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Notes and Comments

Maxfield Weisbrod

R. L. Richman

NOTES AND COMMENTS

LIMITATIONS ON TRIAL BY JURY IN ILLINOIS

SOME OBSERVATIONS ON CORCORAN V. CITY OF CHICAGO

The Supreme Court of Illinois in the case of *Corcoran* v. *City of Chicago*[1] for the first time had squarely presented to it the question of the right of a reviewing court to reverse, or reverse and remand, a cause tried by a jury on the ground that the verdict was against the manifest weight of the evidence.

It is interesting to observe that the attorney for the plaintiff in the Corcoran case is the same attorney who presented to the Supreme Court of Illinois the now famous case of *Mirich* v. *Forschner Construction Company*.[2] Plainly the purpose in the case under discussion was to extend the doctrine of the Mirich case to the end that in trials by jury a reviewing court could not determine that the verdict in any particular case was against the manifest weight of the evidence and thereupon reverse, or reverse and remand.

The facts in the Corcoran case are that Corcoran, the plaintiff, was a guest passenger in an automobile which was proceeding in a southerly direction on Western Avenue at or near its intersection with Fifty-seventh Street in the city of Chicago. When the automobile was passing that intersection it ran into or against a hole or depression in the street and caused the driver of the automobile to lose control of the automobile with the result that the automobile turned over and took fire. The plaintiff received rather severe and permanent injuries.

The negligence charged was that the defendant had carelessly and negligently permitted Western Avenue at or near the intersection in question to be and remain in an unsafe condition for travel, in that there were holes or depressions in the street which rendered it unsafe and dangerous to persons riding in vehicles.

Upon the trial in the Corcoran case there was a verdict in favor of the plaintiff and judgment thereon, from which verdict and judgment the defendant obtained a review in the Appellate Court.[3] That court reversed and remanded the case for a new trial on the ground that the verdict of the jury was against the manifest weight of the evidence. Thereupon the plaintiff filed a motion in the Appellate Court asking that the remanding part of the order be stricken. This motion was supported by an affidavit setting forth that the plaintiff had no additional or different evidence to offer if another trial was had. The motion was granted, and thereupon the remanding clause of the order was stricken, making the order final and appealable. Although the defendant made some objection to this procedure, nevertheless there was precedent for the procedure adopted.[4]

The factual situation has been set out somewhat in detail so that a

1 373 Ill. 567, 27 N.E. (2d) 451 (1940). 2 312 Ill. 343, 143 N.E. 846 (1924).
3 Corcoran v. City of Chicago, 296 Ill. App. 645, 16 N.E. (2d) 922 (1938).
4 Hartley v. Red Ball Transit Co., 344 Ill. 534, 176 N.E. 751 (1931).

clear conception would be had of the controversy submitted to the Supreme Court. The principal ground for appeal was a challenge of the constitutionality of Section 92 (3b) of the Civil Practice Act, which provides that "Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case. . . ." This statute is the successor of a series of statutes, the first of which was enacted in 1837. It is important to note that the court in its opinion found that "neither the Act of 1837, nor any of the succeeding acts, have been challenged on constitutional grounds such as are raised against the present act in the instant case."

The plaintiff contended that, on all questions of fact where the evidence is conflicting, the verdict of the jury cannot be set aside as being against the weight of the evidence except by the court that tried the case, and he asserted that such was the practice at common law. In view of the constitutional guarantee of the right to trial by jury the court considered the practice in such matters at common law and noted that the practice in such matters at common law was the same as the practice under the statute whose constitutionality was attacked, inasmuch as after a trial nisi prius there was a practice by which the record was returned to Westminister and the motion for new trial was passed upon by the full court. There are a number of reported cases in which the court on such motion set aside the verdicts of juries as being against the weight of the evidence. However, in commenting on this practice our Supreme Court failed to note that no English court ever set aside such a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses and heard them testify. The court cited no case in which, without the concurrence of the judge who heard the evidence, a verdict was set aside as being against the weight of the evidence. An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict.

The court stated: "There are statements in some of the later cases which support plaintiff's contention that at common law the power to award a new trial on the grounds the verdict was against the weight of the evidence, rested solely in the trial court. Such statements seem to be partially based on the theory that the trial judge saw and heard the witnesses testify and was for that reason in a better position to consider the evidence than the judges of a court of review who had not had such opportunity. As has been noted, at the early common law, motions for a new trial were addressed to the court at Westminister and not to the judge who presided at the trial. The judges of Westminister acted only on the record before them. . . . The judges of the court at Westminister had no opportunity of seeing the witnesses or hearing them testify. The credibility and weight of the evidence was determined from the records and proceedings before them."

It should be borne in mind in the examination of the English reports that, in some of the cases reported, the trials were had at bar at Westminister before a full bench, and all the judges who sat in the trial sat on the hearing of the motion for a new trial. *Wood* v. *Gunston*,[5] twice referred to in the opinion of the Supreme Court is an example of a case tried at bar at Westminister, and the new trial was granted by the court.

The opinion continued to say: "The certificate of the *nisi prius* judge was not controlling, for in Bacon's Abridgment, volume 6, at page 654, it is said that the case of *Wood* v. *Gunston*, decided in 1655, was the first case reported in the books wherein a new trial was granted, but that it ought not from thence to be concluded that this was the first instance of granting a new trial, for that the silence of reporters as to this matter may be in part due to its not having been formerly the practice to report what was done by courts upon motions; and on page 664 it is stated that a new trial was in some cases refused notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of the evidence."

The important part of this statement is: "The certificate of the nisi prius judge was not controlling." This seems to be a non sequitur from anything else stated in the quotation or elsewhere in Bacon's Abridgment. Certainly the reference to the case of *Wood* v. *Gunston* has no bearing, because that was a case tried at bar at Westminster before the whole bench. The fact that in some cases a new trial was refused, notwithstanding the verdict was, in the opinion of the judge before whom the case was tried, contrary to the weight of the evidence, does not indicate that the opinion of the nisi prius judge was ignored when a new trial was granted.

Bacon's Abridgment seems to have been the principal authority relied upon by the court on this point, but a careful examination of Bacon discloses no case supporting the position that, without the concurrence of the judge or judges sitting with the jury, a new trial had been granted by the English courts on the ground that the verdict was against the weight of the evidence.

In Bacon's Abridgment[6] appears the following: "A new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

"In one case the verdict was for the plaintiff; but upon the report of Willes, Ch.J., before whom the cause was tried, that the weight of evidence was in his opinion with the defendant, a new trial was granted.[7]

"Ryder, Ch.J., before whom the cause was tried, reported that there was evidence on both sides; but that the evidence for the party in whose favour the verdict was, was so very slight that the jury ought not in his opinion to have regarded it; and that the evidence for the other

5 Style 462 and 466, 82 Eng. Rep. 863 and 867 (K. B. 1655).

6 (6th ed., London, 1807), VI, 663-4.

7 Citing Letgoe ex dem. Wheeler v. Pitt, Barnes 439, 94 Eng. Rep. 933 (1740), mis-cited in Bacon as Barn. 322.

party was very strong; and he added that he was dissatisfied with the verdict. A new trial was granted.[8]

"In another case, wherein a new trial was granted, it was laid down generally, that the court ought to grant a new trial, if the verdict be in the opinion of the judge before whom the cause was tried contrary to the weight of evidence, although there were evidence on both sides.[9]

"A new trial has in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

"In one case where the judge, before whom the cause was tried, reported, that the weight of the evidence was with the plaintiff, and that in his opinion the jury ought to have found a verdict for him, a new trial was refused. And by the court—As there was evidence for the defendant, the jury were the proper persons to judge on which side the evidence was.[10]

"In another case, a new trial was refused, although Lee, Ch.J., reported, that the evidence for the plaintiff was very weak, and that he had summed up the evidence strongly for the defendant."[11]

In *Francis* v. *Baker*,[12] the next case, abridged from a MS. Rep., the trial judge said that if he had been on the jury he would have thought the verdict ought to have been the other way, "but I do not choose to declare myself dissatisfied with the verdict . . . for it is the province of the jury . . . to determine which witness they will give credit to. . . ." He left it to the other judges, and a new trial was refused.

In his abridgment of *Boulsworth* v. *Pikington* [*Pilkington*],[13] Bacon quotes the following: "In an action for these words, spoken of a tradesman, 'Thou are a beggarly rogue, go pay thy debts,' the jury found a verdict for the plaintiff with £800 damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the judge, before whom the cause was tried, reported, that the plaintiff had given the defendant no provocation, and that he believed the jury had done what they thought to be right."

The original reports in all of the abridgments quoted from Bacon have been examined and found to be correctly abridged. In the report of the case of *Berks* v. *Mason*,[14] it is to be noted that *Smith* v. *Huggins*,[15] cited by Bacon to support the proposition that "a new trial has in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried contrary to the weight of evidence" was relied upon to sustain the verdict and the Chief Justice

8 Citing Berk v. Mason, Sayer 264, 96 Eng. Rep. 874 (K.B. 1756).

9 Citing Bright v. Enion [Eynon], 1 Burr. 390, 97 Eng. Rep. 365 (K.B. 1757).

10 Citing Ashley v. Ashley, 2 Str. 1142, 93 Eng. Rep. 1088 (K.B. 1740).

11 Citing Smith v. Huggins, 2 Str. 1142, 93 Eng. Rep. 1089 (K.B. 1740).

12 At p. 664.

13 Citing Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685), mis-cited by Bacon as 2 Johns. in the English edition.

14 Sayer 264, 96 Eng. Rep. 874 (K.B. 1756).

15 2 Str. 1142, 93 Eng. Rep. 1089 (K.B. 1740).

after having continued the case to look into his notes stated this to be the rule: ". . . that if the Judge declared himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial . . ." and in the Smith case while the judge who tried the case summed up " . . . the evidence strongly for the defendants," he did not state that he was dissatisfied with the verdict and the new trial was denied.

In an anonymous case[16] referred to in the note to the Smith case, it is said: "The judge who tried the cause certified that six witnesses were examined at the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused."

In *Boulsworth* v. *Pilkington,* previously mentioned, the defendant moved for a new trial on the ground of excessive damages ". . . whereupon the Court (according to the usage in such cases) gave the defendant time to procure the Judge of Assize, before whom the cause was tried, to signify his opinion of the cause." The opinion of the Judge of the Assize having been had, the new trial was denied.

The following three cases, cited in the Corcoran case, sustain the position taken herein:

In *Bright* v. *Eynon,*[17] also abridged by Bacon, Lord Mansfield tried the case at nisi prius, and stated on the hearing of the motion for new trial: " . . . I am clearly of the opinion that there ought to be a new trial."

In *Regina* v. *Corporation of Helston,*[18] no question of fact was involved and the court denied the motion for a new trial on the question of law sought to be raised.

In *Slade's Case,*[19] the court seems to have advised, but did not actually grant, a new trial, and this was done on the certificate of the presiding judge, "that the verdict passed against his opinion."

In the Corcoran opinion there is an extended quotation from Blackstone's Commentaries. All that is quoted from Blackstone in the opinion is entirely consistent with the theory that there never was a new trial granted in the English courts except where the judge who sat with the jury concurred in the decision that the verdict was contrary to the evidence. In fact, Blackstone says[20] that a new trial may be granted "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith. . . . " This statement of Blackstone is omitted from the quotation made by the court.

The Supreme Court of the United States would appear to have reached a conclusion identical with that here urged; for it is said, in speaking of a review of a case, according to the course of the common law, where there was a trial by jury: "The only modes known to the

16 1 Wils. K.B. 22, 95 Eng. Rep. 470 (1743).
17 1 Burr. 390, 97 Eng. Rep. 365 (K.B. 1757).
18 10 Mod. 202, 88 Eng. Rep. 693 (K.B. 1732).
19 Style 138, 82 Eng. Rep. 592 (K.B. 1650).
20 Blackstone's Commentaries (Cooley's ed.), III, 387.

common law 'to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceeding.' "[21]

Not only in the cases cited by the court, but more especially in the cases of *Sinopoli* v. *Chicago Railways Company*[22] and *People* v. *Callopy*,[23] it was held, in speaking of the right to trial by jury, that "this referred to the right of trial by jury as it existed at the time that constitution was adopted in the Territory of Illinois. . . . " The court in the Corcoran case chose to make the test "what trial by jury was at common law" rather than "what the trial by jury was as it existed in the Territory of Illinois at the time the constitution of 1818 was adopted." The reason for this may have been the paucity of authorities concerning the practice as it existed in the Territory of Illinois. It is believed that there are no published opinions of cases decided in the Territory of Illinois. History shows that the courts as they existed prior to 1818 were comparatively crude, and the Supreme Court may have thought that it was impossible to determine, with any degree of certainty, what the practice was in Illinois Territory. However, there are sources from which it can be ascertained with certainty what the law was in the Territory of Illinois, regardless of whether that law was carried out in practice, although it should be presumed that the right of trial by jury as prescribed by statute law was the "right of trial by jury as it existed in 1818."

The Seventh Amendment of the Federal Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It is believed to be universally understood and conceded that the first ten amendments to the Federal Constitution are restrictions only against action by the Federal Government. The Federal Constitution was adopted in 1789 without any express provision concerning trial by jury in civil cases, but the Constitution did provide that the Supreme Court of the United States should have " . . . appellate Jurisdiction, both as to law and fact. . . . "[24] That omission, together with the quoted provision, caused great opposition throughout the states to the adoption of the Constitution.[25] The people generally demanded an amendment to the Constitution to remedy these defects. Alexander Hamilton in The Federalist,[26] while "damning with faint praise" the right of trial by jury, argued vociferously that there was no necessity of any such amendment, and he even made the assertion that from the constitutional provision as originally adopted "it does not follow, that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court."[27] But the seventh amend-

[21] Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 226 at p. 246, 41 L. Ed. 979 at p. 988 (1896).

[22] 316 Ill. 609, 147 N.E. 487 (1925). [23] 358 Ill. 11, 192 N.E. 634 (1934).

[24] U. S. Constitution, Art. III, sec. 2.

[25] Mirich v. Forschner Contracting Co., 312 Ill. 343 at p. 355, 143 N.E. 846 (1924).

[26] Edition of 1871, pp. 595 and 611. [27] Ibid., p. 603.

ment was insisted upon by the people, in spite of these arguments, and was adopted the year after the Constitution went into force.

The clause quoted from the seventh amendment made it certain that no federal court should ever re-examine any fact tried by a jury otherwise than according to the rules of the common law. It would seem to follow, therefore, that the Constitution of Illinois of 1818 applied the same prohibition to the courts of Illinois, when it provided "that the right of trial by jury shall remain inviolate."[28]

A right to trial by jury declared inviolate by the three successive constitutions of Illinois was the right as it existed at common law, and which included the substantial and essential attribute that no fact determined by a jury and approved by the trial judge should ever be retried, except where the judgment was reversed by an Appellate Court for some error of law. The right of trial by jury in the territorial possessions of the United States, a part of which in 1818 became the State of Illinois, included the right to trial by jury as it existed under the Federal Constitution which then had engrafted upon it the Seventh Amendment thereto made in 1790, and that is the right to trial by jury as it existed in the Northwest Territory in 1818 and declared to be inviolate by the Illinois Constitution of 1818 and declared to be inviolate by the Illinois Constitutions of 1818, 1848, and 1870.

The Constitution of Illinois, 1818, provided: "The people of the Illinois territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the Law of Congress, approved April 18, 1818. . . . " These provisions of the Ordinance of 1787 were also recognized and adopted and continued in force by the constitutions of the State of Illinois adopted in 1848 and in 1870.

Section 14, Article 2, of the Ordinance of 1787, enacted by Congress under the Articles of Confederation, July 13, 1787, provided:

"It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in said territory, and forever remain unalterable, unless by common consent. . . .

"Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus and of the trial by jury; . . . and of judicial proceedings according to the course of the common law."

These provisions of the Ordinance of 1787 have been confirmed by Article VI, Section 1, of the Constitution of the United States, and by the Act of Congress of August 7, 1789, after the adoption of the Federal Constitution, and by the Act of Congress of April 18, 1818, enabling the people of Illinois to form a constitution and state government, which provided that such constitution and state government "whenever formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the original States and the people and States of the

[28] Constitution of 1818, Art. VIII, sec. 6.

territory northwest of the river Ohio," and these provisions of the Ordinance of 1787 were further confirmed and adopted by the people of Illinois in their first constitution.

It would thus appear that the provisions of the Ordinance of 1787, in regard to the right of trial by jury, and of judicial proceedings according to the course of the common law, are embodied in the Constitution of Illinois of 1818, and the subsequent constitutions of the state, and are a part of the fundamental law of this state.

It is reasoned, therefore, that if the people of Illinois have the right to have a common-law case tried by a jury and are also entitled to the benefits resulting from such a trial, then the finding of a jury on factual issues should be final. As was said by Judge Cooley, conceded to rank with Marshall and Story as a constitutional lawyer, in his work on constitutional law: "It could be of no importance that one should have a jury trial in the first instance, if his adversary might then remove the case to another court to be tried by the judge himself."[29]

This quotation from Cooley was cited with approval in *Mirich* v. *Forschner Construction Company,* frequently cited in this discussion.

The Supreme Court of Illinois has recognized the Ordinance of 1787 as having the force of law in the state of Illinois, after it was admitted as a state.[30]

A statute granting substantially the same power as that granted by the provision of the Civil Practice Act now under discussion was enacted in New Jersey and a court of last resort in that state held the act unconstitutional.[31]

The circuit courts of this state and the Superior Court of Cook County are constitutional courts created by Article 6, Sections 1, 12 and 23 of the Constitution of 1870. The Constitution confers upon these courts "original jurisdiction of all causes in law." This jurisdiction cannot be taken away, changed or abridged by an act of the legislature as it is conferred by the Constitution, itself. The Supreme Court so held in the following language: "The jurisdiction of the circuit courts, so far as conferred by the constitution, cannot be taken away, nor can it be abridged by an act of the legislature."[32]

If the reasoning and conclusions reached in the Flanigan case may with propriety be applied to Section 92 (3b) of the Civil Practice Act un-

29 Cooley, Constitutional Law in the U. S. (3d ed.), p. 266.

30 Phoebe v. Jay, 1 Ill. 268 (1828); Sinopli v. Chicago Rys. Co., 316 Ill. 609, 147 N.E. 487 (1925); People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934).

Those readers who care to pursue the history of trial by jury further than the discussion contained in this article can find an enlightening discussion of the fundamental principles of the right to a jury trial in an opinion by Judge Story, then a justice of the United States Supreme Court, but who was sitting in the Circuit Court of the United States for the District of Massachusetts, and one may find another enlightening discussion in Sinopli v. Chicago Rys. Co., supra, and U. S. v. Wonson, Fed Cas. No. 16750 (1812).

31 Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647, 44 A. 762 (1899).

32 Berkowitz v. Lester, 121 Ill. 99, 11 N.E. 860 (1887).

der discussion, we must conclude that such section is unconstitutional in its application to a controversy such as disclosed by the Corcoran case.

In the concluding statement of the opinion in the Corcoran case the court says, "Courts of review of other jurisdictions which have sustained statutes similar to the one in question are *Gunn* v. *Union Railway Co.*, 23 R. I. 289, 49 Atl. 999; *Smith* v. *Times Publishing Co.*, 178 Pa. St. 481, 36 Atl. 296; *Hintz* v. *Michigan Central R. R. Co.*, 132 Mich. 305, 93 N. W. 634."

Plainly, we must examine these authorities to ascertain if such be the fact.

The decision in the Smith case is one by the Supreme Court of Pennsylvania, and consists of the separate opinions of four different judges. In support of the proposition that the reviewing court had the right to set aside a verdict of the jury on the facts, the court cited the opinion by Lord Mansfield in *Bright* v. *Eynon,* which is referred to in this discussion in the quotation taken from Bacon's Abridgment. It will be observed that Lord Mansfield sat as the trial judge in that case, so that the statement attributed to him is in fact nothing more than a statement by a trial court. However, we believe that the separate opinions in the Smith case of Chief Justice Starrett and Justice Dean more accurately set forth the incidents of trial by jury at common law. The opinion by Justice Dean is extremely illuminating and might well be read with profit. Because of its length it cannot be reproduced here. No one could read the opinion of Justice Dean without perforce reaching a conclusion that the dissenting opinion more accurately states the law than that of the prevailing opinion.

The decision in the Gunn case must be read in the light of the constitutional provision of right to trial by jury contained in the Rhode Island Constitution of 1843. Section 15 of the Rhode Island Constitution of 1843, the first and only constitution ever in force in that state, provided that "the right of trial by jury shall remain inviolate." This provision, of course, means the right to trial by jury in Rhode Island at the time that state adopted its constitution. Prior to the adoption of that constitution there was, and now is, in force in Rhode Island, a statute which provided that any party who deemed himself aggrieved by the verdict of a jury, for any reason for which new trials have been usually granted at common law, the aggrieved party might petition the Supreme Court of Rhode Island to grant him a new trial.[33] This was the method pursued by the defeated party in the Gunn case, and the Supreme Court heard his petition and granted him a new trial.

The Hintz case must be read in the light of the Michigan Constitution. The provisions of the Michigan Constitution grant much broader and greater powers to the Supreme Court of that state than are given to the Supreme and Appellate Courts of this state. That this is so is disclosed in the early case of *Teller* v. *Wetherell,*[34] where the court quotes the provision of the Michigan Constitution and holds that it gives to the Su-

[33] Revised Public Laws of R. I., 1822, pp. 107-109, § 5; Gen. Laws of R. I., 1896, p. 863, § 5; Gen. Laws of R. I., 1938, p. 949, § 2.

[34] 6 Mich. 46 (1858).

preme Court power to hear and determine all alleged errors *of fact* as well as errors of law.

In *Thompson* v. *Utah*[35] it was held "that the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question."

The Seventh Amendment of the Constitution of the United States, the laws of the U. S. Congress, and the territorial laws of the law-making bodies of Illinois Territory show that at the time of the adoption of the first constitution in 1818, no court of review in the Territory of Illinois had the power to reverse a judgment entered on the verdict of a jury based on conflicting evidence and the verdict of the jury and the judgment of the trial judge entered thereon were final as to questions of fact.

The first of these laws just referred to is an act passed by the Legislative Council and House of Representatives of Illinois Territory, approved December 25, 1812, providing: "Section 2. Be it further enacted by the authority aforesaid that hereafter there shall be no Writ of Certiorari appeal or Writ of Error or any proceeding in the Nature of either to the General Court from any Court in this Territory upon any matter of fact but in future the General Court shall take cognizance of Errors in Law only by Writ of Error or appeal."[36]

The act of December 25, 1812, was substantially re-enacted by Section 16, act of December 10, 1813.[37]

In an act passed December 13, 1814, the name of the General Court is changed to Supreme Court of Illinois Territory, and the provision as to writs of error and appeals is substantially re-enacted in Section 16, as follows: "Appeals may be prayed and writs of error taken out upon matters of law only in all cases wherein they are now allowed by law."[38]

The United States Congress enacted a statute on March 3, 1815,[39] among other things constituting a court to be styled the "Court of Appeals for Illinois territory" and providing (Section 15): "Which court shall have appellate jurisdiction only, and to which appeals shall be allowed, and from which writs of error according to the principles of the common law, and conformably to the laws and usages of the said territory, may be prosecuted," and (Section 18): "That appeals may be prayed and writs of error taken out upon matters of law only, in all cases wherein they are now allowed by law, to the said court of appeals."

Section 18 thus construes and renders certain the meaning of Section 15, that is, that the "principles of the common law" and the "laws and usages" of the Territory of Illinois permitted, on an appeal or writ of error, examinations only of questions of law.

An act passed by the Legislative Council and House of Representa-

35 170 U. S. 343, 346, 18 S. Ct. 620, 42 L. Ed. 1061 (1897), quoted with approval in Capital Traction Co. v. Hof, 174 U. S. 1, at p. 8, 19 S. Ct. 580, 43 L. Ed. 873 (1898).

36 Laws of Illinois Territory, 1812, pp. 48-49, 1920 reprint.

37 Laws of Illinois Territory, 1813, p. 36, 1920 reprint.

38 Laws of Illinois Territory, 1814, p. 95, 1921 reprint.

39 3 U. S. Stats. at Large, pp. 238-9.

tives of Illinois Territory, on January 6, 1817, provides in Section 15 for the constitution of a court of appeals for Illinois Territory, "to which appeals may be allowed, and from which writs of error according to the principles of the common law, and conformably to the laws and usages of this territory, may be prosecuted for the reversal of the judgments. . . . "[40]

The fact that no court of review having jurisdiction in the state of Illinois, or in the territory out of which, or from which, the state was formed, ever had the power to interfere with a verdict on a question of fact found by a jury on conflicting evidence, prior to the adoption of the first constitution would thus appear to be established.

The right to trial by jury as it existed in the Territory of Illinois, in 1818, was fixed and defined by the terms of the Seventh Amendment and by the terms of divers other laws above referred to.

All of these provisions of law, as to the right of trial by jury, were adopted by, and made a part of the Illinois Constitution of 1818, and the subsequent Constitutions of 1848 and 1870. Did the legislature, by the statute attacked, have the power to take away the power of finding facts based on conflicting evidence from a jury, and transfer that power to an appellate court?

It is submitted that the Supreme Court did not fully answer this question in the Corcoran case. One cannot help but hope that the basis of the court's decision may be more fully investigated in future cases before the court. The court's opinion in the Corcoran case rather indicates that such cases will receive the court's most interested attention.

There has been no attempt here to discuss, nor did the Supreme Court discuss, the advisability of changing the practice as it has existed, with some variations, for over a hundred years. There are many reasons that may be advanced for or against such a change; but one may feel some satisfaction that our Supreme Court treated the question raised as strictly a question of constitutional law and not a question of policy.

MAXFIELD WEISBROD

CIVIL PRACTICE ACT CASES

REFERENCE—GROUNDS FOR RECOMMITTAL—RIGHT OF DEFENDANT TO INTRODUCE NEW PROOF WHERE PLAINTIFF HAS AMENDED COMPLAINT.—In the case of *Oetting* v. *Graham*,[1] the Supreme Court of Illinois held that it

[40] Laws of Illinois Territory, 5th Session, 1816-17, p. 31, original edition (1898 reprint, p. 36).

[1] 373 Ill. 247, 25 N.E. (2d) 886 (1940). The plaintiff brought a bill to enjoin the defendants from obstructing a highway, alleging a statutory dedication thereof. The master found that there was no statutory dedication, but that in fact there had been a common-law dedication of certain other portions of the defendants' lands effecting a similar result. The plaintiff was allowed to file an amended complaint, and defendants' motion to refer the cause to the master for original proofs on the question of the common-law decision was denied and a decree was entered affording the plaintiff the relief requested by his amended complaint. On appeal, it was held error to deny defendants' motion.

was erroneous, after a substantive amendment in the plaintiff's pleadings, to deny the defendant an opportunity to present proof to overcome the new case made by the amendment. Although an equitable action was involved, the case serves to shed additional light on the construction of Subsection 3 of Section 46 of the Civil Practice Act.[2]

In cases both in law and equity before the enactment of the Civil Practice Act, the plaintiff could not recover unless his declaration or bill of complaint conformed with the proofs.[3] Historically, equity, exercising the king's prerogative, was extremely liberal in allowing amendment of pleadings. Thus, where the plaintiff could not recover on the case made out by his bill, he could amend his bill to conform to the proofs.[4] Naturally, in a court of equity a substantial amendment was not allowed to take the defendant by surprise or result in hardship or injustice to him, and it developed in Illinois that the court was required to enter a rule on the defendant to answer the amended bill.[5] However, if the amendment was purely formal and introduced no substantial changes in the complaint, the court was not required to allow the defendants an opportunity to answer or offer new proofs.[6]

If substantive changes were made, the defendant was required to exercise reasonable diligence in his behalf and to offer additional proof or object to the failure of the court to allow him to answer the amended pleading.[7] Even at law, under the earlier Illinois practice acts, an amendment was proper where the defendant did not claim hardship or surprise by reason of the amendment.[8]

In the instant case, the result naturally flows from the old equity practice. Since the object of pleadings is to concentrate the controversy upon the issues to be tried, the defendant ought to be allowed to introduce proofs upon any new issues presented by an amended complaint. The old equity practice as to amendments incorporated into the Civil Practice Act, and the same principles will probably be applied to amendments at law. It ought to be remembered, however, that defense attorneys must still use reasonable diligence after the making of such amendment to protect their client's rights or they may possibly waive the right to answer over or introduce proof on the new case.

R. L. RICHMAN

2 Ill. Rev. Stat. 1939, Ch. 110, § 170, (3). "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon such terms as to costs and continuance as may be just."

3 Harper v. Illinois C. R. R. Co., 74 Ill. App. 74 (1897); Wise v. Twiss, 54 Ill. 301 (1870); Adams v. Gill, 158 Ill. 190, 41 N.E. 738 (1895).

4 South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N.E. 732 (1903); Harper v. Illinois C. R. R. Co., 74 Ill. App. 74 (1897); Wise v. Twiss, 54 Ill. 301 (1870); Adams v. Gill, 158 Ill. 190, 41 N.E. 738 (1895).

5 Adams v. Gill, 158 Ill. 190, 41 N.E. 738 (1895).

6 Noll v. Peterson, 338 Ill. 552, 170 N.E. 756 (1930); D'Wolf v. Pratt, 42 Ill. 198 (1866).

7 South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N.E. 732 (1903).

8 Mather Electric Co. v. Matthews, 47 Ill. App. 557 (1892).