictment would be to place the defendant in jeopardy twice. It has, therefore, generally been held that where a party is either acquitted or convicted of a lesser crime which constitutes an essential element or part of a greater offense, that decision serves as a bar to a subsequent prosecution for the larger crime. Thus, a former conviction for an assault has been held to bar prosecution for mayhem; attempting to try a person for assault with intent to commit rape places him in jeopardy a second time if he has previously been convicted of assault and battery; and an acquittal on a charge of homicide has served to bar a prosecution for the larger crime of assassination.

The cases cited by the court in the instant case to the effect that a conviction of assault during the lifetime of the victim is not a bar to a subsequent prosecution for manslaughter or murder should the victim die subsequent thereto are recognized exceptions to the foregoing rule. Decisions of this character proceed on the theory that inasmuch as no murder had been committed at the time of the first trial for the lesser offense, the victim still being alive, no conviction would have been possible so no jeopardy with respect thereto could have arisen. The present case discloses a situation falling within this recognized exception but with a variation seldom found, i.e. the defendant was acquitted of the lesser offense at the first trial. It has been said that such a situation is not likely to materialize but, where it does, the rule should not vary.

The few cases which have arisen presenting that variation are consistent

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6 Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621 (1884); People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938), noted in 16 Chicago-Kent Review 386.
7 Graton v. United States, 206 U. S. 333, 27 S. Ct. 749, 51 L. Ed. 1084 (1907); State v. Blevins, 134 Ala. 213, 32 So. 637 (1902); Floyd v. State, 90 Ark. 94, 96 S. W. 125 (1906); People v. Defoor, 100 Cal. 150, 34 P. 642 (1893); Arnett v. Commonwealth, 270 Ky. 335, 109 S. W. (2d) 795 (1937); State v. Cheevers, 7 La. Ann. 40 (1852); State v. Womdra, 114 Minn. 457, 131 N. W. 496 (1911).
8 People v. Defoor, 100 Cal. 150, 34 P. 642 (1893); State v. Cheevers, 7 La. Ann. 40 (1852); State v. Womdra, 114 Minn. 457, 131 N. W. 496 (1911).
9 State v. Blevins, 134 Ala. 213, 32 So. 637 (1902).
with the statement and with the outcome of the present case. As the
discipline of double jeopardy makes no distinction between prior acquittal
or conviction, being concerned more with the risk of conviction than
anything else, it would appear, then, from that standpoint that the
decision in the instant case was both correct and proper.

This, by no means, necessarily labels the ultimate outcome of the
case as being correct, for the fact of the former acquittal could have
operated to bar the second prosecution in another way, i.e. by the use
of the findings at the first trial as an estoppel against the state when it
sought to introduce proof at the second one. That the doctrine of res
adjudicata or estoppel by judgment is applicable to criminal cases is
undeniable, and the provisions against double jeopardy do not supplant
it in any particular. Where the latter applies, it of necessity over-
shadows the former since a finding of double jeopardy removes any
reason for the application of the doctrines of res adjudicata. The
fundamental difference between the two lies in the fact that in double
jeopardy questions there must be an identity of offenses, while such is
immaterial in the estoppel problems for there the determination of any
fact on the merits in a prior action bars further investigation with respect
thereto in subsequent litigation.

As the latter doctrine applies only as to matters put in issue and
directly determined by the court or jury, it is important to determine
exactly what issues were before the court in the first prosecution. In the
present case, the first jury had been confronted with two questions, to-wit:
(1) did the defendant commit acts amounting to the assault charged,
and (2) was the requisite specific intent present in the mind of the
defendant? It is true that no precise facts are ever determined
by an acquittal, for the jury could have found either that no criminal act was

13 Reg. v. DeSalivi, 10 Cox C. C. 481 (1857). See also Crawford v. State, 174 Md.
175, 197 A. 866 (1938); Commonwealth v. Jones, 288 Mass. 150, 192 N. E. 522
(1934); People v. Warren, 109 N. Y. 615, 15 N. E. 880 (1888).
137 (1916); People v. Ashrawy, 130 Cal. App. 145, 19 P. (2d) 536 (1933); Com-
monwealth v. Spivey, 243 Ky. 483, 48 S. W. (2d) 1076 (1932); Dusenberg v.
Rudolph, 325 Mo. 881, 30 S. W. (2d) 94 (1930); State v. Heaton, 56 N. D. 357,
217 N. W. 531 (1928). But see Town of St. Martinville v. Dugas, 158 La. 262, 163
So. 761 (1925).
15 Collins v. Loisel, 262 U. S. 426, 43 S. Ct. 618, 67 L. Ed. 1062 (1923); United
16 Freeman, Judgments, 5th Ed., Vol. II, p. 1364 et seq.
17 Jay v. State, 15 Ala. App. 255, 73 So. 137 (1916); Commonwealth v. Spivey, 243
Ky. 483, 48 S. W. (2d) 1076 (1932).
18 U. S. v. Morse, 24 F. (2d) 1001 (1926); People v. Ashrawy, 130 Cal. App. 145,
19 P. (2d) 536 (1933); State v. District Court of First Judicial Dist., 100 Mont. 383,
47 P. (2d) 649 (1935).
19 State v. Coblentz, 169 Md. 159, 180 A. 266 (1935).
perpetrated or that the required specific intent was lacking, or they may have found both elements absent. Assuming that the first jury had concluded there was no act of assault, it would be inconsistent with such finding to hold the defendant guilty of murder at a subsequent trial for without the preceding assault there could have been no murder. As was said in one case, "... it is clear, if he did not make the assault, he could not be guilty of that which includes and depends upon the assault."20 If it be assumed that the first jury acquitted because the defendant was found not to possess the necessary specific intent, such fact might be a handicap to the application of the doctrine of estoppel in some situations as where the first crime requires a different type of intent than the second. There is no such obstacle in the present case, however, for it has been held, in determining whether the defendant possessed the specific intent required for the aggravated assault charged, that the test is whether or not a conviction for murder would have been justified had the victim died.21 As the very intent necessary to make out the crime for which the defendant was acquitted would have to be shown in order to sustain a conviction for murder, it must be concluded that, no matter which element the jury found missing in the first prosecution, there must have been a negation of at least one of the elements necessary to sustain the second indictment. The prior acquittal, then, should have served as a complete defense even if it did not suffice for purpose of double jeopardy.

It can only be suggested that the attorney faced with a situation like the one in the instant case should not overlook the second principle. Should there be no identity of offenses to substantiate a plea of double jeopardy, the advantage to be gained from the estoppel as to certain facts already determined is obvious.

W. A. HEINDL

CRIMINAL LAW—NOLLE PROSEQUI OR DISCONTINUANCE—WHETHER OR NOT ENTERING OF UNCONDITIONAL NOLLE PROSEQUI PREVENTS REINSTATEMENT OF THE INDICTMENT AT THE SAME TERM OF COURT—In the recent Illinois case of People v. Watson,1 the defendant had been indicted on charges of burglary and larceny. Upon arraignment, the state's attorney entered a nolle prosequi as to the burglary charge and the defendant pleaded guilty to the one for larceny. Defendant was sentenced on that charge and was removed to the county jail to await delivery to the

21 People v. Downen, 374 Ill. 146. 28 N. E. (2d) 91 (1940).
1 394 Ill. 177, 68 N. E. (2d) 265 (1946).
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penitentiary. Six days later, while still in the county, defendant again appeared in court and upon motion of the state's attorney the sentence on the larceny charge was vacated, that count was nolled, and the burglary count was reinstated. After defendant pleaded guilty thereto, he was again sentenced to the penitentiary. Defendant then sued out a writ of error claiming that inasmuch as the proceedings on the larceny count had been vacated and inasmuch as the burglary one had been improperly reinstated there remained no basis upon which he could be legally detained. His argument was based on the theory that, once the court allowed entry of the nolle prosequi on the burglary charge, no further proceedings could be had upon that count and a new indictment was necessary. It was, however, held that the judgment should be affirmed, particularly since the order reinstating the cause was entered during the term and with the defendant's consent. The Supreme Court nevertheless felt constrained to say that although the procedure was legal it could not be commended.

Attempts to reinstate pleadings that have once been voluntarily withdrawn are likely to create problems in both civil and criminal cases. So far as civil cases are concerned, most of the questions seem to be well settled in Illinois for common-law rules have been followed in this state, even after the enactment of the Civil Practice Act, which rules prevent the plaintiff from reinstating his case unless, at the time of nonsuit, suitable reservation is made.

Reinstatement of a criminal case following the entry of a nolle prosequi is not, however, quite so simple a matter. If reinstatement occurs at the same term, there may be reason to find no objection unless the defendant can show some prejudice to his rights. Certainly, if nolle and reinstatement of a single count occurs while the trial on other counts is still in progress it might be said that the court has not lost jurisdiction to renew the proceedings. Thus, in People v. Caponetto, the defendant had been indicted on four counts, one of which was voluntarily withdrawn during the course of the trial. It was, however, reinstated upon motion made during the course of the argument to the jury and verdict and judgment was predicated thereon. The Illinois Supreme Court affirmed the judgment on the ground that there was no prejudice shown as the defendant appeared to have been offered every opportunity to present evidence on that charge. The instant case, the second of the Illinois

4 359 Ill. 41, 194 N. E. 231 (1934).
decisions touching on the point, differs from that earlier holding in that the trial on the remaining count had been concluded for several days before any attempt was made to revive the charge which had been nolled. That fact raises the question as to whether or not jurisdiction had been lost when judgment was entered or whether jurisdiction continued at least for the remainder of the term.

Decisions elsewhere concede that a case may be reinstated during the same term of court, which decisions accept the general doctrine that, as the court retains jurisdiction over its judgments, orders and decrees throughout the term at which they are rendered, there is nothing to prevent reinstatement. Certain of these decisions, however, are attributable to peculiar circumstances found therein which may have prompted the particular holding. In two of them, the nolle had been entered by reason of mistake of fact on the part of the prosecutor. In the third, the defendant consented to the reinstatement so was hardly, in a position to complain. It is true that the defendant in the instant case appears to have waived any objection to the procedure, at least he did not actively protest, so that may have been a governing factor in the outcome. Had he objected, the prosecution may have been hard pressed to find genuine authority to support the proposition that a court retains jurisdiction over a nolle prosequi order throughout the remainder of the term at which it is entered.

The tenor of a few of the cases would seem to suggest that a nolle prosequi constitutes nothing more than a declaration by the prosecutor that there will be no further proceeding for the time being, hence justifies a reinstatement at a later time if the prosecutor should elect to revive the charge. Despite the broad language used in such cases, a closer examination of the facts therein discloses that in each instance the dismissal was entered with leave to reinstate, so they can hardly be said

5 United States v. Rossi, 39 F. (2d) 432 (1930); Condos v. Superior Court, 29 Ariz. 180, 239 P. 1032 (1925); State v. Nutting, 39 Me. 359 (1855); State v. Lonon, 331 Mo. 591, 56 S. W. (2d) 378 (1932); State v. Phelan, 68 Tenn. 241 (1877); Parry v. State, 21 Tex. 746 (1858).
6 State ex rel. Graves v. Primm, 61 Mo. 166 (1875).
7 In United States v. Rossi, 39 F. (2d) 432 (1930), the prosecutor entered a nolle because he was under the impression that the court had no power to sentence a fourth-time offender against the liquor laws. Upon learning his mistake, the prosecutor reinstated the charge. In Condos v. Superior Court, 29 Ariz. 180, 239 P. 1032 (1925), the nolle was entered because of the prosecutor's belief that the offense constituted a violation of a statute and that there was insufficient evidence to sustain that charge. When it was discovered that the charge was actually for the violation of an ordinance, the case was again put on the docket.
8 Parry v. State, 21 Tex. 746 (1858).
9 State v. Smith, 170 N. C. 742, 87 S. E. 98 (1915); State v. Smith, 129 N. C. 546, 40 S. E. 1 (1901); State v. Thornton, 35 N. C. 177 (1852); State v. Thompson, 10 N. C. 334 (1825).
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to support the view that jurisdiction is retained, at least for the balance of the term, over an unqualified dismissal. If the analogy found in civil cases is to be applied, it would seem that revival subsequent to final judgment would be improper if attempted over the protest of the defendant.

Reinstatement at a subsequent term has quite generally been denied, in the absence of reservation of authority, upon the ground that to allow reinstatement would prejudice the rights of the defendant, particularly since the prosecution could thereby avoid a speedy trial yet leave the threat of an existing indictment hovering over the head of the defendant to fall at the whim of the prosecutor. There are qualifications to such rule, for it has been held that reinstatement is proper if the nolle has been entered by one without authority, or through mistake on the part of court officials, and there would seem to be no logical basis for objection in such situations as a court undoubtably retains jurisdiction to correct errors in its own records. The same result has been achieved where the defendant fled after the case was docketed for trial and the case was nolled to await his re apprehension. But mistake of fact on the part of the prosecutor which induces the nolle is not enough to permit reinstatement of the criminal case any more than it would serve in a civil suit.

10 Kistler v. State, 64 Ind. 371 (1878); State v. Dix, 18 Ind. App. 472, 48 N. E. 261 (1897); Commonwealth v. Smith, 140 Ky. 580, 131 S. W. 391 (1910); Dudley v. State, 55 W. Va. 472, 47 S. E. 285 (1904); Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728 (1884). In the cases of State v. Shilling, 10 Iowa 106 (1859), and State v. Murrell, 170 Tenn. 152, 93 S. W. 2d (1936), it does not clearly appear when reinstatement was sought, but the language used would seem to indicate that reinstatement at any time after nolle would be improper. Such holdings do not necessarily mean that the criminal is to go unpunished for a new indictment may be secured so long as jeopardy has not attached: Wolff v. United States, 299 F. 90 (1924); Ex parte Foss, 102 Cal. 347, 36 P. 669 (1894); State v. Shilling, 10 Iowa 106 (1859); Commonwealth v. Smith, 140 Ky. 580, 131 S. W. 391 (1910); Commonwealth v. Wheeler & Al., 2 Mass. (Tynge) 172 (1806).

11 In Wing v. State, 31 Ga. 155, 120 S. E. 437 (1923), a subordinate of the prosecutor signed and entered the nolle without the knowledge of or authority from the prosecutor.

12 In Ex parte Altman, 34 F. Supp. 106 (1940), the judge ordered the case dismissed in the mistaken belief that there was to be no prosecution. The entry of the nolle in People v. Curtis, 113 Cal. 68, 45 P. 180 (1896), occurred as the result of the incorrect recording of an order by the clerk of the court. See also Keokuk v. Shultzze, 188 Iowa 937, 176 N. W. 946 (1920).

13 Southernild v. State, 176 Ind. 493, 96 N. E. 583 (1911).

14 In State v. Veterans of Foreign Wars, 223 Iowa 1146, 274 N. W. 916 (1937), the defendant had been indicted for maintaining a liquor nuisance. Acting under the impression that the defendant was not incorporated, hence not indictable, the prosecutor caused the case to be dismissed. Upon learning that the defendant was actually incorporated, the prosecutor moved the trial court to reinstate and the motion was granted. Such action was overruled by the state supreme court. See also Henry v. Commonwealth, 67 Ky. 427 (1868).
It may be concluded, therefore, that the problem presented in the instant case would be likely to result in an entirely different solution if the defendant does not preclude himself from raising the question by his own failure to object.

E. W. Jackson

MASTER AND SERVANT—STATUTORY REGULATION—WHETHER OR NOT FOREMEN ARE ENTITLED TO ORGANIZATIONAL PRIVILEGES OF NATIONAL LABOR RELATIONS ACT—The right of foremen to organize and bargain collectively under the sanctions imposed by the National Labor Relations Act was recently affirmed by the United States Supreme Court in the five-to-four decision rendered in the case of Packard Motor Car Company v. National Labor Relations Board. The majority of the court upheld the Board's designation that the Foremen's Association of America was an appropriate bargaining representative and, as such, was entitled to recognition by the employer, indicating that while the Packard Motor Car Company had the right to the whole-hearted loyalty of the foremen in the performance of their duties, the latter possessed the right to protect their independent and adverse interests both in the terms of the employment contract and the conditions of work through the organizational privileges afforded by the National Labor Relations Act.

The implications arising from such a decision are quite broad, but the fact situation involved is sufficiently complex that the actual controversy resolved embraces a much more restricted result. The employer involved, typical of modern American big business organizations, was a highly specialized and substantially productive unit in the automobile industry. The operational activities of the company were supervised and directed by approximately 1100 foremen. They elected to organize under the aegis of an association which was independent of the rank and file


3 Concededly engaged in interstate commerce, Packard Motor Car Company conducts its principal manufacturing operations in two main plants, broken down into approximately 20 divisions, which in turn are subdivided into approximately 300 departments employing approximately 32,500 workers.

4 These employees were subdivided into "general foremen," "foremen," "assistant foremen," and "special assignment men." The general foremen had charge of one or more departments, with the foremen and assistants ranking below them in the supervision of the ordinary workers. The special assignment men were troubleshooters. While foremen, as a group, received higher pay and other privileges not
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employees,5 and which represented supervisory employees exclusively. Pursuant to prescribed procedure,6 the Board decided that all the foremen employed at one of the company’s plants constituted a unit appropriate for the purposes of collective bargaining and certified the association as the bargaining representative.7 The company, asserting that the foremen were not “employees” entitled to the bargaining privileges of the National Labor Relations Act, refused to bargain so the Board issued a “cease and desist” order.8 Upon the company’s challenge that such order was invalid, the Circuit Court of Appeals for the Sixth Circuit decreed enforcement,9 on which the United States Supreme Court subsequently granted certiorari with the result already noted. The rather narrow issue before the court, then, was whether the order of the Board was authorized by the statute.10 Reduced to its simplest form the question was whether the foremen were “employees” within the terms of the act.11

5 The Board, in its holding in In re Packard Motor Car Co., 61 N. L. R. B. 4 (1945), had found that the association was an unaffiliated and independent labor organization, formed for the exclusive purpose of representing supervisory employees, as well as that it was appropriate to group the several levels of supervisors in a single bargaining unit because of an obvious community of interest and lack of marked disparity in rank among the several levels. It thereby overruled its holdings in In re Murray Corp. of America, 47 N. L. R. B. 1003 (1942), and in In re Boeing Aircraft Co., 45 N. L. R. B. 630 (1942).


7 61 N. L. R. B. 4 at 26 (1945).

8 64 N. L. R. B. 1212 (1945).


10 Much of the dissent, overlooking the fact that it is the province of the courts to determine legal issues only, i.e. whether there is substantial evidence to support the ruling or whether the order oversteps the law, proceeds off into the nebulous realm of industrial policy. It invokes the bogey that a change in the management v. labor contest necessarily produces a struggle between owners on the one hand and the operating group on the other. See 329 U. S. — at —, 67 S. Ct. 789 at 794, 91 L. Ed. (adv.) 701 at 702. Since it was industrial strife, no matter the form, which produced the National Labor Relations Act in the first instance, anything which, by democratic means, tends to lessen strife should be regarded as within the spirit and, in this case, within the letter of the statute.

11 The Board itself had said that there had been a tendency to assume that the issue was whether foremen should or should not join unions, but pointed out that such assumption misconceived the Board’s function which was simply to decide whether foremen were entitled to have access to the orderly administrative machinery available to rank and file employees: 64 N. L. R. B. 1212. The lower court similarly pointed out, 157 F. (2d) 80 at 83 (1946), that the “controlling questions are: (1) whether the supervisory employees involved herein are entitled to or excluded from the privileges accorded by the National Labor Relations Act, and (2) if they are entitled to the privileges of the Act, whether the unit established by the Board is appropriate to effectuate the purposes of the Act.”
Reference to the National Labor Relations Act itself immediately discloses the striking anomaly that a foreman comes well within the statutory definitions, at least, of both an "employer,"¹² and an "employee."¹³ Nor does the context aid materially in determining the line of cleavage between the two since the statute, as well as those who enacted it, presupposed two diametrically opposed poles, one of management and the other of labor, to one of which all engaged in industry must of necessity cling,¹⁴ with no provision for a neutral zone somewhere in between.¹⁵ Possibly the best clue is given by the use of the word "acting" in the definition of the term "employer," which tends to emphasize the element of activity of the individual rather than his mere status or membership in a particular group. As the purpose of the labor act is to correct the failure or refusal of industry to recognize the right of workingmen to bargain collectively,¹⁶ latitude should be exercised in order to bring "workingmen"¹⁷ within the ambit thereof if possible. Since such conduct as organizing and bargaining by foremen is obviously not "acting in the interest of an employer," it might be inferred that foremen must necessarily be "employees." But the problem is far too complex to stand upon such oversimplified grounds.

Turning to earlier judicial determinations, it will be seen that the anomalous position of supervisory employees is far more apparent. The bi-polar concept of "employee" and its opposite "employer" has been abundantly illustrated,¹⁸ but the inchoate middle distance is confused

¹² 29 U. S. C. A. § 152(2) defines "employer" as including "any person acting in the interest of an employer, directly or indirectly," with certain exceptions not here relevant.
¹³ "Employee," according to 29 U. S. C. A. § 152(3), includes "any employee," and is not to be limited to the employees of a particular employer unless the chapter explicitly states otherwise. It also includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."
¹⁵ There is no specific reference to "foremen" or "supervisory employees" in the National Labor Relations Act. It is, therefore, unlike the Railway Labor Act, 45 U. S. C. A. § 151, which lists "employee or subordinate official" among the employees covered thereby. See also the Merchant Marine Act, 46 U. S. C. A. § 1253; the Social Security Act, 42 U. S. C. A. § 1301; and the Federal Employers Liability Act, 45 U. S. C. A. § 51, for other examples.
¹⁷ Ibid., § 159(b). In N. L. R. B. v. Armour & Co., 154 F. (2d) 570 at 574 (1945), the court said: "The term 'employee' was not used by Congress as a word of art. It is to be given a broad and comprehensive meaning. It takes color from its surroundings and should be read in the light of the mischief to be corrected and the end to be attained."
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and largely uncharted. It is true that a number of the decisions which indicate that, under this very statute, foremen were to be regarded as "employers" were evolved upon union complaints of interference by such supervisory personnel in the collective bargaining process, interference which the Board and the courts took extreme pains to prevent under any guise. Again, the Supreme Court has been careful to point out that while the determination of facts rests exclusively with the Board, judicial review being limited to questions of law, so that inferences to be drawn from the facts must also rest with the Board, still, as a matter of law, a broad and enlightened interpretation of the term "employee" is not beyond the power of the courts. The enlarged view taken in the instant case is not, therefore, an abrupt contretemps for several previous decisions, at least of lesser courts, have admitted foremen and other supervisory personnel to collective bargaining rights.

10 Consider International Association v. National Labor Rel. Bd., 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50 (1940), where the court pointed out that even slight suggestions of the employer's choice between unions might have telling effect among men who knew the consequences of incurring that employer's strong displeasure; or H. J. Heinz Co. v. National Labor Relations Bd., 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1940), where the mere fact that the company had not authorized or directed the activities of supervisory personnel in organizing was insufficient to relieve the company from responsibility. See also National Labor Relations Board v. Taylor-Colquitt Co., 140 F. (2d) 92 (1941), involving the activities of the wife of the leading foreman, and National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368 (1941).

19 In National Labor Relations Board v. Waterman S. S. Corp., 308 U. S. 206 at 208, 60 S. Ct. 493, 84 L. Ed. 704 at 707 (1940), the court said: "Congress has left questions of law which arise before the Board—but no more—ultimately to the traditional review of the judiciary. Not by accident but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that the courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act."


21 See National Labor Relations Bd. v. Hearst Publications, 322 U. S. 111, 64 S. Ct. 110, 64 S. Ct. 551, 88 L. Ed. 1170 (1944), holding that the term "employee" should be understood with reference to the purpose of the act, and the facts involved in the economic relationship; not to be established technically by previously developed or set legal classifications. See also National Labor Relations Bd. v. Glueck Brewing Co., 144 F. (2d) 547 (1944), and Phelps-Dodge Corporation v. National Labor Rel. Bd., 113 F. (2d) 920 (1940), cert. granted 312 U. S. 669, 61 S. Ct. 447, 85 L. Ed. 1112, modified on other grounds, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

22 See National Labor Relations Bd. v. Skinner & Kennedy Stationery Co., 113 F. (2d) 667 at 671 (1940), the court said: "There is no inconsistency between the provi-
Nor can it be said that the Board itself has been guilty of narrow consistency in delineating that right. From quite early in its history down to May, 1943, the Board had permitted such personnel to be represented by labor organizations for the purpose of collective bargaining with their employers. Then came the decision in *In re Maryland Drydock Company*, in which a union composed exclusively of supervisory personnel was denied collective bargaining rights. The front was not kept united, however, for exceptions were made for the printing and the maritime trades. Although a union of supervisory personnel was allowed to represent nonsupervisory employees, the Board steadfastly refused to recognize bargaining units composed exclusively of foremen. The first real break in the doctrine of the Maryland Drydock case occurred just a year after its formulation. In the case of *In re Soss Manufacturing Company*
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the Board indicated that mere supervisory status did not, by its own force, remove an employee from the protection of the national act. The principal case followed almost a year later, at which time the Board noted a retreat from its former stand because it said that the potential dangers which had required a different position at an earlier date could not materialize where the union representing the foremen is "independent and remains so."33

A pattern is thus beginning to take form, one which follows the original apparent views on the subject.34 In the absence of concise legislative definition, a visible and fairly well defined concept is being worked out. The anomalous position of the foreman, pointed out elsewhere,35 discloses that he stands today, in relation to mass-production industry, on a far different plane than the tyrant of earlier days.35 The restricted, blind "loyalty" heretofore required of supervisors has undergone liberalization. With respect to matters of wages, hours, and conditions of work, he owes no duty to his employer for, in this aspect of his relationship, he deals with management at arms length. He should, therefore, be allowed to assert the privileges given to all who work in, rather than own, modern industry.

W. O. KROHN


33 In re Packard Motor Car Company, 61 N. L. R. B. 4 (1945). In subsequent decisions still further delineation appears. In re B. F. Goodrich Company, 65 N. L. R. B. 294 (1946), permitted various levels of foremen of the one plant to form a single appropriate bargaining unit; In re L. A. Young Spring & Wire Corp., 65 N. L. R. B. 298 (1946), indicates that the kind of industry is immaterial for this purpose; while In re Jones & Laughlin Steel Corp., 66 N. L. R. B. 386 (1946), seems to have forgotten about the requirement of "independence" by allowing the same union to represent supervisors that already represented production workers.

34 See note 25, ante.

35 War Labor Board, Report and Findings of the Foremen's Panel (1945), p. 39, indicates that whereas "he was formerly an executive with considerable freedom of action, he is now an executor carrying out orders, plans, and policies from above: more managed than managing, more and more an executor of other men's decisions and less and less a maker of decisions himself."

36 The author of the comment in 55 Yale L. J. 754 at 755 (1946), says: "The duties of a supervisor in industry today generally are no longer identifiable with the functions of the traditional foreman. The plenary authority to employ, transfer, promote, demote, discipline, or discharge subordinates is gone. Particularly in mass production industries stringent personnel and management policies have relegated supervisory officials to a position of 'traffic cop.'" See also Daykin, "The Status of Supervisory Employees under the National Labor Relations Act," 29 Iowa L. Rev. 297 at 313-5.
involved a petition for a declaratory judgment to determine the constitutionality of a statute of that state purporting to fix the maximum rates which newspapers and radio stations could charge for political advertising. The petitioner therein, publisher of an old established newspaper, filed a schedule of rates pursuant to such statute which schedule indicated that it charged $1.50 per inch for local rate, $2.00 per inch open rate, but $3.00 per inch for political advertisements. It published political advertisements on behalf of, and charged certain of, the defendants the higher rate and thereafter presented its petition for a declaratory judgment asserting that the statute was unconstitutional (1) because arbitrary and without rational basis, (2) because discriminatory since limited in application to newspapers and radio stations and did not regulate other forms of advertising and (3) because invading the publisher’s right to freedom of contract and freedom of press. The nisi prius court transferred the proceeding, without determination, to the Supreme Court of New Hampshire. That court, by a 3-2 vote, held the statute constitutional. The United States Supreme Court subsequently dismissed an appeal from such ruling on the ground that no substantial federal question was involved.

The ability of a state legislature, in the absence of emergency, to regulate private business through the fixing of rates as an incidental function to the proper exercise of the police power seems to possess an interesting historical background. Possibly the earliest demonstration thereof is found in the English statute 1 Eliz. c. 11, where operators of wharves were subjected to regulation as to unloading and were cautioned that only reasonable tolls and duties were to be exacted. An attempt to formulate the basis for such action and to postulate a working rule by which it would be possible to indicate the businesses likely to be subjected to similar rate-making seems to have been made, also quite early, by Lord Chief Justice Hale in his treatise De Portibus Maris. He indicated that when private

1 — N. H. —, 48 A. (2d) 478 (1946). Marble, Ch. J., wrote a dissenting opinion concurred in by Johnston, J.

2 N. H. Laws 1945, Ch. 185, § 2 states: “No person or corporation, within this state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.”

3 — U. S. —, 67 S. Ct. 485, 91 L. Ed. (adv.) 372 (1947). Justices Douglas, Murphy and Rutledge were of the opinion that probable jurisdiction should be noted. Rehearing has been denied.


5 J. Hargrave, A Collection of Law Tracts (Dublin, 1787), p. 78.
property is "affected with a public interest" it ceases to be purely private property and, according to him, it is deemed clothed with a public interest when it is used in a manner so as to affect the community. Upon that rationale, therefore, it was found possible, in Allnutt v. Inglis, to subject warehouses to rate-making legislation.

Justice Hale’s rule was adopted by the American courts quite early, then was allowed to lapse into disuse until it was resurrected and given added strength by the decision in Munn v. Illinois. In that case, a decision upholding the right of a state to fix maximum rates for grain elevators, the doctrine was said to be justified by a "public interest" found to exist in the facts there presented rather than from any constitutional or statutory provision. This willingness to enlarge upon the list of businesses which had thitherto been considered as the only public callings was indicative of an attitude which other courts were to adopt in the ensuing decades. Regulation of fire insurance rates was soon permitted, but other statutes such as those regulating wages in the packing industry, the operation of private employment agencies, the sale of tickets to private amusement parks, or the manufacturing of ice were struck down because the businesses were not "affected with a public interest". Such holdings did not go without strong dissents. In Tyson & Brother v. Banton, for example, Justice Holmes commented on that phrase as a test for determining the validity of price-fixing laws by saying that it was "little more than a fiction intended to beautify what is disagreeable to the sufferers." Justice Sutherland also confessed that it furnished "at best an indefinite standard." In another of these cases, it was Justice Brandeis who noted,
in his dissent, that "the notion of a distinct category of business 'affected with a public interest,' employing property 'devoted to a public use,' rests upon historical error." In his opinion, the true principle should be that the power of the state extended to every regulation of any business reasonably required and appropriate for the public protection.

Modification of the classic rule, suggested as being necessary by these dissents, eventually was accomplished in the case of *Nebbia v. New York*.

The defendant therein had been convicted of violating an order of the New York Milk Control Board which had been given the power to fix milk prices. He sought review before the United States Supreme Court on the ground that the Milk Control Act was an unconstitutional attempt to regulate a private calling. While that court admitted that the milk business did not constitute a public utility, it nevertheless held the statute constitutional, in reliance upon *Munn v. Illinois*,

The court said: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts . . . is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." Only if the price-control legislation is arbitrary, discriminatory, or demonstrably irrelevant to the policy sought to be effectuated, then, can there be any expectation that it may be declared unconstitutional.

Since that decision, a mass of state legislation has been enacted evidencing the rapid adoption of the underlying principles of the Nebbia case, but it is impossible to draw from the cases any basis for prognosticating what businesses might hereafter be regulated although that had been possible in Justice Hale's day. So long as there is apparent necessity for action and so long as the means employed are appropriate,

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20 94 U. S. 113, 24 L. Ed. 77 (1877).
23 Olsen v. Nebraska, 313 U. S. 296, 61 S. Ct. 862, 85 L. Ed. 1305 (1941), upholding the regulation of fees charged by private employment agencies, overruled the holding in Ribnick v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913 (1928). See also Lamere v. City of Chicago, 391 Ill. 552, 63 N. E. (2d) 863 (1945), and Bowen v.
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regulation of private business through price control seems to be an assured fact, so much so that even the rates charged for such personal services as dry cleaning and laundry may be controlled.\(^{24}\)

The statute involved in the instant case is an excellent example. Although it has been clearly established that newspapers are not public utilities but private enterprises,\(^{25}\) still they are to be regarded as no more immune from price control than other private businesses if such regulation is essential in the protection of public welfare. The legislation in question was found to be necessary, in the interest of public welfare, to control and thus prevent corrupt political practices. As the legislature had unquestioned authority to control the latter with a view to their eventual elimination,\(^{26}\) it could regulate some particular device or practice through a scheme of classification not itself arbitrary or unreasonable.\(^{27}\) As newspapers and radio stations are important devices to those with political aspirations, the only problem then left was to determine whether control of maximum advertising rates was a reasonable method of regulation.

In that regard, newspapers have heretofore been subjected to price control under two different situations. The first might be classed as rate-making made necessary for the carrying on of efficient and economical government as in the case of statutes fixing a maximum rate for the publication of assessment lists, legal notices and the like.\(^{28}\) As to the constitutionality of statutes in this category, so long as the rate fixed permits a reasonable return, there can be no question. The second situation includes legislation, similar to that in the instant case, purporting to regulate prices

\(\text{Hannah, 167 Tenn. 451, 71 S. W. (2d) 672 (1934). Businesses which have been declared not to be "affected with a public interest" have been listed in an annotation to Miami Laundry Co. v. Florida Dry Cleaning and L. Board, 134 Fla. 1, 183 So. 759 (1938), in 119 A. L. R. 355.}

\(\text{24 Miami Laundry Co. v. Florida Dry Cleaning and L. Board, 134 Fla. 1, 183 So. 759 (1938).}


\(\text{26 State v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A. L. R. 377 (1930).}


\(\text{28 For example, Ill. Rev. Stat. 1945, Ch. 100, § 11, and Ch. 120, § 585. The latter statute was held constitutional in D. L. Lee Pub. Co. v. St. Clair County, 341 Ill. 257, 173 N. E. 274 (1930). See also Belleville Advocate Printing Co. v. St. Clair County, 336 Ill. 393, 168 N. E. 312 (1929).}
and other practices relating to elections and similar political activity.\textsuperscript{29} Although several such statutes exist, the instant case is the first in which direct assault on constitutional grounds has been rejected. If the policy behind such legislation is admittedly one designed to insure the purity of elections, the public interest is so well-entrenched that, pursuant to the Nebbia case, price regulation is proper. Since there is no doubt that the right of freedom of contract is subject to reasonable restraints imposed by the police power,\textsuperscript{30} as is also the liberty of the press,\textsuperscript{31} it would seem to follow that laws of this character will be and should be upheld elsewhere as they would appear to meet all constitutional requirements.

R. W. Beart

TORTS—INTERFERENCE WITH OR INJURIES IN PERSONAL RELATIONS—WHETHER OR NOT MINOR CHILD HAS A CAUSE OF ACTION AGAINST PERSON WHO ALIENATES PARENT'S AFFECTIONS—The precise problem, upon identical facts except for the element of diversity of citizenship, that was before the Circuit Court of Appeals in the case of \textit{Daily v. Parker}\textsuperscript{1} has now been presented to an Appellate Court of Illinois through the case of \textit{Johnson v. Luhman}.\textsuperscript{2} In that action, a complaint filed on behalf of certain minors charged that the defendant induced and enticed the children's father to desert them and breach his legal duties to his family to the damage of the minor plaintiffs. Motion to dismiss the complaint for failure to state a cause of action was sustained by the trial court. On appeal by plaintiffs, it was held by the Appellate Court for the Second District that the complaint was sufficient, so the order dismissing the complaint was reversed and the cause was remanded for further proceedings. That court, therefore, reached the same result upon much the same grounds as had been attained in the earlier Federal court decision.

It is not intended to canvass the entire subject again, for a complete and critical commentary on the underlying basis for the doctrine

\textsuperscript{29} In addition to N. H. Laws 1945, Ch. 185, § 1 et seq., see also Minn. Stat. 1941, § 211.03 and § 211.05; Miss. Code Anno. 1942, § 3176; Utah Code Anno. 1943, Tit. 25, Ch. 13, § 27.

\textsuperscript{30} Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923); Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915).

\textsuperscript{31} Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). Liberty of the press primarily involves immunity from the restraints of censorship. It may also be endangered by financial restraints. The majority of the court in the instant case recognized this fact but said no issue had been based thereon. The dissenting judge thought otherwise: — N. H. — at —, 48 A. (2d) 478 at 483.

\textsuperscript{1} 152 F. (2d) 174 (1945).

\textsuperscript{2} 330 Ill. App. 598, 71 N. E. (2d) 810 (1947).
in the Daily case has already been published. Little more has been added by the opinion of the Illinois Appellate Court in the instant case for it rests primarily on the fundamental thesis that it is the province of the courts to "fill in the gaps" in our system of law. It does, however, claim some support from the recent Illinois Supreme Court decision in *Heck v. Schupp* which declared the so-called "heart balm" statute to be an unconstitutional restraint upon the filing of suits for alienation of affections by either of the spouses. Any reliance in that case on Section 19 of Article II of the 1870 constitution was justified for the constitutional right to "a certain remedy in the laws" clearly forbids legislative action designed to take away an existing remedy unless, perhaps, some more adequate one be provided in its stead. That provision, however, furnishes no support for the holding in the instant case for there is a vast difference, apparently unrecognized, between a negative restraint placed upon the legislative department and an affirmative command to the judicial department to devise and provide new remedies hitherto unknown. The constitutional provision does not, and was never designed to, go as far as the court would seem to think.

It well may be, as the court suggests, that it is time that frank recognition be taken of the changes which have occurred in the family unit, changes which have made it into a co-operative enterprise, so that much of the ancient law of domestic relations is anachronistic. The short and simple answer is that, if such changes are to be produced, the job is one for the legislature which has competently handled the subject in the past, rather than for the courts. Such, at least, is the view of the Circuit Court of Appeals for the District of Columbia. It has, in the recent case of *McMillan v. Taylor*, refused to follow the views of its sister Circuit Court in the Daily case by dismissing a suit of this character on the ground that such a cause of action is not yet recognized in the law. It is obvious, then, that the last word on the subject still remains to be spoken.

**Workmen's Compensation—Proceedings to Secure Compensation—Whether Review of Arbitrator's Award by Industrial Commission is Prerequisite to Review Before a Court—In Sweitzer v. Industrial Commission,** a question arose as to whether or not one who seeks judicial re-

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4 394 Ill. 296, 68 N. E. (2d) 464 (1946).
5 160 F. (2d) 221 (1946).
6 394 Ill. 141, 68 N. E. (2d) 290 (1946).
view of a decision under the Illinois Workmen's Compensation Act\textsuperscript{2} must exhaust his administrative remedies before being privileged to appeal to the courts. The claimant therein was awarded compensation by an arbitrator but, as neither party petitioned the Industrial Commission for review within the required period of time,\textsuperscript{3} the decision of the arbitrator became the decision of the Commission by operation of law. The claimant thereafter, in apt time, sought a statutory writ of certiorari. The employer moved to quash the writ but its motion was denied and the circuit court thereafter reviewed the proceedings, set the award aside and entered judgment on its own findings, which judgment favored the claimant. The employer then secured writ of error from the Supreme Court, where it was held that if the claimant was dissatisfied with the decision of the arbitrator he should have sought review before the Commission and, for failure to exhaust his administrative remedies, the award had become final so that the courts were lacking in jurisdiction to review. The judgment was, therefore, reversed.

In the last case in point prior to the instant one, that of Jakub v. Industrial Commission,\textsuperscript{4} it had been held, under the then existing statute,\textsuperscript{5} that the courts were given jurisdiction to review, without the necessity of any internal action by the Industrial Commission, so long as the award of the arbitrator had become the final decision of the commission by operation of law. Paragraph one of Section 19(f) of the statute at that time declared that the decision "of the Industrial Board, acting within its powers, according to the provisions of paragraph (e) of this Section, and of the arbitrator or committee of arbitration, where no review is had and his or their decision becomes the decision of the Industrial Board in accordance with the provisions of this section, shall, in the absence of fraud, be conclusive unless reviewed as in this paragraph hereinafter provided."\textsuperscript{6} The third paragraph thereof stated that the court might "confirm or set aside the decision of the arbitrator or committee of arbitration or Industrial Board."\textsuperscript{7} As the law then read, there was evident support for the holding in the Jakub case.

Immediately after that decision, the first and third paragraphs of Section 19(f) were amended by the legislature by omitting those portions above italicized so that thereafter paragraph one read: "The decision of the industrial commission acting within its powers, according to the pro-

\textsuperscript{2} Ill. Rev. Stat. 1945, Ch. 48, § 138 et seq.
\textsuperscript{3} Ibid., § 156(b).
\textsuperscript{4} 288 Ill. 87, 123 N. E. 263 (1919).
\textsuperscript{5} Laws 1917, p. 488, § 19.
\textsuperscript{6} Ibid., p. 501, § 19(f). Italics added.
\textsuperscript{7} Ibid., p. 501, § 19(f), para. 3. Italics added.
visions of paragraph (e) of this section shall, in the absence of fraud, be conclusive, unless reviewed as in this paragraph hereinafter provided,'\(^8\) and the third paragraph read: "The court may confirm or set aside the decision of the industrial commission ... ."\(^9\) In addition, Section 19(b), which provides the procedure for obtaining review of the arbitrator's award before the Industrial Commission, was amended so as to provide that unless a petition for review was perfected as therein specified the decision should not only become the decision of the Industrial Commission but, in the absence of fraud, should also be conclusive.\(^10\)

These revisions have remained since that time without any further change and constitute the important statutory provisions here concerned.

Since these amendments, it has been held that the method of review provided by Section 19(f) is exclusive,\(^11\) that the power of the Industrial Commission to review the award of an arbitrator is conditioned upon the prompt filing of both a petition for review and a transcript of evidence before the arbitrator within the respective time periods fixed by the statute,\(^12\) and also that the jurisdiction of the circuit courts to review in compensation cases is wholly statutory, hence is limited by the provisions of the Workmen's Compensation Act.\(^13\) While the courts have consistently held that the statutory provisions must be followed precisely to perfect a review, no decision prior to the instant one has construed the statute to require a properly perfected review of an award of the arbitrator by the Industrial Commission to be a condition precedent to the right to secure review of such award before the courts.

The doctrine requiring strict construction of statutory provisions relating to the review of decisions of administrative tribunals, requiring as it does the exhaustion of all such administrative remedies prior to application to the courts for relief, now seems well settled and has been extended to all branches of administrative activities.\(^14\) Expounded by Justice Holmes in *United States v. Sing Tuck*,\(^15\) an immigration case, the doctrine was later affirmed in *Prentis v. Atlantic Coast Line Company*,\(^16\) a rate-fixing case, and has since been applied generally to procedure be-

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\(^8\) Laws 1919, p. 547, § 19(f).

\(^9\) The third paragraph, as rewritten, appears as Laws 1919, p. 547, § 19(f) (2).

\(^10\) Laws 1919, p. 547, § 19(b).


\(^12\) Oelsner v. Industrial Commission, 305 Ill. 158, 137 N. E. 116 (1922).


\(^15\) 194 U. S. 161, 24 S. Ct. 621, 48 L. Ed. 917 (1904).

\(^16\) 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908).
fore federal administrative agencies. It has been applied in this state to tax and other administrative proceedings. Statutory provisions requiring rehearing and review of its own decisions by the promulgating agency as a condition precedent to judicial review have been given mandatory effect in some jurisdictions, while in others the appellate administrative agency has been allowed to waive review and permit direct appeal to the courts even though the statute requires an order of that agency from which to appeal. As applied to workmen’s compensation cases, the doctrine has been given effect under statutes fundamentally similar to that found here.

The recently adopted Administrative Review Act also makes exhaustion of administrative remedies mandatory in proceedings in which that statute is applicable. While not specifically applicable to workmen’s compensation cases, the statute is indicative of a legislative intent to require exhaustion of administrative remedies and gives some support to the construction achieved in the instant case. The Federal Administrative Procedure Act, on the other hand, permits direct appeal to the courts from any level of the administrative process unless the enabling statute or the rules of the administrative agency specifically require ex-

17 Adsit v. Lieb, 76 Ill. 198 (1875), as applied to personal property assessments; Mississippi Valley Life Ins. Co. v. Storm, 339 Ill. 245, 171 N. E. 134 (1930), as to corporation capital stock assessments; Bistor v. McDonough, 348 Ill. 624, 181 N. E. 417 (1932), as to apportionment of tax between real and personal property; Kinderman v. Harding, 345 Ill. 237, 178 N. E. 71 (1931), as to real property assessments; Wabash E. Ry. Co. v. Com’rs East Lake Fork Sp. Drain. Dist., 134 Ill. 384, 25 N. E. 781 (1890), as to drainage district assessments.

18 See Cann v. City of Chicago, 241 Ill. App. 21 (1926), for example, as to zoning regulations.


20 See, for example, Tucker v. Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253 (1927).


22 5 U. S. C. A. § 1001 et seq.
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haustion of administrative remedies. Where exhaustion of remedy is not specifically required, judicial construction may become necessary but there is a tendency on the part of the federal courts to insist upon it before they will assume jurisdiction.

The basis for the doctrine has been attributed to a variety of sources but, whatever the reason given during the period of its development, it has resulted in eliminating the possibility of contestants having a choice of remedy or procedure. It incorporates the multifarious administrative tribunals into the judicial hierarchy, thereby fostering orderly procedure. Its extension has been and will be a boon to the proper handling of complex administrative problems. The decision in the instant case, therefore, not only dispels doubts which have existed as to the proper construction to be given to Section 19 of the Illinois Workmen's Compensation Act but may also serve to indicate an attitude on the part of the court so that similar holdings are likely to follow as to other administrative agencies not expressly covered by statutory provision on the subject.

R. C. MONTGOMERY
