June 1949

The Original Jurisdiction of the Illinois Supreme Court

Justin A. Stanley

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol27/iss3/1

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
DIVORCE UPON CONVICTION FOR CRIME

Warren A. Heindl*

THAT PORTION of the law which concerns itself with the dissolution of the marital relation is probably not only the most discussed but also the one best understood by the legal profession, possibly because one of the first cases a practitioner is apt to handle, after admission to the bar, is a divorce action. It is surprising, therefore, to find one segment of this branch of law as misunderstood and hazy in the minds of most lawyers as the statutory ground which authorizes divorce upon the conviction or imprisonment of one of the spouses for the commission of a crime.¹ That lack of understanding may, however, result from the fact

* B. S. Comm., LL. B., LL. M.; Research Assistant, Chicago-Kent College of Law.

that (1) many of the statutory provisions are inadequate, leaving
doubt as to exactly what the statute will or will not permit; (2)
there is a lack of uniformity in the phraseology and content of
the provisions in the various jurisdictions; and (3) judicial deci-
sions interpreting these enactments are relatively few in number,
but worse are often of little value outside of the jurisdiction
where pronounced because based on phraseology different from
that over which the searcher is concerned.

Before launching into any analysis of the various enactments
and the decisions based thereon, it may be beneficial to ascertain
the underlying philosophy which supports this statutory cause
for divorce. The conviction and incarceration for crime of one
of the parties to a marriage brings detriment to the innocent
spouse in two respects: (1) not only in humiliation suffered, but
(2) the imprisoned party is no longer capable of fulfilling the
marital duties undertaken when the marriage was solemnized. By
permitting a dissolution of the marriage under such circumstances,
the law attempts to rectify some of the injustice suffered by the
innocent spouse. It obviously cannot remove the stigma too
frequently attached to those who have, no matter how innocently,
been associated with criminals. By making it possible to destroy
the baleful union, however, the law permits the innocent spouse
to seek fulfillment of the purposes of marriage in another union,
if that is desired.

Without the presence of a specific statutory provision per-
mitting a divorce on this ground, conviction and imprisonment
for crime is not a cause for dissolution of marital ties.\(^2\) Attempts
have been made, however, to utilize such occurrences in conjunc-
tion with other recognized statutory grounds. It has been argued
that conduct of the kind in question amounts to cruelty inflicted
upon the innocent party\(^3\) but, when refusing to recognize this
contention, courts have stated that while the felon may be a
menace to society it does not follow that he or she is likewise a

\(^2\) Sharman v. Sharman, 18 Tex. 521 (1857).

\(^3\) Dion v. Dion, 98 Minn. 201, 100 N. W. 1101 (1904); Sharman v. Sharman, 18
Tex. 521 (1857); Lucas v. Lucas, 2 Tex. 112 (1847).
menace to the person of the other spouse. It has also been asserted that the term of imprisonment may be counted in the period necessary for divorce for desertion. Jurisdictions which have answered in the negative base their holdings on the concept that voluntary separation is of the essence of desertion, hence imprisonment for crime, being involuntary, should not be considered. An affirmative answer, on the other hand, has been reached upon the logic that incarceration amounts to a voluntary separation since it is the natural consequence of voluntarily engaging in criminal conduct. Assimilation of conviction for crime with other recognized grounds for divorce is not possible except by so strained a construction as to border on the ridiculous.

Where statutes on the subject do exist, the first question of importance would seem to turn on the point as to when the events which give rise to the action must occur. Should it be necessary that they take place after marriage, or will cause exist if they happened prior thereto? A specific answer has been provided by the statutes in some of the states. Not a few jurisdictions require that the conviction and imprisonment must take place subsequent to the marriage, but some embody separate provisions permitting divorce where the conviction was antenuptial in character provided the innocent spouse had no knowledge thereof at the time the marriage was celebrated. Those enactments which are silent on this point leave the door wide open to speculation. No court

4 In Wright v. Wright, 6 Tex. 3 (1851), however, the court granted a divorce on the ground of cruelty, holding that a spouse commits an outrage against his mate when he kills his stepson.

5 Truman v. Truman, 36 Del. 104, 171 A. 453 (1934); Porritt v. Porritt, 18 Mich. 420 (1869); Hyland v. Hyland, 55 N. J. Eq. 35, 36 A. 270 (1896); Wolf v. Wolf, 38 N. J. Eq. 128 (1884); Sitterson v. Sitterson, 191 N. C. 319, 131 S. E. 641 (1926). Where, however, the imprisonment occurred after a voluntary desertion had begun, an opposite result has been reached: Hews v. Hews, 73 Mass. 279 (1856); Csanyi v. Csanyi, 93 N. J. Eq. 11, 115 A. 76 (1921).


7 See the statutes of Colo., Ind., Iowa, Kan., Minn., Mo., N. Mex., Okla., Tex., Va., W. Va., Wis. The same result may be implied from phraseology to be found in the statutes of Mass., Mich., Neb., N. Y., Ohio, R. I., Vt., Wash., and Wyo. Editorial note: Except where specific reference is essential, all statutes intended are those tabulated in footnote 1, ante.

has ever been faced with the necessity of providing a ruling, but is it not reasonable to believe that it was the intent of the legislature to make the statute operative only in cases where the conviction and imprisonment took place subsequent to the marriage? Other grounds for divorce such as cruelty, desertion, drunkenness and the like, can arise only after inception of a valid marriage. Is it not likely, then, that the legislators took it for granted that the same interpretation would be given to the clause regarding conviction and imprisonment for crime? Whether or not such logic approximates justice is another question. It would seem that the effect upon the innocent spouse would be the same whether the conviction be imposed for acts done before or after the marriage was entered into. There may be some escape, in the former situation, by way of annulment for the non-disclosure of the prior conviction for crime but, in the absence thereof, the person unfortunate enough to unwittingly marry a convicted felon would be in a sorry plight indeed.

Naturally, only the commission of those crimes or offenses designated in the various statutes can serve as the basis for the dissolution of a marriage. The designation has been made directly, as by naming specific crimes or by specifying certain classes of crimes, or indirectly, by using the type or extent of the punishment as the criterion. The first of these methods is utilized in Pennsylvania, where the statute lists the precise offenses, the commission of any one of which will be considered as a ground for divorce. Under a provision of that type there can be little or

9 In Caswell v. Caswell, 64 Vt. 557, 24 A. 988 (1892), the plaintiff was refused a divorce in a case where the defendant was under sentence for murder when the marriage took place. An appeal was then pending but, subsequent to the marriage, the conviction was affirmed. The court stated that, as the defendant was convicted before the marriage, the plaintiff could not thereafter obtain a divorce. It would seem, however, that the case turned on the fact that the plaintiff had knowledge of the existence of the conviction before entering into the marriage.

10 Prior conviction for crime, unknown to the spouse, was treated as sufficient to warrant annulment in Brown v. Scott, 140 Md. 258, 117 A. 114, 22 A. L. R. 810 (1922).

11 The designation of specific crimes in that state was probably brought about by the fact that the lower courts of Pennsylvania, at one time, had considerable difficulty determining which offenses were included in the term “infamous crime,” as used in a prior statute. Compare, for example, Hess v. Hess, 23 Pa. Co. Ct. Rep. 135 (1899), with Nevergold v. Nevergold, 20 Pa. Co. Ct. Rep. 108 (1897), to see how courts of the same state can disagree as to the degree of infamy involved in the crime of burglary.
DIVORCE UPON CONVICTION FOR CRIME.

no uncertainty as to what crimes come within the purview of the statute. Reference to the list is all that is necessary to determine whether or not the particular offense involved is named therein. But difficulty may arise where the conviction has occurred in another jurisdiction and the name given thereto is not identical with any of those embodied in the statutory list albeit the basic elements of the crime do conform. A Pennsylvania court would then have to decide whether it was the name or the nature of the offense which should possess importance. It may be that the courts of that state will be saved from any such dilemma for most of the crimes catalogued are well-known common law offenses the names of which are not likely to differ from state to state. The point is stressed, however, to show how this type of classification does not necessarily solve all doubts concerned in the subject.

Most states have adopted the second alternative method when classifying the crimes comprehended by the statute as a ground for divorce. Thus, it is necessary in many jurisdictions that the offense committed be a "felony." That term had a definite meaning at common law and, despite statutory modification, it has seemingly presented no particular difficulty, judging by the absence of decisions involving its application. Still other states

12 In Tyler v. Tyler, 10 Pa. D. & C Rep. 773 (1926), the court held that, as the crime of transporting stolen property was not included in the statutory list, no divorce could be granted in a case where the defendant had violated the National Motor Vehicle Theft Act, 18 U. S. C. A. § 408.

13 The Pennsylvania statute allows the granting of a divorce where the crime and conviction occurs outside the state, but not all statutes are of that character. See note 97 et seq., post.


15 Felonies were crimes for conviction of which the estate of the convict was forfeited: 4 Bl. Comm. 95.

16 Statutes defining the term "felony" have been enacted in England and in many American jurisdictions: 16 C. J., Criminal Law, § 6; 22 C. J. S., Criminal Law, § 6. See, for example, Ill. Rev. Stat. 1947, Ch. 38, § 585, where a felony is defined as "... an offense punishable with death or by imprisonment in the penitentiary."

17 It became necessary, in Getz v. Getz, 322 Ill. App. 364, 75 N. E. (2d) 530 (1947), noted in 23 Notre Dame Law. 405, for the court to decide whether a conviction by a military court for desertion from the armed forces in time of war was a conviction for a felony within the meaning of the Illinois divorce statute. The court concluded that, as the court martial could have prescribed a punishment less than death or imprisonment, the offense did not come within the definition of felony laid down in Ill. Rev. Stat. 1947, Ch. 38, § 585. The punishment imposed was imprisonment, but the court conceived itself to be governed not by what actually occurred but rather by what might have occurred.
use the term "infamous crime" to designate the class of offenses for which a divorce may be granted, although one modifies even that term somewhat. Determination of the point as to what crimes are to be considered of "infamous" nature may call for the utilization of two common tests, the first stressing the character of the crime, the second the nature or character of the punishment, but the latter seems to have found favor in this country. As neither of these tests can be applied with any degree of mathematical precision, it is not surprising that courts, even in the same jurisdiction, will differ as to whether a crime involves some degree of infamy. Some courts, interpreting the term in divorce cases, have held that larceny, burglary, assault with intent to rape, and horse stealing were not infamous crimes; while other tribunals have considered that petty larceny, burglary, rape, manslaughter, and the making of false entries in bank ledgers fall within that category. Obviously, the determination of exactly what is an infamous crime must depend upon the view of the individual jurisdiction.

18 C.f., Indiana. The alternative of "infamous crime" or "felony" appears in the statutes of Ark., Ill., Mo., Nev., and Tenn., so the commission of a crime falling into either classification would be sufficient. For an application of this idea, see Hartwig v. Hartwig, 160 Mo. App. 284, 142 S. W. 797 (1912).

19 The Connecticut statute makes it necessary that the infamous crime involve a "Violation of conjugal duty." See Swanson v. Swanson, 128 Conn. 128, 20 A. (2d) 617 (1941), holding that a conviction for assault to commit rape satisfied the statutory requirement.

20 A complete discussion of these tests is set forth in 14 Am. Jur., Criminal Law, § 4.


26 Hartwig v. Hartwig, 160 Mo. App. 284, 142 S. W. 797 (1912).


31 A list of crimes considered infamous in the various states appears in an annotation to be found in 24 A. L. R. 1002.
DIVORCE UPON CONVICTION FOR CRIME.

The vaguest of all terms used to measure the type of crime sufficient for divorce is that of "moral turpitude." On the two occasions when it became necessary for courts to determine whether or not a specific crime involved moral turpitude, it was found that convictions for voluntary manslaughter as well as for violation of the Harrison Narcotic Act did do so. In neither of these cases, however, did the courts concerned shed much light upon the exact elements of moral turpitude and, unfortunately, where this term has been utilized in other types of statutes, it has not received either a concrete or a consistent interpretation. The most prevalent definition, in substance, would suggest that moral turpitude involves any act contrary to good morals, honesty, and justice. Such a definition, obviously, encompasses all criminal conduct. A much more restricted interpretation, applied by other courts to other situations, requires that aspects of baseness, vileness, or depravity must be present. Much will depend upon the selection of definitions made in any given divorce case. Naturally, the broader the definition, the more offenses will be included in the actionable list. The selection may be governed, however, by considerations of local policy in matters of divorce, some courts being strict, others loose, in granting dissolution of the marital relationship.

Many states do not directly indicate, either by specific or by class name, the crimes which fall within the purview of their several statutes. They do, however, by designating the type of punishment which the guilty spouse must suffer, indirectly specify the significant offenses. Thus, by designating that the punishment must entail life imprisonment, imprisonment for a specific

32 The term is found in the D. C. and Georgia Codes.
34 Menna v. Menna, 102 F. (2d) 617 (1939), noted in 6 U. of Chi. L. Rev. 497.
36 U. S. ex rel. Manzella v. Zimmerman, 71 F. Supp. 534 (1947). The consequence to the defendant therein, if found guilty of a crime involving moral turpitude, would have been deportation. This fact might explain the reason for insisting upon a strict and narrow definition. For other definitions of moral turpitude, see Words and Phrases (Perm. Ed.), Vol. 27.
term,\textsuperscript{38} imprisonment in the penitentiary,\textsuperscript{39} prison or reformatory,\textsuperscript{40} or be an ignominious punishment,\textsuperscript{41} these states do place a limit on the crimes considered adequate to warrant divorce. It is unnecessary, in such situations, to determine whether any given offense is included within the definition of a felony, an infamous crime, or a crime involving moral turpitude, but it would appear that, under enactments of this type, that the list is quite selective. It would seem, at first glance, that there could be very little chance for confusion thereunder for the punishment specified in the sentence of the court is usually definite both as to the place and the term of incarceration. As will be explained later, however, such terms as “penitentiary,” “prison,” “reformatory,” and the like are, unfortunately, susceptible to several definitions thereby engendering some degree of uncertainty. For that matter, such a term as “ignominious punishment” is not easily defined.\textsuperscript{42} It is no simple matter, therefore, to decide whether or not the guilty spouse has become involved in criminal conduct of the character or degree contemplated by the legislature.

Even if that fact be determined, it must be noted that a mere charge that the defendant in the divorce action has committed one of the abovementioned crimes will not establish a ground for divorce in most jurisdictions\textsuperscript{43} for there must, usually, have been a judicial determination of the individual’s guilt. Such is clearly the case where the statute provides that there must have been a “conviction”\textsuperscript{44} or a “condemnation.”\textsuperscript{45} It will be implied where

\textsuperscript{38} Del., Mass., Mich., Neb., N. H., Vt., Wis. In Clark v. Clark, 94 N. H. 398, 54 A. (2d) 166 (1947), the court held that, since the defendant was actually imprisoned after his conviction by a court martial, grounds for divorce existed.

\textsuperscript{39} Miss., Ohio.

\textsuperscript{40} Minn., Wash.


\textsuperscript{42} See Hull v. Donze, 164 La. 199, 113 So. 816 (1927).

\textsuperscript{43} There are states which do allow a dissolution of the marriage where one spouse is charged with crime provided he or she has fled the jurisdiction: Dart’s La. Gen. Stat. Anno. 1939, § 2201; Va. Code Anno. 1942, § 5103. The Louisiana statute imposes the duty on the party seeking the divorce to produce evidence showing that the other is actually guilty of the crime charged. The Virginia statute makes it necessary that the accused spouse be absent from the jurisdiction for two years.

the statute provides that there must be a "sentence" or "imprisonment," for these only follow a conviction. Necessarily, the term "conviction" implies a criminal proceeding conducted in a legal manner conforming to due process of law. Even so, some statutes contain phrases intended to leave no doubt about this. Such items as conviction "in a competent court having jurisdiction, " as a result of trial," and "in a court of record" are sometimes found inserted, but they would appear to add nothing, and the absence thereof in the other statutes does not render them subject to criticism.

One important qualification regarding the criminal proceeding is found in two states. It serves to prevent divorce where the accused spouse was convicted on the testimony of the spouse seeking dissolution of the marriage. The limitation was probably designed to prevent a spouse from perjuring herself or himself at the criminal trial with the hope that the termination of the marriage might thereby be facilitated. It is not clear, however, exactly what is meant by the phrase "convicted on the testimony of the spouse." Is the divorce to be barred only when the testimony given by a spouse was primarily instrumental in obtaining

(1869), stated that it was not prepared to hold that the commission of a crime without a conviction is a ground for divorce.

45 The Kentucky and the Louisiana statutes both use the term "condemnation" for "conviction." In Davis v. Davis, 102 Ky. 440, 43 S. W. 168 (1897), the court inferentially held the terms were synonymous.


47 Ala., Ohio, Wash.

48 Ammidon v. Smith, 14 U. S. (1 Wheat.) 447, 4 L. Ed. 132 (1816). See also Ann. Cas. 1915B 284. In Getz v. Getz, 332 Ill. App. 364, 75 N. E. (2d) 530 (1947), the court felt that only a criminal proceeding in a civil court, in contrast to one before a military tribunal, would satisfy the statute. For an opposite result, see Clark v. Clark, 94 N. H. 398, 54 A. (2d) 166 (1947), where a court martial conviction was held to be within the statute, the court stating that the nature of the tribunal was not controlling. See comment in 28 Bost. U. L. Rev. 222.


50 Del. and Pa. Under the Delaware and Vermont statutes, the accused must have had opportunity for trial by jury if the conviction relied upon took place in a foreign country.

51 Delaware. The same phrase appears in the Vermont act except that it there has reference to convictions which take place in other states.

52 Colorado.

53 See the Arizona and Texas statutes.
the conviction, or is the stipulation operative whenever any testimony is given, even though it be a formal or insignificant part of the state's case? Application of the former construction to the stipulation would make it necessary to determine exactly how important the husband's or wife's testimony was to the case of the prosecution and could lead to a great many difficulties. On the other hand, adoption of the latter interpretation might mitigate against the possibility of one spouse being willing to testify against the other, to the consequent disadvantage of the state.

Even after the guilt of the individual has been determined in a judicial proceeding, the ground for divorce may not have yet materialized. Many states insist that the individual must be sentenced, an idea at least implicit in those jurisdictions where the statutes require imprisonment for, in the normal course of events, incarceration takes place only after the court's judgment has been rendered. Difficulty could arise, however, in determining whether actual sentence is necessary where the statute merely requires a conviction. If the popular conception of the word "conviction" is utilized, the ground for divorce would accrue after motion for new trial had been denied, if not after the rendition of the verdict, without the necessity of the court imposing sentence. On the other hand, the technical definition of "conviction" includes both the verdict and the sentence thereon. Thus, using this interpretation, the court's judgment would have to be pronounced before cause for divorce could accrue but the elements of the term "conviction" have never been determined in relation to these divorce provisions, so it is a matter of speculation as to which definition will find favor if and when the question arises.

The next item of importance is to attempt to determine what

---

55 Kan., N. Mex., Okla., Tex., Wash.
the terms of the sentence must be in order to satisfy the various enactments. In a number of jurisdictions, the statutes specify that the sentence must be for a stipulated period of time, as for life,\textsuperscript{59} not less than two years,\textsuperscript{60} three years,\textsuperscript{61} five years,\textsuperscript{62} or as much as seven years.\textsuperscript{63} With the development, in recent years, of the indeterminate sentence, a problem has arisen under statutes of this type. In all of the cases considering the problem, the minimum term of confinement was less than that required by the divorce statute but the maximum term was equal to it or greater. It was argued by the defendants therein that the minimum time should be considered as controlling the length of the sentence for this purpose, hence divorce should be denied.\textsuperscript{64} The courts, by contrast, have been uniform in holding that it is the maximum time which controls.\textsuperscript{65} The gist of these decisions has been that the maximum term must be served before the convict can, as a matter of right, demand his release. He can only obtain his liberty before that time if those in charge of the penal system should deem it proper to permit an earlier release. Somewhat analogous is the question concerning the effect of two or more consecutive sentences. In one case, that of \textit{Kauffman v. Kauffman},\textsuperscript{66} the defendant had been convicted on two charges of crime and had been sentenced to one and one-half years for each offense. The Pennsylvania statute made it necessary that the party be sentenced for a term exceeding two years before a divorce could be granted. It was held that, even though the sentences ran consecutively, they could not be joined in order to add up to the

\textsuperscript{60} D. C., Ga., Pa.  
\textsuperscript{61} Mich., Neb., Vt., Wis.  
\textsuperscript{62} Mass.  
\textsuperscript{63} Ala. Code 1940, Tit. 34, § 20(4).  
\textsuperscript{64} Only the Delaware statute gives specific recognition to the indeterminate sentence. In that state there must be continuous imprisonment for at least two years but, if an indeterminate sentence is involved, one year is sufficient to support divorce.  
Many of the statutes do not contain a recital of the specific number of years for which the sentence must run so the length of the sentence, in these states, is not a controlling factor although other requirements, to be discussed hereafter, may be important.

An additional requirement, found in both types of statutes, makes it mandatory that the incarceration take place in a specific type of institution. Referring to the place of imprisonment, statutory language varies from "in a penitentiary" under the Ohio statute,68 through in "the penitentiary" as in Mississippi;69 from "in the state prison,"70 or "in any prison,"71 through "in any state prison or reformatory,"72 "in any prison, jail, or house of correction,"73 "in a state penal institution,"74 and "to a penal institution,"75 up to "in a penal or reformatory institution," as in Massachusetts.76

Where the convict is sentenced to confinement in the exact institution mentioned in the divorce statute, no difficulty is encountered. Where the place of incarceration specified in the sentence does not conform to that stipulated in the statute, a question of interpretation can well arise. One court, for example, construed the phrase "in any prison, jail, or house of correction" as broad enough to include a women's reformatory78 since the same was on an equivalent penal level with the men's penitentiary, an institution clearly deemed included in the quoted phrase. In another decision, the court reached the conclusion that a re-

67 For a discussion as to whether or not sentences running concurrently should be added up to equal the necessary term, see 9 Australian L. J. 332 and 11 Australian L. J. 101.

69 See Ala., Ga., N. Mex., Okla., Tenn., and Va.
70 Miss. Code Anno. 1942, § 2735(3rd).
71 Conn., Tex., Vt.
73 Minn. Stat. Anno., § 518.06(4).
74 Michigan and Nebraska.
76 D. C. Code, Tit. 16, § 16-403.
formatory was included in the phrase "in a penitentiary," despite the fact that the treatment accorded prisoners in the former was different from that meted out in the latter institution. The decision appears to have rested on the fact that the article "a" appeared before the term "penitentiary," indicating to the court that the legislature did not have any particular institution in mind when it drafted the divorce statute.

In two other decisions, however, the courts were not as liberal in their construction of statutory terminology. In one of these cases, that of Dion v. Dion, the Minnesota court relied on the difference in the treatment accorded inmates of a reformatory by contrast to that accorded in the "state prison," the former being substantially different from the latter, to show that no cause for divorce existed. The court also pointed to the fact that the reformatory was built after the divorce statute had been enacted, hence could not have been in the contemplation of the legislature. Both of these arguments also made their appearance in another case and were upheld, the court concluding that the term "state prison, jail, or house of correction" did not include a reformatory. Unless the sentence to one type of institution could mean that the confinement would be longer than in another, there should be no valid reason for distinguishing between two penal institutions in determining whether or not a divorce should be granted. So far as the innocent spouse is concerned, the result is the same whether the convicted person is sent to the state prison, penitentiary, reformatory, house of correction, or any other type of penal institution. In any event, the guilty spouse is still unable to perform the marital duties.

Still other statutes contain no limitation upon the type of sentence rendered either with respect to its length or to the place of confinement. These may be divided into two groups: (1) those which mention imprisonment by way of such phrases as "sen-

80 92 Minn. 276, 100 N. W. 4 (1904).
tenced to imprisonment'" or "conviction and imprisonment;" and (2) those which do not make any mention, either directly or indirectly, that the sentence handed down be one providing for imprisonment. Obviously, those falling within the first category contemplate a sentence to some type of imprisonment, though the length of the confinement is of no consequence. In the second group the necessity for a sentence may be implied, but there is absolutely nothing which requires that it amount to imprisonment or incarceration. However, since the crimes enumerated under these provisions are felonies and infamous offenses, a conviction would, under ordinary circumstances, be followed by a prison sentence of some kind.

Once there has been a conviction, with the required sentence pronounced thereon, does this complete the ground on which a divorce may be based, or is actual imprisonment necessary? Here, again, the answer depends wholly upon the wording of the individual state statute. In order to adequately analyse the situation it is necessary to recognize that the statutes again fall within two groups: (1) those that either directly or indirectly indicate that actual confinement is necessary, and (2) those which are silent on the matter.

Within the first group, two jurisdictions make it necessary that there be an actual imprisonment for a specified number of years. It is apparent, under these statutes, that the right to divorce does not accrue until the expiration of the time stipulated. Others, while directly mentioning imprisonment, do so without

82 Ariz., W. Va.
83 Del., Kan.
84 All that is indicated in the following statutes is that there must be a conviction or condemnation; nothing is said with reference to the type of punishment: Ark., Calif., Colo., Ida., Ill., Ind., Iowa, Ky., Mo., Mont., Nev., N. D., Ore., S. D., Tenn., and Utah.
85 The term "conviction" has been, on some occasions, interpreted as including both the verdict and sentence thereon: Commonwealth v. McDermott, 224 Pa. 363, 73 A. 427 (1909).
86 For instance, in Illinois, by definition the term "felony" names a crime which is punishable by death or imprisonment in the penitentiary: Ill. Rev. Stat. 1947, Ch. 38, § 585.
87 Ala., Del.
indicating that any specific duration of confinement is necessary.\textsuperscript{88} There are also a few states within this first group that indirectly make actual incarceration a necessary element, for the action for divorce can only be brought at the time the party is confined.\textsuperscript{89} Logic would dictate that the right to a judicial dissolution of marriage under these provisions does not accrue until there has been an actual confinement, although presumably the cause arises at the very moment the individual is placed in the custody of the requisite prison or penitentiary official.

The New Mexico case of \textit{Klasner v. Klasner}\textsuperscript{90} throws some light in that regard for it presents an unusual factual situation requiring the court to determine whether or not the term "imprisonment" meant actual confinement behind prison bars. The defendant there had been convicted and the conviction had been affirmed by an upper court. While she was at liberty, but after receiving the commitment order from the clerk of the court, she went to the governor to plead for a pardon. He indicated he would grant a pardon, but stated that she had to deliver the commitment order to the warden of the prison to which she had been sentenced. She did so deliver the order, at which time her name was enrolled on the prison books and she was given a number. The warden then permitted her to return to the governor, from whom she received her pardon. In an action for a divorce brought by the defendant's spouse, it was argued that since she had not been placed in a cell nor confined within the walls of a penal institution, she had not been imprisoned within the contemplation of the divorce statute. The court, however, held that, from the time she delivered the commitment order until she had received a pardon, the defendant was in the custody of the warden and therefore technically in prison even though not actually confined. The deci-

\begin{itemize}
\item \textsuperscript{88} D. C., Kan., Me., N. H., N. Mex., Ohio, Okla., Tex., Wash. See also the Rhode Island statute, Ch. 416, § 1 and its companion section, Ch. 624, § 1.
\item \textsuperscript{89} See statutes of Vermont and West Virginia. The Mississippi statute specifies that the convicted spouse must be "... sentenced to any penitentiary and not pardoned before being sent there." The phrase "sent there" would seem to indicate that the legislature intended that the party be actually incarcerated before the divorce could be obtained.
\item \textsuperscript{90} 23 N. Mex. 627, 170 P. 745 (1918).
\end{itemize}
sion is of considerable significance, for by ordinary definition the term "imprisonment" involves confinement or incarceration.\(^{91}\)

Statutes falling in the second group, namely those that do not directly or indirectly provide that actual confinement is necessary, merely state that the individual must be "sentenced to imprisonment,"\(^{92}\) "sentenced to confinement,"\(^{93}\) or be "convicted."\(^{94}\) By no stretch of the imagination can any one of these terms or phrases be interpreted to mean that actual confinement is necessary before the ground for divorce accrues. The term "sentenced" more nearly refers to the pronouncement by the court of the punishment that is to be inflicted,\(^{95}\) while the added terms "imprisonment" or "confinement" indicate what the nature of that punishment is to be. The two terms, when joined, do not extend the concept so as to require the carrying out of the punishment. In much the same way, all that can be inferred from the terms "convicted" or "conviction" is that there must be a verdict of guilty and sentence based thereon,\(^{96}\) but not that there must be actual imprisonment. In states with statutes of the second category, then, the pronouncement of the sentence would appear to be all that is necessary to establish a basis for divorce, even though the sentence be a suspended one. If the reason for allowing divorce on this ground lies in the fact that an imprisoned person is unable to perform the marital duties, it would seem reasonable to make actual imprisonment a necessary element even though the statute does not specifically require it. On the other hand, conviction and sentence will bring about humiliation and disgrace even in the absence of actual imprisonment. It is submitted, therefore, that where the enactment does not mention actual imprisonment much will again depend upon the divorce policy of any given state.

Having ascertained that certain events must take place before

\(^{91}\) State v. Woodward, 123 Ind. 30, 23 N. E. 968 (1890).
\(^{92}\) Ariz., Conn., Ga., Mich., Minn., Neb., Pa., Wis., and Wyo.
\(^{93}\) Mass., Tenn., Va.
\(^{95}\) Featherstone v. People, 194 Ill. 325, 62 N. E. 684 (1902).
DIVORCE UPON CONVICTION FOR CRIME.

205

a cause of action for divorce can accrue, it is necessary to determine whether the place of their occurrence is important. Does the innocent spouse have ground for divorce where the conviction, sentence, and imprisonment if necessary, take place in a jurisdiction other than the one in which the divorce action is instituted? The events might have occurred in the same or another federal district, in another state, or even in a foreign country. Again, the solution to the problem depends wholly upon the wording of the statute. Where the state statutes specifically provide that the incidents leading up to the cause of action may occur outside of the jurisdiction, there is no uniformity in terminology to describe exactly where they may take place. Thus, some permit a divorce where the conviction and imprisonment occurs in any state, federal district, territory, or foreign country. This all-inclusiveness can also be inferred in other statutes from provisions indicating that the conviction, or the imprisonment, can happen "in any country," "in or out of this state," or "within or without this commonwealth." Most of the other states are not as liberal. Those stipulating that the conviction or imprisonment may occur in any state or federal tribunal would seem to rule out the possibility of basing a divorce suit on criminal offenses committed in a foreign country. Even more limited are statutes which use the term "other states" in this regard. If a literal interpretation be employed, conviction by a federal tribunal or imprisonment in a federal penal institution would not satisfy.

The majority of the statutes, however, make no provision for instances where the necessary events take place outside of the state boundaries. In two of these states it is true that the local enactment authorizes a divorce where the party has been "sent-

97 Delaware and Pennsylvania. In the two states which allow divorce for premarital conviction for crime, it makes no difference that the judicial determination of the spouse’s guilt took place in another state or another country: Ariz. Code Anno. 1939, § 27-802(7); Mo. Rev. Stat. Anno., § 1514.
98 Burn’s Ind. Stat. Anno. 1933, § 3-1201(7).
99 Kentucky and West Virginia.
2 Mass., Minn., N. H.
3 Ala., Colo., Va.
tenced to imprisonment in any prison, jail, or house of correction." By utilizing the word "any," it would appear that no specific institution was intended so that sentence to imprisonment in a penal institution whether within or outside the jurisdiction would suffice. That word was seized upon as the basis for the decision in one case, but where the courts have had nothing of this nature from which to discern the intent of the legislature they have uniformly held that no divorce may be granted where the conviction or imprisonment took place in another jurisdiction. Once a legislature has decided that it shall be the policy of the state to permit a dissolution of a marriage where one spouse has been convicted of a crime, it is inconsistent, to say the least, to limit the granting of divorce to those situations where the requisite occurrences take place within the boundaries of the particular jurisdiction. The shame is not diminished nor the inability to perform the marital functions lessened where the conviction or imprisonment occurs in another state. It is suggested, therefore, that many of the statutes could bear rewriting in this respect.

In a few states an automatic dissolution of the marriage occurs as soon as there has been the requisite conviction or imprisonment and there is no necessity for resorting to legal process. That view proceeds on the basis, as at common law, that the convicted felon is to be regarded as civilly dead for all purposes. In all other jurisdictions, however, a formal divorce is required. As is true of other cases, no divorce proceeding should

---

6 Leonard v. Leonard, 151 Mass. 151, 23 N. E. 732 (1890); Daughdrill v. Daughdrill, 180 Miss. 589, 178 So. 106 (1938); Martin v. Martin, 47 N. H. 52 (1868); Klutts v. Klutts, 5 Sneed (Tenn.) 423 (1858).
7 Such is the result in Maine, Michigan and New York when the punishment is life imprisonment. The operation of these statutes is illustrated by Gargan v. Scully, 82 Misc. 667, 144 N. Y. S. 205 (1913), and State v. Duket, 90 Wis. 272, 63 N. W. 83 (1895). For the effect upon the property rights of the erring spouse in the property of the innocent spouse, see Witschi v. Witschi, 261 Mich. 334, 246 N. W. 139 (1933), and In re Lindwall's Will, 287 N. Y. 347, 39 N. E. (2d) 907 (1942).
8 The right to sue a convicted individual for a divorce was upheld in Gray v. Gray, 104 Mo. App. 520, 79 S. W. 505 (1904), even though it was argued that, under the law of that state, a convicted individual was considered civilly dead. Only the Connecticut statute provides for special procedure where divorce is sought on the ground of conviction for crime.
be instituted until the cause of action has accrued. The elements leading up to accrual have already been discussed. In addition thereto, several states make it necessary for the innocent spouse to wait a specified period before filing the action. This waiting period is, in all probability, designed to allow the convicted individual time within which to appeal and thereby arrive at a final determination of his or her guilt. Obviously, if the spouse is not actually guilty, he or she should not be deprived of marital rights because of an erroneous conviction. Silence on the part of other statutes would seem to permit immediate suit, but issues of this nature may then arise by way of defense.

The defense of a pending appeal from the criminal conviction, for example, has been pleaded in several cases. There has been a divergence of opinion on this point, one jurisdiction holding that the conviction is not a ground for divorce until it has become final by affirmation or because no appeal has been taken. New Hampshire, on the other hand, takes the view that the mere fact that an appeal has been taken from the conviction does not make it any the less a ground for divorce. If permanency of marital relationships is of the utmost importance, no marriage should be dissolved until all doubt that the conviction will stand has been removed. Logically, then, if the innocent spouse does not institute the action for divorce until after the appeal has been

9 In Arizona and in Texas, no suit may be maintained until twelve months after final judgment has been pronounced in the criminal case.

10 It was urged, in Polson v. Polson, 140 Ind. 310, 39 N. E. 498 (1895), in the absence of such a provision, that since the defendant had a year in which to appeal his conviction, the action for divorce could not be maintained until that year had passed. As other grounds for divorce existed, the court did not consider itself bound to rule on this contention.

11 There is a conflict of opinion as to the effect of an appeal from a conviction of crime at least in situations other than divorce. One line of authority holds that the pending appeal operates to prevent the adjudication of guilt from being considered a conviction: Card v. Foot, 57 Conn. 427, 18 A. 713 (1889). Other courts have held that the presence of an appeal does not disturb the convictions: In re Kirby, 10 S. D. 322, 73 N. W. 92 (1897).

12 Rivers v. Rivers, 60 Iowa 378, 14 N. W. 774 (1883); Vinsant v. Vinsant, 49 Iowa 639 (1878). The statutes of Arizona, District of Columbia, and Texas specifically make it necessary that the conviction become final before a divorce may be obtained. It has been held that a conviction is not final if an appeal has been taken: Ashcraft v. State, 94 P. (2d) 939 (Okla. Crim. App., 1939).

13 Cone v. Cone, 58 N. H. 152 (1877).
decided and there has been a reversal, divorce should be denied for there is no longer any conviction.\footnote{Luper v. Luper, 61 Ore. 418, 96 P. 1099 (1908).}

Pardons are occasionally granted, so it is important to determine the effect thereof on this ground for divorce. Obviously, once a marriage has been dissolved, it should not be reinstated simply by the granting of a pardon. Several states have specific provisions to this effect\footnote{Mass., Mich., Neb., N. Y., Wis., Wyo. In South Dakota, the provision only pertains to cases where the sentence is to life imprisonment: S. D. Stat. 1939, §14.0108. For application of this type of provision in states where an automatic dissolution of marital relations occurs, see Gargan v. Sculley, 82 Misc. 667, 144 N. Y. S. 205 (1913), and State v. Duket, 90 Wis. 272, 63 N. W. 83 (1895).} but the same result should be obtained even in the absence thereof for any other result would be socially intolerable. More important, however, is the question as to whether or not the presence of an executive pardon would be a good defense against a subsequent action for divorce. The statute of one state answers this question with an emphatic "No,"\footnote{See Ariz. Code Anno. 1939 § 27-802(3). The West Virginia act contains the following proviso: "... no pardon granted to the party so sentenced if suit for divorce shall have been commenced before the granting of such pardon shall restore such party to his or her conjugal rights." Inferentially, if the suit should be brought after the pardon had been granted, the pardon would be a good defense.} while others provide that it "shall not restore the conjugal rights."\footnote{Minn., Va.} The meaning of this latter phrase is vague, to say the least. It could be interpreted to mean that once there is a divorce dissolving any of the conjugal rights, a pardon should not operate to restore them. But it might be construed in another way, that is as if the conviction and imprisonment \textit{per se} deprived the guilty spouse of marital rights, not to be restored by a pardon yet permitting the latter to be urged as a defense should divorce litigation be instituted thereafter. Only one state makes a pardon a bar to a divorce action,\footnote{Texas. In Young v. Young, 61 Tex. 191 (1884), the court held that a commutation of sentence is not the same as a pardon as it merely reduces the punishment but does not completely withdraw it.} while one other makes it a defense if the pardon is granted before actual incarceration has occurred.\footnote{Miss. Code Anno. 1942, § 2735(3rd).} Where the statute is silent, the decisions are in agreement that a pardon granted prior to or
during the pendency of divorce proceedings does not nullify the ground for divorce.\(^{20}\) The merit of that rule seems to lie in the fact that the indignity and disgrace of the conviction is not removed by an executive pardon, in fact that acceptance thereof is tantamount to an admission of guilt, hence the innocent spouse should not be deprived of the right to maintain an action.\(^{21}\)

Condonation and recrimination being available defenses in a divorce action, there is nothing to prevent their use in an action to dissolve a marriage on the ground of the conviction of one of the spouses. One jurisdiction specifically provides that no divorce will be granted where there has been cohabitation subsequent to the conviction\(^{22}\) but, even without such a provision, it would logically follow that a resumption of the marital relationship after there had been a release from prison should prevent the maintenance of a divorce action\(^{23}\) for condonation would then set in. Insofar as recrimination is concerned, the problem would be to determine whether or not the spouse seeking the divorce has been guilty of misconduct on the same level as the person convicted of the crime for some states insist upon finding varying degrees of culpability between the several causes for divorce. It goes without saying that, if the plaintiff has also been convicted of an offense within the statute, this fact should be a bar to a divorce.\(^{24}\) The commission of adultery, however, has been regarded as sufficient to bar the suit.\(^{25}\)

One further fact should be noted. Two states require that a divorce proceeding based upon a criminal conviction must be

---

\(^{20}\) Wood v. Wood, 135 Ga. 385, 69 S. E. 549 (1910); Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191 (1906); Davidson v. Davidson, 23 Pa. D. & C. Rep. 578 (1914). See also Handy v. Handy, 124 Mass. 394 (1878), where it was inferentially held that pardon did not extinguish the ground.

\(^{21}\) For a discussion of this problem, see 7 Col. L. Rev. 54.


\(^{23}\) Miller v. Miller, 19 Ohio App. 518 (1926). See also Englemann v. Englemann, 18 Pa. Dist. Rep. 387 (1907), where it was held that since there had been no continuance of the marital relation during the time the party was confined in prison, there had been no condonation even though the wife had used her convict-husband's money to support herself and had visited him during the period of incarceration.


\(^{25}\) Handy v. Handy, 124 Mass. 394 (1878). See also Abshire v. Hanke, 119 La. 425, 44 So. 186 (1907); J. F. C. v. M. E., His Wife, 6 Rob. 135 (La., 1843).
instituted within a specified period of time. In Idaho, for instance, the suit must be commenced within one year after pardon or termination of the sentence.\textsuperscript{26} Montana, by contrast, requires that the suit be instituted within two years after the judgment and sentence.\textsuperscript{27} It is evident, then, that the statute of limitations may be pleaded as a bar in these states, but the same thing is no doubt true of other states where a general limitation period or the doctrine of laches might well be relied on.

The foregoing resume of existing statutory language on the point of divorce for commission of crime, when considered in the light of the slight judicial gloss thereon reveals one thing if nothing else and that is that even this small segment of the law is not without its complications and its inconsistencies. Perhaps it is fortunate that relatively few divorces are sought on this ground as compared with others. Not that the crime rate is decreasing, for such is far from the case. It may be that the very complications noted serve as an effective deterrent to more frequent suits. If so, those who propose the adoption of a uniform divorce measure might well keep in mind the deficiencies in existing statute before offering any model law for country-wide adoption.

\textsuperscript{26} Ida. Code, Tit. 32, § 615(2).
\textsuperscript{27} Mont. Rev. Code Anno. 1935, § 5762(2). The statute of limitations cannot be waived by the defendant for the divorce suit involves not only the parties but the state as well: Franklin v. Franklin, 40 Mont. 348, 106 P. 353 (1910).
CERTAIN PROBLEMS which plague the members of the Illinois General Assembly are so recurrent that their consideration becomes a matter of routine at every session. The legislature hardly has time to convene before a series of bills are proposed, sponsored by interested municipalities and other taxing bodies, designed to cure defects and errors which have arisen in the process of levying taxes in the interim between the previous session and the current one. The constant request for legislative assistance evokes a query as to whether the taxing officials of the state should not be skilled, by this time, in the processes of taxation so as to be able to avoid such mistakes, but so long as each session brings statutory modification in the fundamental laws, and so long as taxing statutes are as complicated as they are, it is not surprising that errors do creep in. If the taxing machinery were operated by lawyers experienced in detailed statutory requirements, the picture might be different. But many taxing bodies perform their functions on the basis of information handed down by predecessors in office, often completely ignorant of changes in the taxing laws, hence necessity for the frequent resort to curative statutes in an effort to avoid a complete breakdown in the sources of revenue.

The steps which taxing authorities must follow are hedged in by statutory requirements and the possibilities for error are great. When they are multiplied by the thousands of taxing districts in Illinois, the magnitude of the problems which can be created is apparent, but attention to a few fundamental facts will quickly reveal whether pitfalls can be avoided or, if not, whether the effect of falling therein may be overcome by the adoption of curative statutes. It should first be noted that authority to levy any tax at all must rest in statutory grant of

* A.B., LL. B. Member, Illinois bar, and faculty of Chicago-Kent College of Law.
power, constitutionally conferred by the legislature on the taxing body. In the absence thereof, no tax levy could stand. The municipalities of the state, at least in cases of organized districts having less than 500,000 inhabitants, gain their authority through certain sections of the Cities and Villages Act. The first of these specifies that the municipal authorities, within the first quarter of the fiscal year, shall pass an annual appropriation ordinance in proper form which shall have been published, after adoption, in the manner required by law. When the total amount of the annual appropriation has thus been determined, the municipal authorities are then obliged, on or before the date prescribed by statute, to adopt a levy ordinance placing the burden of the sums appropriated upon the taxable property in the municipal area. Certification of these ordinances to the county officials results, in due time, in the making of assessments and the issuance of tax bills.

Any failure to follow the general method outlined endangers the collection of needed revenue and, if deviation occurs at what may be regarded as jurisdictional points in the process, the tax levy may be entirely void. If no protest is made, the taxpayer who has discharged his obligation to his government is prevented from complaining of any error in the taxing process. It is the alert taxpayer, however, who will scan the municipal operation closely and, not infrequently, uncover some defect upon which to resist collection of the tax imposed. To offset this challenge, or even the threat thereof, the municipal authorities seek recourse to the curative statute which the obliging legislature enacts.

The term "curative act" is occasionally used to refer to statutes designed to have prospective operation, that is to remedy errors which have not yet occurred and which may arise in the future. Illinois has long had one statute of that character, a re-enactment of Section 191a of the Revenue Act of 1872. A discussion of the scope thereof may be found in a note in 32 Ill. L. Rev. 456.

2 Ibid., Ch. 24, § 10—3.
3 Ibid., Ch. 24, § 16—1.
4 Ibid., Ch. 120, § 177. It is a re-enactment of Section 191a of the Revenue Act of 1872. A discussion of the scope thereof may be found in a note in 32 Ill. L. Rev. 456.
EFFECT OF CURATIVE STATUTES.

signed to take care, automatically, of any of the irregularities to which it may apply. Many defects, merely formal in nature, constitute no threat to the validity of the taxing procedure because of the presence thereof. Thus this statute, or its predecessor, has been held to legalize an indefinite description of land or the omission of the words "dollars" and "cents" from the assessment roll; the listing of property in the wrong book; the failure of a town clerk to certify the levy to the county clerk at the proper time; the oversight of the assessor to set down the full value of the property as the assessed value; the assessing of property in the wrong name; or other like defects.

In general, however, curative statutes in Illinois have generally been designed to possess retroactive operation, serving to correct errors, if operating to cure errors at all, that have already taken place. In fact, the Illinois Supreme Court once said, in the case of People v. Illinois Central Railroad Company, that "curative acts do not authorize the doing of anything in the future, and the very nature of such acts must be and is wholly retrospective. They relate solely to actions that have been performed and legalize the same." In the light of that statement, and bearing in mind that the general curative statute above referred to is designed to deal with defects, errors and other informalities which do not affect the "substantial justice of the levy," it is apparent that the term "curative statute," as most frequently used in Illinois, applies to enactments intended to be

5 People v. Brown, 261 Ill. 73, 103 N. E. 559 (1913).
6 Wabash, St. L. & Pac. R. Co. v. Johnson, 108 Ill. 11 (1883).
7 Thatcher v. People, 79 Ill. 597 (1875).
8 People v. Fleming, 355 Ill. 91, 188 N. E. 818 (1933).
10 Burligh v. People, 79 Ill. 214 (1875).
11 301 Ill. 288, 133 N. E. 779 (1921).
12 301 Ill. 288 at 297, 133 N. E. 779 at 782. See also People v. Kinsey, 294 Ill. 530, 128 N. E. 561 (1920). In People v. C., B. & Q. R. R. Co., 305 Ill. 567 at 568, 137 N. E. 392 at 393 (1922), the court said: "The object of a curative act is not to change the law governing future action, but to waive some requirement of the law affecting past action."
retrospective in operation\textsuperscript{13} and planned to cure those defects which do affect the "substantial justice" of the tax levy.

Absence of an appropriation ordinance in force at the time of the levy, for example, could hardly be considered an "error or informality" within the meaning of the general curative statute\textsuperscript{14} and, even if it were, lack of publication thereof could scarcely be considered aided by the statute for its purports to amend not to supply original action, without which there is nothing to be amended. The problem, then, is to ascertain how far the legislature may go in passing curative measures falling within the second category, that is those enacted after the error of substance has occurred.

The power of a legislature to validate defective tax proceedings by the enactment of retroactive statutes, while universally recognized,\textsuperscript{15} is not without restraint for no statute can stand which contravenes constitutional limitations. Illinois, in harmony with other states, will not sanction curative acts which impair vested rights, as where a taxpayer has changed his position before attempt has been made to cure the defect,\textsuperscript{16} or which purport to interfere with the proper exercise of the judicial power, as by seeking to upset a judicial declaration of tax invalidity pro-

\textsuperscript{13} Special curative acts have been employed, however, to cure merely formal defects which were probably legalized anyway by Ill. Rev. Stat. 1947, Ch. 120, § 717. See, for example, People v. I. C. R. R. Co., 301 Ill. 288, 133 N. E. 779 (1921), where a validating act remedied the failure of a school board to return certificates of levy at a proper time, and People v. Millard, 307 Ill. 556, 139 N. E. 113 (1923), where a resolution, defective because passed at an improperly called meeting, was validated by a curative act and the levy was saved.

\textsuperscript{14} In C. & N. W. Ry. Co. v. People, 193 Ill. 594 at 598, 61 N. E. 1100 at 1101 (1901), the court said: "The substantial justice of a tax is affected if it is one which the authorities attempting to impose it have no power or right to impose. Provisions of the statute designed for the protection of the taxpayer are mandatory, and a disregard of them will render the tax illegal." It therefore held that Section 191a of the Revenue Act of 1872, now Ill. Rev. Stat. 1947, Ch. 120, § 717, did not operate to validate a levy made at a time when the commissioners had no authority. See also People v. McElroy, 248 Ill. 574, 94 N. E. 81 (1911), where the same section was held not to save a tax when the appropriation ordinance was not enacted or published within the first quarter of the fiscal year as required by a statute, the provisions of which were deemed mandatory.

\textsuperscript{15} See annotation to People ex rel. Larson v. Thompson, 377 Ill. 104, 35 N. E. (2d) 355 (1941), in 140 A. L. R. 959.

\textsuperscript{16} Conway v. Cable, 37 Ill. 82 (1865).
nounced before passage of the statute.\textsuperscript{17} To permit statutes of that character to stand would be to deprive the taxpayer of property without due process of law. In addition to such general prohibitions, the Illinois Constitution of 1870 contains a restraint, not frequently found elsewhere, prohibiting the legislature from imposing taxes on the municipality or its inhabitants for corporate purposes.\textsuperscript{18} This limitation, at times, has been found to serve as a basis for declaring curative acts ineffective\textsuperscript{19} but upon reasoning which has been limited to this state and which has not found favor elsewhere.\textsuperscript{20} 

So long as no constitutional prohibition is invaded, the Illinois Supreme Court has been willing to recognize that the legislature may, by curative act, validate any proceeding which it might have authorized in advance.\textsuperscript{21} While this principle has been stated rather frequently, it should not be accepted entirely at its face value for it would seem to indicate that the legislature has the power to waive any procedural requirement, at some future time, since almost all the taxing procedure is prescribed by the legislature. A succession of cases, however, has served to prove that the legislature has no such sweeping power for it has been denied the right to provide a cure where there was (1) a funda-

\textsuperscript{17} See C. & E. I. R. R. Co. v. People, 219 Ill. 408, 76 N. E. 571 (1905), where it was held that, after a decision invalidating a tax for failure to itemize its purposes, the legislature had no power to cure the defect.

\textsuperscript{18} Ill. Const. 1870, Art. IX, § 10.

\textsuperscript{19} See cases listed in note 29, post.

\textsuperscript{20} In a note in 32 Ill. L. Rev. 456, at 471, it is stated that, of nine states having constitutional provisions similar to that in Illinois, in two such states where the question arose the Illinois interpretation was rejected. Curative acts were there regarded not to amount to an “imposition” of a tax by the legislature contrary to constitutional prohibition: Weber v. City of Helena, 89 Mont. 109, 297 P. 455 (1931); Owings v. City of Olympia, 88 Wash. 289, 152 P. 1019 (1915).

\textsuperscript{21} See Owens v. Green, 400 Ill. 380, 81 N. E. (2d) 149 (1948). Cooley, Const. Lim., 8th Ed., p. 775, states: “If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.” The latter sentence comes close to statements of the Illinois Supreme Court which emphasize that the defect is curable if it relates to a mere immaterial irregularity, a formal defect, or one not necessary to the exercise of the power. See cases cited in notes 37 to 41 inclusive, post.
mental lack of power to act,\textsuperscript{22} (2) where there was no jurisdiction to tax,\textsuperscript{23} or (3) where the entire tax proceeding was void.\textsuperscript{24} It is not too clear how the court could distinguish between these three situations, but the conclusion is apparent from the holdings that almost all of the attempts to cure what might be regarded as defects of a serious nature and which might come under one or more of these heads have been ineffective.

By way of illustration, one need consider only a few of the decisions on the subject. In the case of \textit{People ex rel. Ward v. Chicago \& Eastern Illinois Railway Company,}\textsuperscript{25} for example, the board of supervisors had levied a tax, on December 12, 1934, for Vermillion County although the statute required that the tax levy should be made prior to December 1st. The legislature, by an act approved on January 17, 1935, purported to grant to such county boards as had omitted to levy by the proper date the authority to make another levy\textsuperscript{26} while also providing, through another statute, that levies made after the first day of December were valid.\textsuperscript{27} The court held the curative act void, stating at the time

The legislature may by statute validate the irregular or defective exercise of a power where the power already existed and the proceeding sought to be cured was not one of the fundamentals of the power exercised. However, the General Assembly cannot give validity to the exercise of a power where such assumed power did not exist at the time it was purported to have been exercised. The power to levy a tax


\textsuperscript{25} 365 Ill. 202, 6 N. E. (2d) 119 (1936).

\textsuperscript{26} Laws 1935, p. 685; H. B. No. 4.

\textsuperscript{27} Ibid., p. 685; H. B. No. 5.
by an administrative body is jurisdictional. Jurisdiction to act cannot be conferred by subsequent legislative acts where the assumed power to act was lacking at the time the purported proceeding was had.\textsuperscript{28}

It also found that the attempted validation fell afoul of the constitutional restraint aforementioned in that the result, if upheld, would amount to the legislative imposition of a tax for corporate purposes.\textsuperscript{29}

It may be noted that the court, when speaking of the "power to levy," was not referring to an actual lack of authority on the part of the board of supervisors for it is plain that the taxing function had been validly delegated to that body. What happened in the case might more nearly be described as a defect in procedure in the carrying out of that power. Such defects, however, are not uncommonly referred to by the court as illustrating a "lack of power to act." In this respect, one should bear in mind that the phrase "lack of power" possesses a different significance and has a contrasting meaning with the same phrase when used in other municipal affairs for it then refers to a complete absence of grant of authority from the legislature to the municipal corporation to indulge in the given activity.

In another case, that of People ex rel. Larson v. Thompson,\textsuperscript{30} a forest preserve district passed an appropriation ordinance on July 18, 1939, but failed to publish the same until the following September 8th. The levy ordinance was passed on September 15th. The law required publication of the appropriation ordinance within ten days after its passage but declared that the ordinance provisions should not become effective until ten days

\textsuperscript{28} 365 Ill. 202 at 207, 6 N. E. (2d) 119 at 122.

\textsuperscript{29} See also People v. Pennsylvania R. R. Co., 375 Ill. 85, 30 N. E. (2d) 739 (1940); People v. Orvis, 374 Ill. 536, 30 N. E. (2d) 28 (1940); People v. C. & E. I. Ry. Co., 343 Ill. 101, 175 N. E. 4 (1931); People v. Public Service Co., 328 Ill. 440, 159 N. E. 797 (1928); People v. C., M. & St. P. Ry. Co., 321 Ill. 499, 152 N. E. 560 (1926); People v. E., I. & St. L. Ry. Co., 312 Ill. 134, 143 N. E. 431 (1924); People v. Ill. Cent. R. R. Co., 310 Ill. 212, 141 N. E. 822 (1923). All cases listed in notes 22, 23, 24, 25, 26 and this one were cases which decided that curative acts were incapable of validating defective levies.

\textsuperscript{30} 377 Ill. 104, 35 N. E. (2d) 355 (1941).
Again the legislature enacted a curative statute clearly intended to fit the case for it specified that such levies were valid "notwithstanding that the publication of the appropriation ordinance occurred more than ten days after its passage and notwithstanding that the tax levy ordinance was passed within ten days after the publication of the appropriation ordinance." The court accepted the contention that the requirement for publication within ten days after passage was a directory one only, except that the appropriation measure could not become effective until ten days after its eventual publication. But it went on to find that the levy was void because passed at a time when no enforceable appropriation ordinance existed. That position was achieved by virtue of the fact that the appropriation ordinance was considered not legal until September 18th, or three days after the purported levy had been made. The court again adverted to the proposition that the district was absolutely without authority under the circumstances and reiterated that no validating act could cure a "lack of authority to act at all." In effect, it accused the legislature of attempting to confer the power to levy posthumously as well as of violating the state constitution.

31 Ill. Rev. Stat. 1939, Ch. 57 1/2, § 12.
32 Ill. Rev. Stat. 1941, Ch. 57 1/2, § 15d.
33 In People v. Wabash Ry. Co., 360 Ill. 173, 195 N. E. 665 (1935), the court held that a tax levy ordinance was void because not passed at a time when there was a valid appropriation ordinance in force, since both ordinances were passed by the village board at the same meeting, and the appropriation ordinance would not be in force until 10 days after its publication. Accord: People v. C. C. & St. L. Ry. Co., 281 Ill. 162, 118 N. E. 1 (1917); People v. P. D. & E. R. R. Co., 116 Ill. 410, 6 N. E. 459 (1886). A levy has been declared void, even when made after the appropriation ordinance, if the latter has not been published as required by statute, the publication being in a foreign language newspaper: People v. Day, 277 Ill. 543, 115 N. E. 732 (1917). So a tax levy ordinance passed before the appropriation ordinance has been published is clearly void: People v. Florville, 207 Ill. 79, 69 N. E. 623 (1903). Where the appropriation ordinance is published the day after the levy ordinance is passed, the levy is void for lack of a valid appropriation ordinance: People v. Wabash R. R. Co., 387 Ill. 460, 56 N. E. (2d) 820 (1944). See also People v. I. C. R. R. Co., 396 Ill. 200, 71 N. E. (2d) 39 (1947).
34 377 Ill. 104 at 113, 35 N. E. (2d) 355 at 359. It might be questioned whether this situation is one where the phrase "lack of authority to act at all" is technically accurate. However, levies have been uniformly held void for that reason, apparently on the reasoning that the power to levy is not conferred on the taxing body until it has first properly passed and published an appropriation ordinance.
35 See also People v. Ill. Cent. R. R. Co., 310 Ill. 212, 141 N. E. 822 (1925), holding the curative act of May 31, 1923, Laws 1923, p. 506, incapable of validating
Logically, the constitutional argument should be the real basis for the decision so long as the court adheres to the interpretation it has placed on Article IX, Section 2 of the state constitution. But, for some reason, the court prefers to find the curative act invalid because of the general principle that curative acts are inherently incapable of supplying a missing power and then links up that conclusion with the constitutional issue. The former rests upon a void proceeding for its force. The latter more nearly turns on a "lack of power" or, what sometimes seems to be the equivalent in this regard, a "lack of jurisdiction" to tax.

In contrast, there have been cases in which curative acts have been upheld on the rationale that the error corrected was over a matter which the legislature "might have dispensed with in the first place." Thus insufficient itemization or failure to itemize the particular purpose of the tax levy at all may be validated; defects produced by the fact that the tax was levied at an unauthorized meeting have been cured; uncertainties in the statement of purpose for the levy have been rectified; and defective schedules of claims have been remedied. The superficial explanation for such results may rest in an expression of the court, to be found in the case of People ex rel. Pearsall v. The Chicago, Milwaukee & St. Paul Railway Company, to the effect that the legislative power "to validate by curative law any tax levy made without first obtaining written consents of the town auditor at a proper meeting as required by statute. The act was found to violate Ill. Const. 1870, Art. IX, § 10.

36 See note 21, ante.
37 A curative act validated the tax levy in People v. Mercil & Sons Co., 378 Ill. 142, 37 N. E. (2d) 539 (1941), where insufficient itemization had occurred, since this was regarded merely as a defective exercise of a power existing in the city.
38 Failure to itemize does not go to the fundamental right to levy, so this defect may be validated according to People v. C., M. & St. P. R. R. Co., 324 Ill. 43, 154 N. E. 472 (1926). Accord: People v. C., B. & Q. R. R. Co., 323 Ill. 536, 154 N. E. 488 (1926); Bowyer v. People, 220 Ill. 93, 77 N. E. 91 (1906); People v. Wis. Central R. R. Co., 219 Ill. 94, 76 N. E. 80 (1905).
39 People v. Millard, 307 Ill. 556, 139 N. E. 113 (1923).
42 310 Ill. 428, 141 N. E. 827 (1923).
proceeding which it might have authorized in advance is limited to the case of irregular exercise of power.” 43

Reference to “irregular exercise of power,” just as is true with the phrase that the legislature may cure that which it “might have dispensed with in the first place,” is essentially meaningless in describing the errors which may be cured for there are few requirements which the legislature could not have dispensed with had it chosen, while “irregular exercise” includes practically anything which a taxing body could do in the wrong, as well as the right, way. But even if the expressions be faulty, the idea that things not necessary to the exercise of the power may be waived is a valuable one to be set in contrast with the other concept that “lack of jurisdiction” may not be overcome.

Aside from having cured occasional minor defects of the kind above referred to, curative acts have met with little success in Illinois. Errors in proceedings which affect the substantial justice of the tax 44 have generally been held incurable by validating statutes and, in some cases, the validating statutes themselves have been held unconstitutional. 45 Other cases have resulted in declarations by the court that it would not assume that the legislature had attempted to do that which it had no authority to do, so no effort was made to apply the curative act to the invalid proceeding it was designed to correct. 46 Taxes levied at an un-

43 310 Ill. 428 at 429, 141 N. E. 827 at 828.

44 See note 14, ante. A failure to itemize is more than an irregularity which may be overlooked under Ill. Rev. Stat. 1947, Ch. 120, § 717, but is such an irregularity that may be cured by a validating act “because the legislature might have dispensed with the requirement in the first place.” This defect has been held not to go to the power to levy, even though it did affect the substantial justice thereof, in People v. C., M. & St. P. R. R. Co., 324 Ill. 43, 154 N. E. 472 (1926).


authorized excess rate have failed for want of an efficient cure.\textsuperscript{47} The failure to obtain written consents of town auditors at proper meetings, as required by statute, has not been remedied by validating statute.\textsuperscript{48} A bond issue, void because approved by voters at an election called on improper notice, has likewise failed despite legislative attempts to validate.\textsuperscript{49} For that matter, an attempt to make valid a bond issue, where the petition requesting the election on the proposition did not contain a sufficient number of signatures, has been turned down even though a majority of the voters at the election had favored the issue.\textsuperscript{50} Certainly, then, where there is no valid organization of the taxing district, any attempt to validate the levy of such an organization would necessarily fail, for the power to tax never existed.\textsuperscript{51}

It is apparent, then, that the Illinois Supreme Court has taken a dim view of attempts by the legislature to counteract the mistakes and omissions of the taxing authorities. It is somewhat difficult to see upon what principle of justice a person may be allowed to avoid his obligation to contribute to the support of his local governmental unit merely because of oversight, accident, or technical error on the part of the taxing officials. Rarely is there a question of vested interests presented but, so long as the court pursues its former views, those who object are relieved of the tax burden while others, who do not, suffer added injury by being forced, in subsequent years, to make up for the taxes lost to the successful objector.

There may be occasion to hope, however, that the court might change its views on the subject of the validity of curative stat-


\textsuperscript{48} See note 35, ante.

\textsuperscript{49} People v. Ervin, 375 Ill. 435, 31 N. E. (2d) 789 (1940).

\textsuperscript{50} See People v. Riche, 396 Ill. 85, 71 N. E. (2d) 332 (1947); People v. Miller, 392 Ill. 445, 64 N. E. (2d) 869 (1946); People v. C. & N. W. Ry. Co., 391 Ill. 145, 62 N. E. (2d) 460 (1945); People v. B. & O. R. R. Co., 385 Ill. 86, 52 N. E. (2d) 255 (1944); People v. C. G. W. R. R. Co., 379 Ill. 594, 41 N. E. (2d) 960 (1942); People v. Thompson, 377 Ill. 244, 36 N. E. (2d) 351 (1941).

utes. As late as 1948, in the case of Owen v. Green, the Supreme Court made a statement which may recast the whole theory of curative acts into a single formula. It there said

Where there is no constitutional prohibition, the legislature may, by curative act, validate any proceeding which it might have authorized in advance. The principal, if not the only, exception to legislative power to ratify . . . is in tax levy cases where section 10, article IX of the Constitution precludes the enactment of a curative act.

If that formula is followed, tax cases need not be complicated in the future, as has been the case in the past, by distorted attempts to rationalize a result inconsistent with the general rule governing the validity of curative statutes.

It is possible, in the not too distant future, that there may be occasion for the court to give substance to that formula if it feels so inclined for a serious problem looms over the revenues of many of the taxing units of the state. The problem grows out of the fact that, in 1947, the legislature amended Section 10-3 of the Cities and Villages Act. Prior to amendment, the statute required that all ordinances designed to impose any fine, penalty, imprisonment, or forfeiture, as well as those which made any appropriation, should be printed in book or pamphlet form by the corporate authorities or they should be published at least once in a newspaper published in the city or village, or should be posted, if no newspaper was published therein, all within one month after passage. Emphasis is given to the word "or" since the law then clearly contemplated alternative forms for giving notoriety to the intended ordinance. By the amendment adopted in 1947, publication was permitted in any newspaper of general circulation distributed in the municipality even though not published therein, but posting was permitted in municipalities having less than 500 population. The period for publica-

52 400 Ill. 380, 81 N. E. (2d) 149 (1948).
53 400 Ill. 380 at 403-4, 81 N. E. (2d) 149 at 162.
tion was also shortened from one month to ten days,\footnote{Ill. Rev. Stat. 1947, Ch. 24, § 10-3.} so as to conform the publication period to that found in other statutes regulating certain particular governmental units.\footnote{See, for example, Ill. Rev. Stat. 1939, Ch. 57Y, § 12.} But, whether intentionally or not, the amended statute, as passed, contained the word "and" where previously had appeared the word "or," so that ordinances of the type mentioned, after 1947, should be both printed in pamphlet form \textit{and} be published in the manner indicated.

Judging by the haste with which the legislature acted at its last session, many taxing authorities in the state must have failed to notice the minute but tremendously significant change thus caused. It can only be supposed that substantial amounts of revenue must have been in jeopardy, for the legislature not only recast Section 10-3 of the Cities and Villages Act, replacing "and" with "or" and making the amendment an emergency measure,\footnote{Laws 1949, p. 102: H. B. No. 49, § 1. See also Smith-Hurd Stats. Ann., cum. supp. June 1949, p. 44. Section 2 thereof states that whereas, "in order to prevent an unnecessary and great expense and a serious embarrassment in the administration of municipal affairs, cities and villages must be immediately relieved of the requirement heretofore existing that certain ordinances be published both in book or pamphlet form and in certain newspapers, an emergency exists and this act shall take effect upon its becoming a law." The phrasing conceals, but still suggests, the thought that duplicate publication was probably not intentionally imposed on municipalities.} but also tried to fill the breach with a curative statute designed to validate all appropriation and levy ordinances passed in the interim between the 1947 and the 1949 sessions.\footnote{Laws 1949, p. 99: H. B. No. 623, §§ 1 and 2. See also Smith-Hurd Stats. Ann., cum. supp. June 1949, p. 57; Ch. 24, §§ 697e2 and 697e3.} In general, the curative act purports to make valid not only all taxes levied despite failure to publish in the form required but also those where publication of the annual appropriation ordinance preceded the levy ordinance by only ten days. The problem, of course, is whether this curative act, resembling other statutes of the past, will prove to resemble them also in failing to provide the hoped-for solution.

If the present court, when faced with tax objections based upon municipal failure to comply with the requirements of Section 10-3 of the Cities and Villages Act as it stood before its
recent re-amendment, follows in the footsteps of its predecessors it can only conclude that the curative act is a nullity. Reference need only be made to the case of *People ex rel. Larson v. Thompson* to sustain that conclusion, for it was there held that a curative measure designed to validate both an appropriation ordinance, void for want of publication at the proper time, and the ensuing levy ordinance, void because not preceded by a valid appropriation ordinance, was totally ineffective to cure either. If further ammunition is needed, reference to the decisions previously noted on the inability of the legislature to retroactively confer the power to levy a tax should be all that should be necessary. The prospects of success for the measure in question are, therefore, quite dim.

But the opportunity will no doubt be presented for the court to strike out afresh on the subject if it so wishes. It may elect to confirm the formula of *Owen v. Green* and conclude that there is no constitutional restraint upon a measure of this kind. It may rationalize that “and” means “or,” and vice versa, when the subject warrants it. It may realize the governmental necessity for revenue as well as the calamity which could ensue from a wholesale deprivations of taxes, and produce a decision not in keeping with those cited. There is reason to believe, however, that it should re-interpret the Illinois Constitution in this respect to find, as have other courts, that there is no constitutional vice in curative statutes remedying defects in taxation in the absence of a clear-cut deprivation of property without due process of law.

59 377 Ill. 104, 35 N. E. (2d) 227 (1941).
60 400 Ill. 350, 81 N. E. (2d) 149 (1948).
61 When a defect threatened to invalidate a great number of tax proceedings in Illinois on a prior occasion, the abstract principle of limitation on the scope of curative statutes was overcome by such necessity: *People v. N. Y. Central R. R. Co.*, 282 Ill. 11, 118 N. E. 462 (1917). A statute providing for the organization of school districts was there held unconstitutional but the validating statute was allowed to stand. The defect certainly went to the jurisdiction of the taxing body to act at all. Other cases involving the same statute are *People v. Kessler*, 282 Ill. 16, 118 N. E. 493 (1917); *People v. Leigh*, 282 Ill. 17, 118 N. E. 495 (1917); *People v. New York C. R. R. Co.*, 282 Ill. 19, 118 N. E. 481 (1917); *People v. Matthews*, 282 Ill. 85, 118 N. E. 481 (1917); *People v. K. & S. R. Co.*, 282 Ill. 541, 118 N. E. 753 (1918); *People v. P., C. C. & St. L. R. Co.*, 284 Ill. 87, 119 N. E. 914 (1918); *People v. C. & A. R. R. Co.*, 285 Ill. 232, 120 N. E. 454 (1918). Three justices dissented in the Matthews case on the ground that the curative act violated the state constitution.
62 For related cases from other jurisdictions, see annotation in 140 A. L. R. 959.
AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—

Whether or Not Owner of Parked Automobile Who Leaves Key in Ignition Is Responsible for Injuries Inflicted by Thief Who Steals Car—Judicial speculation on the purpose and intent of the legislature when enacting Section 189(a) of the Motor Vehicle Act became apparent in the case of Ostergard v. Frisch,1 a case of far-reaching importance to car owners in Illinois. The defendant automobile owner there concerned

---

1 333 Ill. App. 359, 77 N. E. (2d) 537 (1948). Niemeyer, P. J., wrote a dissenting opinion.
left his car standing unattended on a Chicago street with the motor off but with the key left in the ignition, thereby violating the statute aforementioned. A thief drove off with the car, collided with and damaged plaintiff's parked automobile, and the Municipal Court of Chicago, sitting without a jury, rendered judgment against the defendant for the damage done. That judgment was affirmed by the Appellate Court for the First District, despite a dissenting opinion, on the ground that, in determining whether the negligence involved in a violation of the statute was the proximate cause of the resulting injury, the statute might, by its obvious intent, "enlarge upon the general definition of proximate cause."\(^2\)

Through the years, the courts have been called upon to decide the broad general question of whether a violation of a statute should serve to impose civil liability,\(^4\) but the law on this subject is in a state of uncertainty and the decisions are no models either of logic or consistency. One group of cases holds that every violation of a statute is negligence \textit{per se} but that whether or not such negligence is the proximate cause of the injury should be a jury question.\(^5\) Another group of cases, agreeing that a violation of a statute is negligence \textit{per se}, nevertheless holds that, as a matter of law, the intervening act of an intermeddler, not the original negligence of the party violating the statute, is to be regarded as the proximate cause of any subsequent injury.\(^6\) On the specific point, the increase in recent years of statutes and ordinances requiring that cars left standing unattended on public streets should be locked has come to be an important factor. Several states have statutes identical with or

\(^2\) Ill. Rev. Stat. 1947, Ch. 95 1/2, §§ 189(a) and 118.

\(^3\) 333 Ill. App. 359 at 369, 77 N. E. (2d) 537 at 541. The minority opinion adhered to the time-honored rule of law that the causal connection between a person's negligence and an injury is broken by the intervention of a willful, malicious and criminal act of a third person, unless there are special circumstances which will render the defendant liable on the theory that the intervening cause was reasonably foreseeable.


very similar to the Illinois provision construed in the instant case\(^7\) and, where these statutes have been involved, some decisions to date line up with the minority holding therein\(^8\) but there has been a strong tendency to hold as did the majority of the court.\(^9\)

In situations of this kind, three fundamental inquiries immediately arise, namely: (1) did the defendant violate the statute; (2) what were the facts concerning the plaintiff’s injury; and (3) was plaintiff’s injury of the type which the statute was intended to prevent? The first two are fact questions, but the third generates a question of law which embraces and, in effect, actually eliminates the troublesome and confusing consideration of proximate causation.\(^{10}\) It necessarily requires a construction of the statute, which may be construed as if it were intended to protect all persons or as if designed to protect a particular class of persons against a more or less narrowly restricted type of hazard. If the former, the violator is more or less automatically liable upon a showing of violation. Under the latter view, the offender cannot be civilly liable unless the injury which results to the other is caused by his exposure to the particular hazard from which it was the design of the statute to protect him.\(^{11}\)

Canons of construction require that a statute should be interpreted with reference to the principles of common law in force at the time of its passage and, to arrive at sound interpretation, the search should be guided by four cardinal points of orientation, to-wit: (1) what was the common law before the passage of the act; (2) what was the hazard against which the common law did not provide; (3) what remedy did the legislature intend to provide to cure the hazard; and (4) what was the true purpose of the law.\(^{12}\)

As to the first of these, it was not unlawful at common law to park a car unattended, to leave the key in the ignition, to keep the motor running, or to fail to set the brakes and turn the wheels to the curb when on a


\(^11\) Restatement, Torts, § 286(h).

\(^12\) Potter’s Dwaris on Statutes (1871), p. 184.
perceptible grade. Any of these things might or might not have been regarded as actionable negligence, depending upon how a jury decided the question of proximate causation, but they were not negligent acts as a matter of law nor were they offenses against the state. A motor vehicle was not regarded as a dangerous instrumentality but more nearly analogous to a horse and wagon, so the operator was under a duty to exercise only such care as a person of ordinary prudence would exercise under the circumstances. Leaving a car or horse unattended, unlocked or unfastened on a public street was not ipso facto negligence although, with added circumstances, it might be so considered particularly if a prudent man would have reasonably foreseen that injury might result.

What, then, was the hazard against which the common law did not provide? Clearly it failed to provide adequate measures to lessen the danger to the public from runaway horses or runaway cars in those cases where no fault attended upon the leaving thereof unguarded. By declaring it to be a misdemeanor to park a car with the motor running, or with the key in the ignition, or without bracing the wheels on a hill, the state could, under its police power, materially lessen the hazard to the public from runaway cars, without at the same time increasing the car owner’s civil responsibilities on common law principles. The common law already provided sufficient protection against the hazard of having a parked car set in motion by the intervention of children, for the courts were ready to hold the car owner liable where the intervening efficient cause of the injury was such as he could reasonably have anticipated. But, to be reasonably foreseeable, the act of the intermeddler should be a normal response to the situation created by the defendant’s negligence. Theft of a parked automobile, made easy because the key is in the ignition, is not a normal response but is, rather, the willful, malicious or criminal act of

another for which the common law relieved the party guilty of mere passive negligence from liability. That fact, then, might have been within the cognizance of the legislature when it acted. But is it not more reasonable to suppose it was the first defect at which the statute was aimed rather than the second, i.e. the hazard of a parked car being stolen and driven negligently by the thief? To read into the statute a presumption that the owner impliedly consented to the use of his car by a thief or other unauthorized person would be clearly unconstitutional, even if the courts should be permitted to so liberally construe a statute in derogation of the common law when no such intent is to be found in its language.

What remedy did the legislature provide designed to cure the hazard? The provision in question is part of the Uniform Act Regulating Traffic on Highways. The whole act was designed to regulate traffic and the language thereof is free from ambiguity. Under the general purpose of regulating traffic in the interest of public safety, and for the obvious specific purpose of lessening the danger that parked cars might be set in motion without the intervention of human agency, the legislature, pursuant to its police power, set out such precautions as would guard against runaway cars. The engine should be stopped because a shove from some direction might start the vehicle up under its own power. The ignition should be locked and the key removed because a shove might move the key, unlock the ignition and start the car. The brakes should be set and the wheels turned to the curb when parking on a grade, because the force of gravity or a shove might start the driverless car on a terror-laden frolic of its own. To lessen these dangers, the legislature ordered that drivers should abide by the regulations set forth, under penalty of being guilty of a misdemeanor. Just that, and nothing more, can be found in the words of the legislative command.

What, then, was the true purpose of the statute? Simply stated, it was to regulate traffic. If the purpose had been to prevent theft, the statute would have required, in addition, that the car doors be locked and all windows be shut tight. Provision for the setting of brakes would then have been entirely out of place. It therefore seems clear, without the need for unnecessary speculation, that the purpose of Section 189(a) was merely to prevent injuries apt to be caused by runaway cars. If the statute had been construed and applied as it would seem to have been intended, that is to protect the public against a narrowly restricted type of hazard, the defendant in the instant case would not have been held civilly liable for his violation thereof. To hold otherwise exposes the majority of the court to the charge of making an unjust enlargement upon both the legislative language and purpose.

Automobiles—Injuries from Operation, or Use of Highways—Whether Substituted Service of Process against Nonresident Autoist Should be Limited to Actions Based on Accidents Occurring on Public Highways—In the recent case of O'Sullivan v. Brown, the United States Court of Appeals for the Fifth Circuit was confronted with the problem of determining whether or not the nonresident motorist statute of Texas was applicable to an accident which occurred on a road within premises owned by the United States Government but leased by it to a manufacturing corporation to be used as an airplane plant. The defendant was a resident of Illinois and service of process was had upon him in the statutory fashion. Defendant moved to quash the service and to dismiss the action on the ground of want of jurisdiction, contending that the road upon which the accident occurred was not a public highway within the meaning of that term as used in the statute. It was shown that the premises were entirely surrounded by a fence, that ingress and egress to and from the premises could be had only through gates provided for that purpose, and that admission to the premises could be had only upon securing a proper permit from the company's representative or from United States Army personnel in charge. Once inside the premises, the individual came under the control and jurisdiction of the United States Army. The trial court overruled the motion and, after trial, judgment was rendered in favor of the plaintiff. On appeal, the Court of Appeals reversed on the ground that the locus of the accident did not fall within the statute. The court indicated that the controlling factor, in determining the meaning of the term "public highway," was whether the public had the right, generally, to use the road. If, as of right, the use of the road was open to the public, then it was a "public highway." If, on the other hand, the use of the road could be inhibited by any private person, then the road was not public, no matter what the facts were regarding its prior use by the public, the volume of that usage, the state of maintenance or of police jurisdiction. The court was not unaware of the fact that the result reached was not entirely satisfactory for it said, after noting that other courts which have dealt with the problem have strictly construed statutes of the kind in question, that a "strict construction seems unfortunate, for it

1 177 F. (2d) 199 (1948).

2 Vernon's Tex. Civ. Stats. Ann., Vol. 5, Tit. 42, Art. 2030a, §1. The pertinent parts thereof are as follows: "The acceptance by a nonresident . . . of the rights, privileges and benefits of the public highways or public streets of this state . . . shall be deemed equivalent to an appointment by such nonresident . . . of the Chairman of the State Highway Commission . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action . . . growing out of any accident or collision in which said nonresident . . . may be involved while operating a motor vehicle or motorcycle on such public highway or public street. . . ." Italicized.
DISCUSSION OF RECENT DECISIONS.

may disregard the true intent of the lawmakers as well as the public policy which prompted the enactments and may operate to defeat the purpose for which the statutes were enacted. 3

The seeming inequity in the result and the cogency of the observation made by the judge raises a problem of legislative intent and makes appropriate an inquiry into the language used in the various nonresident motorist statutes to ascertain if a distinction between accidents occurring on public property in contrast to those occurring on private property is warranted. The principal factors motivating the enactment of statutes of this nature lie in a recognition of the capability of the negligently operated vehicle to inflict harm; the ease with which the nonresident tortfeasor may remove himself from the state in which the harm was inflicted, thereby escaping personal service of process with its consequent judicial accountability in that state; as well as the burden and handicap thrust on the resident whose only redress is to pursue the nonresident to the state of his domicile and there institute action. 4 At the outset, then, it would seem arbitrary, capricious and unreasonable to distinguish between accidents occurring on private property and those occurring on public land. To do so is to lose sight of evils sought, in the first instance, to be rectified. Certainly, the danger of the vehicle is not mitigated by virtue of its operation on private property. The resident is no less harmed, while the disadvantage to which he is put, if he would have redress, is the same.

The answer, then, lies in the language of the statutes themselves. All of the forty-eight states and the District of Columbia have nonresident motorist statutes. Common to all of them, are the so-called "agency" clause and the "coverage" clause. The former is, of course, that part of the statute under which some designated state officer becomes the agent of the nonresident; the latter denotes the loci which are intended to be covered. Twenty-five states and the District of Columbia create the agency by virtue of the nonresident's use and operation of a motor vehicle on a public highway and would, seemingly, limit the agency to accidents occurring on the "public highway" for the limiting term "public highway" appears in both clauses. 5 A second group of statutes, found in

3 177 F. (2d) 199 at 202.


thirteen states, while in other respects not dissimilar from the first group, are distinguishable because of the omission of the word "public" in both the agency and coverage clauses. The basic situation would seem to be broadened under these statutes unless the term "highway" is given a narrow definition.

The statutes of Kansas and of New Mexico are also generally similar but with one important distinction. The agency is there created by the use of the "public highway" but thereafter the nonresident becomes amenable to service of process under the statute for "any accident or collision in which said motor vehicle may be involved" while it is being operated in the state. The coverage clause is there clearly intended to be far broader. The statutes of Tennessee and of New Hampshire also present variations for in these two instances the agency is created by the use of "highways" and "ways" respectively, but thereafter coverage is extended to any accident "in this state," in the words of the Tennessee statute, or to any accident occurring "on such ways, or elsewhere," in the words of the New Hampshire statute. The latter, by the insertion of the words "or elsewhere," seems pointedly to have provided against any strict construction based on distinctions between public or private property. The fifth and last group of statutes would appear to be best suited to cure the evils at which these statutes were aimed for, in seven states, the mere operation of a motor vehicle in the state creates the agency and


9 Williams' Tenn. Code Ann. 1934, Vol. 6, Tit. 1, Ch. 5, Art. 4, § 8671.


DISCUSSION OF RECENT DECISIONS.

thereafter the nonresident becomes amenable to the process of that state for "any accidents" in which such nonresident is involved while operating the motor vehicle "within the state." No attempt is there made to restrict the locus, so any distinction based on public or private property would seem to be unwarranted.

The question of locus of the accident, within the meaning of these statutes, has arisen but few times. For the most part, the courts have felt themselves bound by the principle that the statutes, being in derogation of the common law, must be strictly construed. In three cases, the courts have even felt that the statutes could not constitutionally apply to accidents, the causative force of which did not arise from the use of the highways. The result has been harshness and seeming inequity to the injured plaintiff, but in most instances the result has been proper in the light of the statute which the court had to construe. Thus, in those states which require both the use of the public highway and the occurrence of an accident thereon to enable the resident to avail himself of the statutory benefit, the fact that the accident has occurred on a private driveway, on the grounds of a filling station, on the grounds of a World's Fair, in a privately owned public garage, and on the parking lot of a night club, has been held to bar the resident from obtaining service of process on the nonresident through the statute. The Supreme Court of Louisiana, however, interpreting a statute similar in language to those under which the results just noted were obtained, reached a different conclusion in the case of Galloway v. Wyatt Metal & Boiler Works. The court there held that a road which was privately owned but was publicly used constituted a "public" highway within the meaning of the Louisiana statute. While the result is admirable and in accord with the fundamental purpose of these statutes, the reasoning therein, in the light of the statute, is not beyond reproach.


16 Catalano v. Maddox, 175 Misc. 24, 22 N. Y. S. (2d) 149 (1940).


18 Harris v. Hanson, 76 F. Supp. 481 (1948).

19 189 La. 837, 181 So. 187 (1938).
It is interesting to note that New York, which at one time belonged in the category of states first mentioned, amended its statute in 1942 so as to eliminate any reference to "public" highways. The mere operation of a motor vehicle in that state now serves to create the agency, and the nonresident is thereafter amenable to service of process for any accident in which he may be involved while so operating the motor vehicle. The New York cases noted above all stemmed from causes of action arising prior to the effective date of the amendment and may have been the cause of the same. No case bearing on the precise point has been decided in that state since then but it would seem that, by the amendment, the legislature intended to destroy the arbitrary distinction theretofore existing between public and private property which produced the results already observed.

Illinois has likewise had occasion to consider the question. In the case of Brauer Machine & Supply Company v. Parkhill Truck Company, the decision turned on a question of proximate cause, but the court did indicate by way of dictum that, as long as the causal force of the accident originated in the use of the highway, it would make no difference where the harm was inflicted so the statute could apply. Conversely, the court indicated that if the nonresident statute was intended to apply to accidents occurring on private property, both as to cause and effect, it would then be constitutionally objectionable as violative of the Fourteenth Amendment. It was reasoning of that character which induced Kansas, a state with a statute which places no restriction on the locus of the accident so long as the proper agency is created, to reach a result seemingly dissonant with the language of its statute. In Kelley v. Koetting, the nonresident combine operator negligently destroyed a resident's wheat while working on plaintiff's field with his machine. Despite the all-inclusive language of the statute, the court, one judge dissenting, held that the statute was

20 See notes 14 to 18 inclusive, ante.
21 More recent cases, such as Cooper v. Amehler, 178 Misc. 844, 35 N. Y. S. (2d) 917 (1942); LaPlaca v. Hutcheson, 191 Misc. 27, 79 N. Y. S. (2d) 355 (1948); Lowe v. Western Express Co., 189 Misc. 177, 68 N. Y. S. (2d) 873 (1947); and the like, all deal with other aspects of the law.
22 383 Ill. 569, 50 N. E. (2d) 836, 148 A. L. R. 1208 (1943). The accident occurred while the nonresident defendant's truck was being unloaded on private property after traversing the public highways of the state in order to reach the place of unloading. The truck was at rest at the time and had been so for some time prior to the accident. The court held there was no connection between the use and operation of a motor vehicle on the highways and the accident, the use of the highway not being the causal force of the accident. For that reason, it was decided that the court had no jurisdiction over defendant by virtue of service had pursuant to Ill. Rev. Stat. 1947, Ch. 95½, § 23.
23 164 Kan. 542, 190 P. (2d) 361 (1948).
applicable only where the harm resulted from the negligent operation of
a motor vehicle on the state highway.

The point has not arisen for decision in the courts of New Hampshire
and Tennessee, comprising the fourth group in this statutory classification,
but in a decision entirely consistent with the language of the Pennsylvania
statute, falling in the fifth class, the Supreme Court of that state has
decided that accidents occurring on private property clearly fall within
the compass of the statute.24 Just as in the instant case, the accident
there involved occurred on private property. Considering the constitu-
tional issue, the court noted that to hold that state police power in this
regard could not "constitutionally be exercised beyond the highway itself
and encompass within its scope instances where the nonresident, after
having entered the state over state highways, proceeds onto private
property and there causes injury to another, would [be to] create an
unreasonable distinction."25

If the result in the instant case is unsatisfactory, the fault would
seem to lie in the language of the statute which necessitated the result
rather than in the reasoning of the court. Logically, no other result could
be justified for the inherent limitations of the language employed admit
of no other construction. The choice of language in the Texas statute,
and those similar to it, is unfortunate. To create a distinction between
public and private property insofar as the locus of the accident is con-
cerned, is to lose sight of the harm to be righted, and the capability of
the negligently operated motor vehicle to inflict harm, no matter where
it is driven. New York, where the question has most frequently arisen,
has recognized the invalidity and basic injustice in such a distinction
and has rectified the situation by an appropriate amendment. It is to
be hoped that other states with limited statutes will take cognizance of
the situation.

F. J. Lynch

25 353 Pa. 75 at 78, 44 A. (2d) 263 at 264. The constitutional issue raised in Hess
v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927), dealt principally
with the issue as to whether the mere use of the highways of a state by a non-
resident could be sufficient, by implication, to constitute his appointment of the
designated state officer as his agent for service of process. The court therein did
not unequivocally state that such agency would be limited to accidents occurring
on a public highway, although it did say that, under the statute before it, the
"implied consent is limited to proceedings growing out of accidents or collisions on
a highway in which the nonresident may be involved." It should be recognized
that this language was spoken of a statute from Massachusetts, then under con-
sideration, which did in fact limit the agency created. The quoted language is
aptly descriptive of the Massachusetts statute, but it is by no means a generalization
on the point. To contend, as has been suggested, that this language was intended
to limit the applicability of statutes of the kind in question to accidents occurring
only on the highways, and to no others, seems unwarranted.
Declaratory Judgment—Pleading—Whether or Not Coercive Counterclaim May be Interposed in Declaratory Judgment Action—

When Professor Sunderland wrote in 1917 about that modern evolution in remedial rights designated as the declaratory judgment, he visualized it as a friendly suit which would put less strain on the business and personal relations of the parties and lead to less animosities than a suit for coercive relief. He saw, in the action, a cooperative proceeding in which the courts would operate as "diplomatic" instead of "belligerent" agencies. When a plaintiff approaches a court acting as such a diplomatic agency, seeking its advice, a problem may arise as to whether it would be proper for the court to permit the defendant to change the character of the litigation and demand a coercive countersuit. In the recent case of Metropolitan Casualty Insurance Company of New York v. Friedley, a federal district court sitting in Iowa decided, for the first time, the question whether reformation of a contract might be obtained under a counterclaim to an action for a declaratory judgment. An agent of the insurance company there concerned had written a policy of automobile insurance on the car of the defendant. Since the latter was a minor, the agent caused the policy to be issued in the name of his mother, representing this to be a standard practice in the business. When the minor became involved in an accident, the plaintiff sought a declaration of non-liability under the policy because of breach of the sole ownership clause. The defendants unsuccessfully tried to establish that the clause had been waived by the misrepresentation of the agent. The judge found that there had been a mutual mistake but likewise held there was no valid reason why reformation could not be pleaded defensively in a declaratory judgment action and granted such relief even though the defendants had not specifically requested the same.

The decision is in harmony with the policy of liberality under which the federal courts have permitted counterclaims in declaratory actions whether based on the former or the present federal Declaratory Judgment

3 Rule 54(c) of the Fed. Rules of Civ. Pro., 28 U. S. C. A. foll. § 723c, directs that every final judgment shall grant the relief to which the party is entitled even though no demand therefor appears in the pleadings. Reformation was prayed for in counterclaims to declaratory actions in Aralac Inc. v. Hat Corp. of America, 166 F. (2d) 286 (1948), and in Tolle v. Struve, 124 Cal. App. 263, 12 P. (2d) 61 (1932), but in each case the court found no ground for reformation hence did not pass on the procedural question of the propriety of the counterclaim. In the California case mentioned, one involving the validity of certain leases, it was held proper, however, to render judgment against the plaintiff for rent which had accrued.
4 28 U. S. C. § 400 was repealed in 1948.
DISCUSSION OF RECENT DECISIONS.

Act. In common actions begun by insurers seeking a declaration as to their rights and liabilities under policies, counterclaims for the amount due thereon to the insured or to the beneficiary have been considered proper. Where a life insurance company, for example, sought a declaratory judgment to determine whether a policy was in force at the time of the death of the insured, it was held proper to set aside a purported release executed under a mutual mistake of law and fact, although the defendant did not ask for rescission or cancellation of the release. In actions brought to have the defendant’s patent declared invalid, it is common to find counterclaims therein for infringement, not only of the patent sought to be declared invalid but also of other patents held by the counter-plaintiff. Such counterclaims in patent suits have even included requests for further relief such as for an injunction and an accounting. Similarly, in actions for judgments to declare trade-marks invalid, counterclaims have been upheld for infringement and injunction or for unfair competition.

In view of this weight of precedent, an objection to coercive counterclaims in declaratory judgment proceedings is now rarely heard under the federal rules. A litigant bringing a declaratory judgment action in a

7 Penn Mut. L. Ins. Co. v. Forcier, 103 F. (2d) 166 (1939), cert. den. 308 U. S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).
11 Swarthmore Classics v. Swarthmore Junior, 81 F. Supp. 917 (1949). In Quaker Oats Co. v. General Mills, 134 F. (2d) 429 (1943), the counterclaim was dismissed on the merits.
federal court should realize that he may be placed in a difficult situation. In a recent case, that of Merchants Indemnity Corporation of New York v. Dana, 13 a liability insurer instituted an action against an employee of its insured to determine whether he drove an automobile with the permission of his employer at the time when he became involved in an accident. Cross-claims were filed therein to recover for injuries and death due to the negligence of the defendant. The counsel for the plaintiff found himself in the anomalous position of opposing the employee of the insured on the complaint but also forced to defend him against the cross-claimants. A request for an extension of time as to the cross-claims, until a determination had been had on the issues of the complaint, was denied in order to avoid a delay in the expeditious disposal of all the issues.

Turning to the decisions of the state courts, there is a paucity of specific decisions on the propriety of the use of coercive counterclaims. The most detailed discussion may be found in the Utah case of Gray v. Defa. 14 The Utah statute made no provision for the use of a counterclaim nor did it anyway prescribe the procedure to be followed in seeking relief under the act. 15 The trial court's refusal to take evidence on the counterclaim was held to be error by the Supreme Court of that state which decided there was no reason to give a narrow construction to the statute so as to prevent a court from entering the usual legal or equitable coercive judgment customary on a counterclaim. The Oregon case of Lowe v. Harmon 16 is similar in its facts.

In both cases, the cross-defendants based their arguments on the doctrine of Brindley v. Meara, 17 an Indiana case in which the Supreme Court of that state had held that supplementary relief available under a declaratory judgment act 18 was limited to declaratory relief and did not authorize the grant of a coercive judgment. Both reasoned that if the relief available to a plaintiff is limited, the counterclaimant should be in no better position, but the Utah and Oregon courts rejected the Indiana doctrine and adopted instead the more liberal view expressed by two of the leading text writers on the subject. 19 The Utah court even went so far as to deny

13 8 F. R. D. 32 (1948).
14 103 Utah 339, 135 P. (2d) 251, 155 A. L. R. 395 (1943). The plaintiff there sought a declaration that he owned the land in question free from all adverse claims of the defendants. Defendants counterclaimed for a complete adjudication of their rights under a contract of sale and leasehold agreement and for damages.
15 Utah Code 1943, Tit. 104, Ch. 64.
16 167 Ore. 128, 115 P. (2d) 297 (1941).
18 Ind. Acts 1927, Ch. 81, p. 209.
that the declaratory judgment statute set up a new form of action entitled to special treatment, considering it to be merely a 'new form of relief.'\(^{20}\) A declaratory judgment proceeding is usually described as *sui generis*, being deemed neither strictly legal or equitable.\(^{21}\) In *Liberty Mutual Insurance Company v. Jones*,\(^{22}\) however, the Missouri Supreme Court emphasized that the historical affinity of the action is equitable,\(^{23}\) hence it could see no procedural reason to refuse a cross-action for affirmative relief. The court admitted that, by interposition of a demand for an injunction, the suit was converted into a suit in equity.

Difficulty may be expected where special state statutes regulate the use of counterclaims in particular types of actions. A New York statute, for example, once permitted counterclaims in matrimonial actions only "where an action for divorce, separation or annulment is brought by husband and wife."\(^{24}\) In *Kiebler v. Kiebler*,\(^{25}\) where a husband asked for a declaration that he was validly divorced, it was held to be proper for his wife to counterclaim for a divorce. But in *Zawadsky v. Zawadsky*,\(^{26}\) where a husband sought a decision that no valid marriage had been contracted, a counterclaim for separation was held improper as barred by statute, although the court stated that the declaratory judgment act of the state\(^{27}\) was "broad enough to permit matrimonial counterclaims in actions which are not matrimonial in character."\(^{28}\) Justice Pecora, in *Antrones v. Antrones*,\(^{29}\) refused to follow this decision. He admitted that a declaratory action to have a marriage declared void was matrimonial in nature but permitted the counterclaim to stand on the ground that the "provisions for the interposition of counterclaims should be liberally construed so that related issues may be determined in one action."\(^{30}\) Emphasis on the point that the issues should be related is probably without

---

\(^{11}\) Ind. L. J. 376 (1936). An express repudiation of the holding in *Brindley v. Meara* also appears in the case of *Morris v. Ellis*, 221 Wis. 307, 266 N. W. 921 (1936).

\(^{20}\) The court was probably concerned with the fact that any other holding would be inconsistent with a constitutional requirement to the effect that there should be but one form of civil action.


\(^{22}\) 344 Mo. 932, 120 S. W. (2d) 945, 125 A. L. R. 1149 (1939).

\(^{23}\) Such is also the view of Borchard, op. cit., pp. 237-40 and 439.

\(^{24}\) New York Civil Practice Act, § 1106. The statute was repealed in 1948.

\(^{25}\) 170 Misc. 81, 9 N. Y. S. (2d) 909 (1939).

\(^{26}\) 169 Misc. 404, 7 N. Y. S. (2d) 966 (1938).

\(^{27}\) New York Civil Practice Act, § 266.

\(^{28}\) 169 Misc. 404 at 406, 7 N. Y. S. (2d) 966 at 968.

\(^{29}\) 58 N. Y. S. (2d) 241 (1945).

\(^{30}\) 58 N. Y. S. (2d) 241 at 243.
significance in the more modern code states\textsuperscript{31} but, since the older codes still require that the subject of the counterclaim be connected with the subject of the action or arise out of the same transaction,\textsuperscript{32} it is not surprising to find a counterclaim in a declaratory judgment action failing for non-compliance with these rules.\textsuperscript{33}

Neither the Illinois Civil Practice Act nor the rules of the Supreme Court contain any express provision indicating the propriety of the interposition of a coercive counterclaim in a declaratory judgment proceeding. The section of declaratory judgments,\textsuperscript{34} adopted in 1945, is quite liberal and was based primarily on the Michigan act\textsuperscript{35} with significant additions such as the one which authorizes the declaration of rights as an incident to a counterclaim.\textsuperscript{36} Subsection 3 thereof, providing for further relief, is similar to a Kentucky statute\textsuperscript{37} as well as to the Uniform Declaratory Judgment Act,\textsuperscript{38} but there has been no precise interpretation of the statute on this point as yet.\textsuperscript{39}

Most courts will permit a defendant, unwilling to have a declaratory proceeding conducted as a friendly suit at the diplomatic level, to convert the litigation into a regular legal battle with full belligerent status and consequences. Under codes as liberal as the federal, the court may even decide so to convert the character of the suit on its own motion in order to assure a final adjudication of all the issues. The processes of change, leading to uniformity in all types of actions, legal, equitable, or special in origin, appear to be irreversible. It is regrettable that such should be the case when the worthy objectives proposed by Professor Sunderland are sacrificed along the way.

\textbf{H. A. WEBNER}


\textsuperscript{32} In general, see 47 Am. Jur., Set-off and Counterclaim, §§ 44 and 46.

\textsuperscript{33} Montgomery v. City and County of Denver, 102 Colo. 427, 80 P. (2d) 434 (1938).

\textsuperscript{34} Ill. Rev. Stat. 1947, Ch. 110, § 181.1.

\textsuperscript{35} Mich. Comp. Laws 1929, § 13903 et seq.

\textsuperscript{36} A counterclaim for declaratory relief was filed to a declaratory action in the case of Progressive Party v. Flynn, 400 Ill. 102, 79 N. E. (2d) 516 (1948).

\textsuperscript{37} Carrol's Ky. Code 1948, § 639(a)-(1) et seq. Under this statute, in George v. George, 238 Ky. 381, 141 S. W. (2d) 558 (1940), injunctive relief was granted under a counterclaim to a declaratory action.

\textsuperscript{38} 9 Unif. Laws Anno., Declaratory Judgment Act, pp. 213 and 252.

\textsuperscript{39} Western Foundry Co. v. Wicker, 333 Ill. App. 106, 80 N. E. (2d) 548 (1948), reversed on other grounds in 408 Ill. 260, 85 N. E. (2d) 722 (1949), comes closest to the point but the issue was not argued therein. The case proceeded as a suit for a declaration that an amendment to a corporate charter was valid. The defendant, by counterclaim, sought payment of dividends allegedly due. There may be a hint of criticism in the remark of the Appellate Court to the effect that the record did not show "that the propriety of the summary judgment procedure was questioned."
DISCUSSION OF RECENT DECISIONS.

MINES AND MINERALS—Termination of Rights Granted—Whether Abandonment Terminates Rights Acquired under Mining Grant Containing Provision that Grantee shall have Mine in Operation in One Year or Deed will be Void—In the recent case of Midwest-Radiant Corporation v. Hentze,¹ the United States Court of Appeals for the Seventh Circuit was required to construe the effect of an instrument by which the grantor conveyed and quit-claimed all her interest in the coal underlying her farm in a down-state Illinois county in consideration for one dollar and certain specified royalty payments. The instrument provided that the grantee was to commence the sinking of a mine in six months and to have it in operation in one year, or the deed would be void. The grantee never entered upon or developed the property. Seven years after the execution of the instrument, without taking action of any kind, the grantor conveyed the farm to a third person and warranted title to the entire fee. Thirty-five years later, the present owner of the farm leased the same to the plaintiff under a mineral lease for the purpose of mining coal thereon. Thereafter, the defendant procured a quit-claim deed from the grantee in the initial mineral instrument and laid claim to the coal. Plaintiff sought a declaratory judgment to the effect that the defendant had no right, title or interest in the coal, thereby raising an issue as to whether the rights acquired by the grantee in the original instrument were terminated by abandonment evidenced by his failure, for forty years, to sink a mine or enter upon and develop the property. The trial court entered judgment for the defendant, holding that the material instrument was effective to convey an estate upon condition subsequent which could not be lost merely by nonfulfillment of the condition subsequent or by reason of abandonment. Plaintiff appealed, contending that the instrument should have been construed as a mining lease or, even if treated as a grant, the abandonment clause therein should have been given effect. The Court of Appeals reversed in plaintiff’s favor, holding that, whether the instrument be construed as a mining lease or a grant, the necessity for giving such a construction as would carry out the manifest intention of the parties required that the instrument be treated as one designed to convey an estate on condition precedent which had never materialized by reason of abandonment.

¹ 171 F. (2d) 635 (1948).
precedent or on condition subsequent. Lacking state precedent, the federal court was compelled to turn to a decision from another jurisdiction in order to reach the result above set forth. It must be noted, however, that such result is only persuasive authority so far as Illinois courts are concerned, the decision being no more than an indication of what the federal court thinks the Illinois law on the subject should be. A review of the decisions of courts of other jurisdictions upon the question, as well as those Illinois decisions bearing upon related questions, is appropriate, therefore, in order to determine the probable effect of the instant decision upon Illinois law.

It has long been established that rights acquired under a mining lease proper, given in consideration of royalties or a percentage of the profits to be derived from development, may be lost by nonuser or abandonment. In the instant case, however, the defendant relied on the presence in the instrument of the words “convey and quit-claim,” sufficient under Illinois law to convey a title, which title, according to Uphoff v. Trustees of Tufts College and Jilek v. Chicago, Wilmington & Franklin Coal Company, is ordinarily not lost by abandonment. In those cases, it was held that where there has been a severance, by deed, of title between the surface and the underlying minerals, mere nonuser or abandonment by the grantee is not sufficient in and of itself to terminate the mineral estate. However, as the court properly pointed out, those cases are distinguishable from the instant case. Each involved an absolute and present conveyance, completely closed at the time of the transaction, without condition and based on a present consideration, whereas the instrument before the court recited a nominal consideration of one dollar, called for specified royalty payments, and contained an express condition that development should be commenced within a specified time. It shall be shown that the presence of these features, viewed in the light of prevailing principles and precedents, made inevitable the result achieved in the instant case.

The decisions in the Uphoff and Jilek cases are logical extensions of the principle that, according to the common law, there can be no divestiture of a vested legal title by abandonment unless the same results

6 351 Ill. 146, 184 N. E. 213 (1933).
7 382 Ill. 241, 47 N. E. (2d) 96 (1943).
from some form of estoppel or because of sufficient adverse possession under a statute of limitation. In the application of that principle, it has been held that a conveyance by deed of mineral rights or surface rights alone creates two distinct estates in land and, where there has been such a severance of the surface and the underlying minerals, mere possession of the surface is not possession of the minerals, hence occupancy of the surface by the original owner, or those claiming under him, does not cause the statute of limitation to run against the mineral owner. It has also been held that deeds by the original owner, even those purporting to convey the entire title, do not operate as adverse possession or notice of an adverse claim.

The aforementioned principle is applicable, however, only in cases where title has actually vested in the mineral owner. The result in the instant case is grounded upon the determination of the court that title never vested in the grantee under the instrument involved. The sinking and operation of a mine within one year was held to be a condition precedent, a condition which has been defined as one which must happen before an estate can vest or be enlarged. The condition precedent being unfulfilled, no title vested in the grantee. As a result, there was no basis for the application of the doctrine of the Uphoff and Jilek cases.

Undoubtedly, if the condition had been construed as a condition subsequent, the rights acquired under the deed would not have been terminated by the mere nonperformance thereof. Conditions subsequent are such that, by their failure or nonperformance, an estate already vested may be defeated, but the breach thereof does not per se produce a reversion of the title. The estate continues in the grantee until some proper step has been taken to consummiate a forfeiture, such as a re-entry or some other act that may be considered a lawful substitute therefor. There must be some affirmative, positive act manifesting the intention to this end, and it has been held that the mere execution and recording of a deed to a third person is not such an act.

9 Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144 (1898).
11 Renfro v. Hanon, 297 Ill. 353, 130 N. E. 740 (1921); Gill v. Fletcher, 74 Ohio 295, 78 N. E. 433 (1906).
12 Maguire v. City of Macomb, 293 Ill. 441, 127 N. E. 682 (1920).
13 Nowak v. Dombrowski, 267 Ill. 103, 107 N. E. 807 (1915).
14 Hart v. Lake, 273 Ill. 60, 112 N. E. 286 (1916).
It is often difficult to determine whether a condition is precedent or subsequent for the same words may be employed to create each according to the intention of the person creating the condition. Consequently, it has been affirmed as a general proposition that a decision on the question of the nature of a condition depends not so much on artificial rules of construction as it does on the application of good sense and sound equity to the spirit of the instrument. The instant decision, in holding that the provision involved was a condition precedent, is a good illustration of the application of that principle.

The court is not without support in its holding in the instant case that, despite the presence in the instrument of words of conveyance, title did not vest in the grantee. It has been held that the presence of words of conveyance in a mineral deed is not sufficient to require a holding that the effect thereof is to vest in the grantee title to the mineral interests in the land. The courts strive to give effect to the ruling intention of the parties, and in ascertaining that intention they closely scrutinize the real consideration flowing to the grantor to determine whether he has retained such a continuing interest in the premises as would be prejudiced by the failure of the grantee to develop the mineral estate. Typical of the prevailing view are the decisions in the cases of Tennessee Oil, Gas & Mineral Company v. Brown and Eastern Kentucky Mineral & Timber Company v. Swann-Day Lumber Company. In those cases, the instruments involved recited nominal considerations plus reservations of continuing interests; in the form of royalties in the Brown case, but a percentage of the profits that the grantee might realize in the Swan-Day case. Both cases culminated in holdings that the rights of the grantees were terminated by abandonment, the presence in the instruments of words of conveyance to the contrary notwithstanding. In each case it was decided that the nature of the real consideration moving to the grantor required a holding that the instrument did not result in an out and out conveyance in praesenti. The courts were of the opinion that to hold otherwise would be to place upon the instruments highly unreasonable constructions, directly opposed to the manifest intention of the parties.

Admittedly, the owner of land has a right to dispose of his interest

17 Burdis v. Burdis, 96 Va. 81, 30 S. E. 462 (1898).
20 131 F. 696 (1904), cert. den. 197 U. S. 621, 25 S. Ct. 798, 49 L. Ed. 910 (1905).
21 148 Ky. 82, 146 S. W. 438 (1912).
wherein for any valuable consideration he may choose to accept, but the prevailing view appears to be that the recital of a nominal consideration coupled with the reservation of royalties or a percentage of profits indicates that the real consideration inducing the conveyance is the development of the property, and, in the absence of any showing that the true consideration is other than that appearing on the face of the instrument, courts are reluctant to give such a construction to the instrument as would place it absolutely in the power of the grantee to hold the property for an indefinite period of time, or forever, without ever attempting to pursue the essential purposes and objects of the conveyance.

It would appear that this attitude serves to safeguard both public and private interests in the development of minerals, to the extent that it discourages inactivity on the part of holders of mineral interests under instruments similar to the one under consideration. The instant decision is to be commended, therefore, not only because it is in harmony with sound principles and precedents but also because of its salutary effect upon the development of the state's natural resources.

A. N. HAMILTON

SEARCHES AND SEIZURES—UNREASONABLE SEARCHES AND SEIZURES—WHETHER MEMBERS OF A PARTNERSHIP MAY CLAIM BENEFIT OF FOURTH AMENDMENT AGAINST SUBPOENA TO PRODUCE PARTNERSHIP BOOKS AND RECORD—A recent ruling of a federal district court sitting in California dealt with the question as to whether the protection of the Fourth Amendment could be invoked by a partner against an alleged unreasonable search of partnership papers. The Anti-Trust Division of the Department of Justice had there caused a subpoena duces tecum to be issued to one of the partners of a California partnership directing him to produce certain specified records and communications for use as evidence in a criminal prosecution against other members of the partnership. The other partners appeared and moved to quash the subpoena as being in violation of their

22 See Franklin Fluorspar Co. v. Hosick, 239 Ky. 454, 39 S. W. (2d) 665 (1931), holding that a mineral deed vested title in the grantee where the instrument recited a consideration of "one dollar in hand paid" and no royalty or percentage of profits was reserved.

23 See Paine v. Griffiths, 86 F. 452 (1898); Kentucky Rock Asphalt Co. v. Milliner, 234 Ky. 217; 27 S. W. (2d) 937 (1930); Munsey v. Marnet Oil & Gas Co., 113 Tex. 212, 254 S. W. 311 (1923).


1 In re Subpoena Ducas Tecum, 81 F. Supp. 418 (1949).
rights. The court granted the motion, holding that the subpoena was violative of the movants' rights against unreasonable searches and seizures.

The ruling necessarily revolved around the nature and extent of the protection afforded by the constitutional guaranty as interpreted by the courts. It has been well established that compulsory production by an individual of his private papers, under force of a subpoena duces tecum, whether to be used against him in criminal proceedings or to effect a forfeiture of his property, is an unreasonable search and seizure. The doctrine has been also invoked for the protection of a corporation, although in a much more limited sense than is true of the absolute protection afforded the individual. A corporation may be required to produce its papers and records under a proper subpoena because of a difference in the nature of the relationship existing between an individual and the state on the one hand and that of a corporation and the state on the other. The corporation, being a creature of the state, is subject to visitorial powers for, being limited to the specific powers granted, it owes a duty to the state to open its doors to an investigation by the state designed to determine whether the power conferred has been used or abused. The human being owes no such duty to the state for he has received nothing from it insofar as his powers to act are concerned, albeit he does get protection in the exercise thereof. The right to require a corporation to bring in its records is, nevertheless, subject to limitations based upon reasonableness in the exercise thereof, so the subpoena must be definite, must specify particular papers, and must be motivated by more than a mere desire to find some violation of the law from a general perusal of all corporate records and papers. In this limited sense, therefore, corporations enjoy a measure of protection under the Fourth Amendment but such protection is afforded to the corporation alone. It may not be invoked by either an officer or a stockholder, when ordered to produce corporate papers, so as to serve as a personal privilege, for the right is a

4 Coastwise Lumber & Supply Co. v. United States, 259 F. 849 (1919).
7 Grant v. United States, 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423 (1912).
DISCUSSION OF RECENT DECISIONS.

personal one and may be relied upon only by the person who is the owner of the documents in question.⁸

A fairly logical extension of these doctrines has led to the conclusion that a member of a labor union,⁹ or of any other voluntary association,¹⁰ stands in the same relative position as would an officer or a stockholder of a corporation. Neither may refuse to produce the papers or records of his organization under the direction of a lawful subpoena duces tecum for organizations of this nature cannot be said to embody or represent the purely private or personal interests of the individual members. Because corporations¹¹ and other associations such as labor unions¹² and fraternal organizations¹³ have been regarded as entities, distinct and separate from the officers, members, or stockholders thereof, it is quite apparent that the former and not the latter are the only ones privileged with respect to the papers and records of the organization.

The ruling in the instant case, considering the personal aspects of the constitutional privilege in issue, necessarily demands an investigation into the true nature of the status of a partnership, to ascertain whether it should be regarded as a distinct entity or, as was the case at common law, a contractual relationship incapable of existence independent of the individuals composing it.¹⁴ As California disclaims the entity theory of partnership, it was inevitable that the result reached in the instant case should be to quash the subpoena as a violation of the rights of the individual partner for ownership and possession of partnership property, in California, is in the partners as co-owners and not in any entity.¹⁵

Considering the impact of this decision, however, while noting that it is the first recorded case wherein the question of the applicability of the Fourth Amendment to partnership papers has been taken up, it should not be concluded that the case establishes a general rule that the individual members of all partnerships will be entitled to protection. Rather, it extends a general test, in use since Hale v. Henkel,¹⁶ to a partnership, i.e. is the organization such that it may be regarded as an entity or not? A

---

¹⁰ Haywood v. United States, 288 F. 795 (1920).
¹¹ Guckenheimer v. United States, 3 F. (2d) 786 (1925).
¹³ United States v. Walner, 49 F. (2d) 789 (1931).
number of states have adopted the civil law concept of a *societas* under which a juristic person is created separate and distinct from the membership.\(^{17}\) In these states,\(^{18}\) it would logically follow that the entity would be the only one entitled to claim protection against an unreasonable search and seizure of partnership papers. The majority of states, however, including Illinois,\(^{19}\) still adhere to the common law concept so, if the instant case is followed, in such jurisdictions the individual partner might bring partnership papers under the shield of the Fourth Amendment.

F. Wood

---

\(^{17}\) 40 C. J., Modern Civil Law, § 196, p. 1407.

\(^{18}\) The states involved are Georgia, Iowa, Louisiana, Michigan, Nebraska, New Jersey, Oklahoma, Oregon, and South Carolina, as indicated by judicial decisions therefrom as follows: Floyd & Lee v. Boyd, 16 Ga. 34, 84 S. E. 494 (1915); Fenner & Beane v. Nelson, 64 Ga. App. 600, 13 S. E. (2d) 694 (1941); Soursos v. Mason City, 230 Iowa 157, 296 N. W. 807 (1941); Toelke v. Toelke, 153 La. 697, 96 So. 536 (1923); Lebato v. Paulino, 394 Mich. 688, 8 N. W. (2d) 873 (1943); In re Zent's Estate, 148 Neb. 104, 26 N. W. (2d) 793 (1947); Finston v. Unemployment Compensation Commission, 132 N. J. L. 276, 39 A. (2d) 697 (1944); Anderson v. Dukes, 193 Okla. 395, 143 P. (2d) 800 (1943); Leadbetter v. Price, 102 Ore. 47, 201 P. 428 (1921); Chitwood v. McMillan, 189 S. C. 262, 1 S. E. (2d) 162 (1939).

\(^{19}\) Ill. Rev. Stat. 1947, Ch. 106½, § 25. As to co-ownership of partnership property, see Lindley v. Murphy, 387 Ill. 506, 56 N. E. (2d) 71 (1944); Lueth v. Goodknecht, 345 Ill. 197, 177 N. E. 690 (1931). The case of Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782 (1914), denies the existence of a separate partnership entity so far as the Illinois partnership is concerned.
RECENT ILLINOIS DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—
WHETHER AFFIDAVIT TO SUPPORT SUBSTITUTED SERVICE OF PROCESS IN
ACTION AGAINST NONRESIDENT MOTORIST MUST SHOW FULL COMPLIANCE
WITH STATUTE—The case of Rompza v. Lucas serves warning on all who
contemplate relying on the provisions of the Illinois statute which permits
service of process on the Secretary of State in actions involving nonresident
vehicle operators that close attention to statutory requirements is essential
before the court can acquire valid jurisdiction over the nonresident
defendant. The case arose out of an accident occurring in Illinois. Plaintiff
sought to obtain jurisdiction over the defendant, pursuant to the
statute, by filing a copy of the summons with the Secretary of State and
by sending, through registered mail, a notice of such service and a copy
of the summons to the defendant at his last known address. Defendant’s
signed receipt for the latter was obtained. Plaintiff then filed his affidavit
of compliance, bearing a date approximately one year after the accident,
in which the foregoing facts were recited together with a statement that
the defendant “is a nonresident of this state” and that defendant’s last
known place of residence “is” a specified location in Wisconsin. Although
defendant had filed an answer, neither the court nor the plaintiff were
advised thereof and a default judgment was taken against defendant. The
latter subsequently moved to vacate the default judgment, contending the
service of process was defective, and was successful. On appeal by plain-
tiff, this order was affirmed on the ground that the affidavit of compliance
with the statute was deficient in that it did not make it appear that
defendant was a nonresident on the date of the accident but, rather,
disclosed only that he was a nonresident on the date the affidavit was made.
The statute not having been strictly observed, the service was invalid.

The case appears to be the first one in Illinois considering the require-
ments for a sufficient affidavit to show compliance with the statute in
question. As the court is to determine its jurisdiction therefrom, it would

3 As to the necessity for such receipt, see Powell v. Knight, 74 F. Supp. 191
(1947), noted in 26 CHICAGO-KENT LAW REVIEW 275.
4 Emphasis has been added. The full text of the affidavit is set forth in 337
Ill. App. 106 at 110, 85 N. E. (2d) 467 at 469.
5 See comment in 26 CHICAGO-KENT LAW REVIEW 159-62 on the case of Carlson v.
District Court, 116 Colo. 330, 180 P. (2d) 525 (1947), dealing with the right to
use substituted service against a resident who leaves the state after the accident
but before service has been obtained.

249
seem that the affidavit should affirmatively allege all basic facts necessary. These facts are (1) that process has been served on the Secretary of State; (2) that notice of such service, and a copy of the process so served, has been sent, within ten days thereafter, by registered mail, to defendant at his last known address; and (3) that the action arose out of the use and operation of a vehicle, over the highways of Illinois, by one who was, at the time the action accrued, then a nonresident of Illinois. The views expressed in the instant case would seem to be preferred over the holding in *Biddle v. Boyd,* involving a similar point, where the court made much of the fact that defendant did not deny nonresidence at the time of the accident. The desirability of having all jurisdictional facts disclosed in the record should be apparent.

**COURTS—UNITED STATES COURTS—WHETHER STATE STATUTE, WHICH PROHIBITS THE BRINGING OF A WRONGFUL DEATH ACTION IN STATE COURT WHERE CAUSE AROSE ELSEWHERE, OPERATES TO LIMIT FEDERAL COURT SITTING IN THE SAME JURISDICTION**—The Illinois Injuries Act prohibits the bringing of an action in Illinois to recover damages for a death occurring outside of the state where a right of action for such death exists under the law of the place where such death happened provided service of process may be had upon the defendant in such place. In *Davidson v. Gardner,* the United States Circuit Court of Appeals, Seventh Circuit, was called on to decide whether this prohibition also extended to a federal court sitting in Illinois. Briefly, the fact situation was that the plaintiff’s husband was killed, while in the course of his employment as a railroad switchman for the Burlington Railroad Company, in Kansas City, Missouri. Death was caused when the decedent stepped into the path of a locomotive operated by the Alton Railroad Company, of which the defendant was trustee. Suit was brought in the United States District Court for the Northern District of Illinois on two counts; one based on the Federal Employers’ Liability Act, the other under the Missouri wrongful death statute. The principal defendant moved to dismiss on the ground that the District Court did not have jurisdiction by reason of the Illinois statute referred to above. The motion was denied and, after trial, judgment was awarded to the plaintiff. This judgment was affirmed on appeal when the Circuit Court of Appeals agreed that the decision in the case of

---

6 *8 Harr. (Del.) 469, 193 A. 593 (1937).*
2 *172 F. (2d) 188 (1949).*
3 *45 U. S. C. A. § 51 et seq.*
Stephenson v. Grand Trunk Western Railroad Company was controlling on the point that the extent of the jurisdiction of federal courts is solely a matter of congressional bestowal and not subject to limitation by any state agency or statute, the rule of Erie Railroad Company v. Tompkins being confined solely to matters of substance and not of jurisdiction. The significance of the case becomes apparent, however, and its soundness open to doubt, when it is contrasted with two recent cases decided by the United States Supreme Court shortly after the opinion in the instant case was handed down. In Cohen v. Beneficial Industrial Loan Corporation and in Woods v. Interstate Realty Company, the highest court held that state statutes regulating proceedings in state courts were binding on federal courts when exercising jurisdiction on the basis of diversity of citizenship.

Forcible Entry and Detainer—Appeal—Whether Motion to Vacate Judgment and Grant New Trial, Unsupported by Affidavit, Stays Running of Time Within Which to Perfect Appeal—In the recent case of Atlas Finishing Company v. Anderson, the Appellate Court for the First District was required to determine whether the five-day limitation for the perfection of appeals in forcible entry and detainer suits begins to run from the date of entry of the judgment or from the date of disposition of a motion that the judgment be vacated and a new trial granted, where the case is heard by the court without a jury and the motion is unaccompanied by affidavit. The plaintiff's suit for possession of the premises was heard by the court without a jury, resulting in a judgment in favor of plaintiff on March 12th. On March

---

5 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).
6—U. S. —, 69 S. Ct. 1221, 93 L. Ed. (adv.) 1221 (1949). Douglas, J., with whom Frankfurter, J., concurred, wrote a dissenting opinion, as did Rutledge, J. The case involved the applicability of a New Jersey statute, requiring security for costs in a stockholder's representative suit, to a case pending in a federal court.
7—U. S. —, 69 S. Ct. 1235, 93 L. Ed. (adv.) 1245 (1949). Jackson, J., wrote a dissenting opinion, concurred in by Rutledge, J., and Burton, J. The case dealt with the force of a Mississippi statute which made void all contracts entered into by unlicensed foreign corporations. The majority required that the statute be applied to the federal court proceeding.
1 336 Ill. App. 167, 83 N. E. (2d) 177 (1949). Niemeyer, J., wrote a dissenting opinion. Information received from Eugene H. Dupee, Jr., counsel for the plaintiff, indicates that appeal to the Illinois Supreme Court was granted on a certificate of importance but, following a settlement, the appeal was dismissed pursuant to stipulation of the parties.
19th, defendant filed a written motion specifically asking that the judgment be vacated and a new trial be granted. That motion was denied on the day on which it was filed. On March 23rd, within five days after the denial of defendant’s motion but on the eleventh day after entry of judgment, defendant filed notice of appeal, both from the judgment and also from the final order denying the motion. Upon plaintiff’s motion, the Appellate Court, one judge dissenting, dismissed the appeal on the ground that it was not properly perfected. The majority held that, as defendant’s motion failed to comply with the provisions of the Civil Practice Act requiring that good cause for the vacating of a judgment be shown by affidavit, the same should not be considered as a motion to vacate the judgment but rather a motion for new trial, particularly in view of the fact that the defendant so labelled it in its notice of appeal. Granting that Section 68 of the Civil Practice Act prevents truly final judgment in jury cases until motions for new trial are disposed of, the court held that that section did not apply to cases heard by the court without a jury, hence defendant’s motion did not affect the finality of the judgment and, a fortiori, did not stay the running of the jurisdictional time limitation for the perfection of an appeal.

In his dissenting opinion, Judge Niemeyer laid great stress on the well-established principle that, where a motion to vacate is made within thirty days of entry of a judgment, no judgment can be regarded as final until the motion is disposed of. It is to be noted, however, that the majority opinion does not reject that rule. On the contrary, from the manner in which the court went to great length to distinguish the motion in the instant case from a motion to vacate a judgment, it is to be inferred that, had the defendant’s motion been construed to be one of the latter type, a different result would have followed. The majority was of the opinion that Section 50 of the Civil Practice Act, which requires that good cause be shown by affidavit in support of a motion to vacate a judgment, was controlling over the older provisions of the Judgment

3 Ibid., Ch. 110, § 174.
4 Ibid., Ch. 110, § 192.
5 The court cited Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 N. E. 873 (1908), which held that a motion for new trial in non-jury cases is neither required nor authorized by law or the rules of practice, and can serve no purpose whatever in preserving questions for review.
RECENT ILLINOIS DECISIONS.

Act, silent on the point. The motion in question, lacking an affidavit, was said to be a motion for some other purpose. The dissenting judge, by contrast, was of the opinion that the right to move within thirty days to vacate judgment should not be restricted to the remedy provided by the Civil Practice Act and that, regardless to the name given, the motion was, in substance, a motion to vacate the judgment and should have been given that effect.

The dissenting opinion is not without support in its holding that the motion involved should have been given the effect of a motion to vacate judgment. In the earlier case of Hosking v. Southern Pacific Company, where the trial court heard the case without a jury and the motion was similar to the one in the instant case, the Appellate Court held that, although a motion for a new trial in non-jury cases is entirely useless so far as preserving any question for review is concerned, no rule of law prevents the trial judge from entertaining such a motion and it is, in effect, an application for a rehearing which, when entertained, suspends the finality of the judgment already entered. The Supreme Court, affirming the decision, also treated the motion as one to vacate a judgment, sufficient to stay the same and prevent time from running. The instant decision would also seem to be in direct conflict with the holding in Geisler v. Bank of Brussels, wherein the court indicated that the pertinent provisions of the Judgment Act were controlling over the Civil Practice Act provisions rather than vice versa. The present case, then, appears to produce an unwarranted technical application of the Civil Practice Act not in harmony with its avowed purposes.

NEGLIGENCE—ACTIONS—WHETHER ALLEGATION OF FREEDOM FROM CONTRIBUTORY WILLFUL AND WANTON MISCONDUCT IS ESSENTIAL IN STATEMENT OF CASE BASED ON DEFENDANT’S WILLFUL AND WANTON MISCONDUCT—In the recent case of Prater v. Buell, the plaintiff filed suit to recover for injuries allegedly resulting from the purported willful and wanton

9 Ibid., Ch. 77, § 83.
10 The dissenting judge cited Department of Public Works and Buildings v. Legg, 374 Ill. 306, 29 N. E. (2d) 515 (1940). That case held that a court has inherent power to vacate a judgment during term time independently of any statutory authority.
13 Counsel for plaintiff notes that the ruling may have significance in other proceedings, beside forcible detainer cases, where the appeal period is shorter than the one generally applicable to civil suits. He specifically refers to cases under Ill. Rev. Stat. 1947, Ch. 46, § 6 et seq., and Ch. 102, § 16.
1 336 Ill. App. 533, 84 N. E. (2d) 676 (1949).
misconduct of the defendant who owned and operated a dairy farm upon which the plaintiff worked as a farm hand. While the plaintiff was driving a herd of cattle to the barn, as part of his regularly prescribed duties, he was gored by a bull. The complaint charged willful and wanton misconduct on the part of defendant in that he had repeatedly baited and annoyed the bull thereby greatly increasing its vicious propensities. The defendant's motion to dismiss on the ground that the plaintiff had failed to state a cause of action, inasmuch as his complaint did not allege freedom from contributory willful and wanton misconduct, was sustained. On appeal from a judgment dismissing the suit because plaintiff refused to plead further, the Appellate Court for the Third District affirmed the ruling. In this, the first case in Illinois which has held that an allegation of freedom from contributory willful and wanton misconduct is an essential allegation in a complaint charging the defendant with similar conduct, the court has based its holding on the same principle which has led to the well-settled doctrine that freedom from contributory negligence is an essential allegation in an action based on simple negligence. The principle that no one shall be permitted to profit from a wrong to which he has contributed has also been applied in suits based on willful and wanton misconduct, but it does not appear that an allegation of freedom from conduct of that type has heretofore been regarded as necessary to the statement of a case. Now that the same has become essential, the customary phrase to the effect that plaintiff was "exercising due care and caution for his own safety" may be insufficient in view of the fact that the presence of simple negligence is no defense to a suit based on willful misconduct.

PLEADING—PROFERT, OYER AND EXHIBITS—WHETHER NECESSARY ALLEGATIONS OF A COMPLAINT MAY BE SUPPLIED BY AN UNNECESSARY EXHIBIT ATTACHED TO COMPLAINT—The Appellate Court for the First District had opportunity in the late case of Morris v. Broadview, Inc., to

2 Hanson v. Trust Co. of Chicago, 380 Ill. 194, 43 N. E. (2d) 931 (1942).
3 Walsh v. Gazin, 316 Ill. App. 311, 45 N. E. (2d) 95 (1942). A special interrogatory finding plaintiff guilty of willful and wanton misconduct was there set aside as being unsupported by the evidence.
4 The complaint in Walsh v. Gazin, 316 Ill. App. 311, 45 N. E. (2d) 95 (1942), the most recent one on the subject, seems merely to have alleged that the plaintiff was "in the exercise of ordinary care."
5 Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275 (1913).
discuss the effect of Section 36 of the Civil Practice Act. Plaintiff therein was a certificate holder in the defendant corporation and had requested, by mail, a list of all other corporate certificate holders, beneficiaries of a trust, for the purpose, as stated therein, of "discussing with them the advisability of opposing any attempt by you to further extend the trust and insisting upon a sale of the property." Upon defendant's refusal to comply, plaintiff filed a complaint in equity asking, among other things, for an order compelling the defendant to furnish the list of certificate holders. The complaint itself contained no allegation as to plaintiff's purpose in making the request but, in the copy of plaintiff's letter to defendant attached to the complaint as an exhibit, the purpose was there set out. The trial court struck the complaint on motion and dismissed the suit on the ground that the Business Corporation Act, upon which plaintiff rested his claim, required that the list be given only for a proper purpose which should have been specifically alleged in the complaint, and the exhibit attached, not being required by Section 36 of the Civil Practice Act, merely served as evidence of the demand and nothing more. The Appellate Court reversed, one justice dissenting, when it decided that the words of Section 36 to the effect that, in pleading any written instrument, a "copy thereof may be attached to the pleading as an exhibit" and that "the exhibit shall constitute a part of the pleading for all purposes," mean exactly what they apparently seem to say. Although the first part of the code section clearly refers to the attaching of certain mandatory exhibits on which the claim is founded, not concerned here, the last portion is cast in permissive language. The final sentence thereof, declaring exhibits to be parts of the pleading "for all purposes," has now been made to apply to both types of exhibits. The advantage, from the standpoint of the plaintiff, is obvious.

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER ILLINOIS PROBATE COURT HAS JURISDICTION TO ORDER CONSERVATOR OF INCOMPETENT LEGATEE TO RENOUNCE WILL ON WARD'S BEHALF—Under the appeal taken in the recent case of In re Reighard's Estate, the

---

3 338 Ill. App. 99 at 102, 86 N. E. (2d) 863 at 864-5.
5 Failure to attach exhibits of this character, or give adequate explanation for the failure, will make the complaint subject to a motion to strike: Sarelas v. Fagerburg, 316 Ill. App. 606, 45 N. E. (2d) 690 (1943).
1 402 Ill. 364, 84 N. E. (2d) 345 (1949).
Illinois Supreme Court was asked to consider whether an Illinois county court had the power to order the conservator of an incompetent person's estate to renounce a will in behalf of his ward. The will there concerned devised a portion of the estate to a trustee who also served as executor. The trustee was directed to pay the net income from the trust estate to the testator's surviving widow for life with a remainder over upon her death. The will further provided that, if any person entitled to the payment of money under the will should become disabled, the trustee should retain all monies so payable and apply only so much thereof as he deemed necessary for the proper support and maintenance of the disabled beneficiary. One month after the will was admitted to probate, the testator's widow was declared incompetent by the same county court and a conservator was appointed over her person and estate. He filed a petition in the court of his appointment seeking a direction as to whether he should renounce the will in behalf of the widow and was ordered so to do. The trustee and executor, having been notified of the proceeding and having participated in the hearing thereon, appealed to the circuit court, claiming that the petition should be dismissed on the ground that the county court, and the circuit court on appeal, each lacked jurisdiction in that renunciation might be ordered only by a court of chancery. It was also urged that the proceeding, being an *ex parte* one, should be dismissed for want of necessary parties. The motion was denied and the order was affirmed. On further appeal to the Supreme Court, that decision was affirmed on the authority of the earlier case of *Davis v. Mather*. That case had held that an Illinois probate court, under a statute conferring equitable jurisdiction over the estates of incompetent wards, did have the power to order a renunciation of a will whenever it was determined that such action was for the best interest of the incompetent ward. Although the statute referred to therein was since repealed, the sense thereof forms the present Section 50 of the new Probate Act. The practice has not, in this respect, been in anyway changed from that which formerly prevailed.

---

2 Direct appeal to the Illinois Supreme Court was proper under Ill. Rev. Stat. 1947, Ch. 110, § 199(1).

3 309 Ill. 284, 141 N. E. 209 (1923).

4 Hurd's Rev. Stat. 1921, Ch. 3, § 78.


6 The court also noted that, as renunciation is a matter of right, there is no occasion for notifying the legatees and devisees of the fact of renunciation except as the same is made of record, hence an *ex parte* proceeding to obtain direction with regard thereto is proper.
Workmen’s Compensation—Relation of Parties to Compensation Act and Occupations Governed Thereby—Whether Relation of Parent and Child Prevents Minor Son from Being an Employee of His Father within Meaning of Illinois Workmen’s Compensation Act—Attention is directed to the decision of the Illinois Appellate Court for the First District in the case of Victor v. Dehmlow wherein the court had to determine whether or not the minor son of the deceased defendant was an employee of the latter within the meaning of that term as used in the Illinois Workmen’s Compensation Act. The question became important in order to decide whether the defendant was entitled to the benefits of Section 29 thereof or whether plaintiff might maintain an action for the wrongful death of her intestate husband. The cause arose out of an accident in which the plaintiff’s intestate was struck and killed by defendant’s truck operated by defendant’s minor son. The son had been sent on a business errand and was returning to the place of business when the accident occurred. It was conceded that the employer of plaintiff’s intestate as well as defendant’s intestate were operating under the act at the time of the accident but it was urged that the death of plaintiff’s intestate did not arise out of and in the course of his employment and also that the minor son was not an employee of his father at the time of the accident. In support of the latter contention, it was shown in evidence that the son was a school boy, that he was not paid wages, that no social security taxes were paid for him, that he drove the truck for his father only after school hours, and that his father supported him; all tending to show an absence of any contractual relationship. Both issues were resolved in favor of plaintiff at the trial and she recovered judgment. An appeal by defendant forced consideration of the same two points.

It was decided that the deceased employee died from an accident arising out of and in the course of his employment, and that the minor

1 336 Ill. App. 432, 84 N. E. (2d) 342 (1949).
2 Ibid., Ch. 48, § 166. That section is intended to govern those situations in which the employee is injured through the negligent conduct of someone other than his employer. If the offending party is also bound by the Act, the injured person’s employer is obligated to provide him with compensation benefits, the injured employee being limited to the statutory remedy, while all right to recover from the offending party is transferred to the employer of the injured party. Otherwise, the injured party has an election to recover from his employer, with subrogation accordingly, or to proceed directly against the offending party in a common law action.
3 Ibid., Ch. 48, § 166. That section is intended to govern those situations in which the employee is injured through the negligent conduct of someone other than his employer. If the offending party is also bound by the Act, the injured person’s employer is obligated to provide him with compensation benefits, the injured employee being limited to the statutory remedy, while all right to recover from the offending party is transferred to the employer of the injured party. Otherwise, the injured party has an election to recover from his employer, with subrogation accordingly, or to proceed directly against the offending party in a common law action.
4 Ibid., Ch. 48, § 142(second), defines an “employee” as one “in the service of another under any contract of hire, express or implied, oral or written . . . including aliens, and minors.”
5 That ruling, while important to the outcome of the case, was not novel.
son, driving the truck, was a covered employee because of the evident legislative purpose to include as such even those who had no fixed rate of compensation. The court found no occasion to distinguish between minors employed by strangers and those employed by their parents. The case, however, has far-reaching implications for, if the minor so employed is a covered employee where third persons are concerned, it would seem to follow that he should also be treated as such when he becomes the victim of an industrial accident connected with the parent’s business. A way now seems to have been opened up to claims for compensation by minors who perform only casual services, often exacted by the parent as a part of the child’s training. It would seem, then, that stronger proof should have been required to establish a contract of hiring than appears in the record of the instant case, unless the court is willing to permit any minor child to have his action against the parent for physical harm suffered at the parent’s hands.

6 Ill. Rev. Stat. 1947, Ch. 48, § 147(f), provides a method for the computation of compensation to be paid to an employee who receives no fixed wage.

7 A wage-earning but unemancipated minor child has been held entitled to compensation benefits against the parent’s insurance carrier, despite the general public policy forbidding suits between parent and child over injury inflicted by the one on the other, in Dunlap v. Dunlap, 84 N. H. 352, 150 A. 905, 71 A. L. R. 1065 (1930).
Within the last half century, the United States Supreme Court has effected a considerable change in tack in statutory interpretative theory. While the recent tendency to examine minutely into the legislative history of a given statute is certainly the more rational approach, that tendency imposes an almost insuperable burden on the attorney. He can no longer feel secure in his knowledge of a law merely from reading the text of an enacted statute. He must, instead, become adept at predicting what the court will determine Congress had in mind when enacting the law and what it intended that statute should mean. To be able to do so takes more than clairvoyance; it requires a careful study of the voluminous mass of data to be found, among other places, in the congressional hearings and debates incident to the passage of the particular statute. The United States Supreme Court, the government attorneys, and perhaps some of the more prosperous law firms, will have this material available. The average firm or the individual lawyer, however, could hardly afford to house, let alone collect and index, the huge mass of printed matter which may have been produced. Even assuming that it was available, a vast amount of time-consuming effort would be required to winnow the chaff of the irrelevant, immaterial political soundings from the pertinent thinking on the point.

The editors of this book, cognizant of the problem created by the general inaccessibility of legislative material and its normally disorganized state, have set out to encroach upon chaos. Their approach is eminently logical. They chose, for purpose of demonstrating the utility of their plan, a single federal statute, the Revenue Act of 1948. They

The court once said that "the province of construction lies wholly within the domain of ambiguity. . . ." See Hamilton v. Rathbone, 175 U. S. 414 at 421, 20 S. Ct. 155 at 158, 44 L. Ed. 219 at 222 (1899). In more recent years, by contrast, the court has noted that "there is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words." See United States v. American Trucking Association, 310 U. S. 534 at 543, 60 S. Ct. 1059 at 1063, 84 L. Ed. 1345 at 1350 (1940).
gathered all of the material concerning its legislative history and arranged that material in a planned sequence under the section, or sub-section, of the act to which the material related. In addition to editorial reorganization, they liberally applied a blue pencil to congressional verbiage which pertained to no section of the statute when viewed from a dispassionate standpoint. By and large, the editing has been done with discrimination and with ready reference to title and source for those who desire more complete information. There has been no attempt made at editorial rationalization nor is this a textual restatement of the law. The book does, however, reduce to intelligible status the source material, hence it should prove invaluable to workers in the tax field. For counsel preparing an appellate brief on a tax question, the book is clearly a "must."

One may, however, indulge in some speculation regarding the volume. The editors, both from the standpoint of practical utility and also that of conserving space, have been obliged to delete considerable of the material brought out in the congressional hearings and debates, material which was deemed unessential to or unrelated to the statute. The necessary consequence is that the reader must rely on the editors' perspicacity if entire dependence is to be placed on this volume rather than on the original source materials. When one reads, for example, the purely political, self-laudatory exchange between Representatives Reeves and Dingell, as it appears on pages 200-4, one's faith is somewhat shaken. An even more serious defect, one which it is hoped will be cured in later works of the series, is the failure to date the material cited. It is true that there is a chart setting forth the chronology of events as they appear in the Congressional Record, but there is no inkling of date for the House and Senate Hearings. Unless the reader is able, constantly, to make reference to the chart he will rapidly lose all sense of time, a factor the significance of which ought not be lost.

E. G. ROBBINS


The principal title for this book should be especially noticed for the work in question deals with both law and tactics in the conduct of jury trials. No case, of course, can be properly tried without an observance to the requirements of law. Until one has become thoroughly seasoned in practice, however, the appearance of tactics as a trial problem is less manifest. The term "tactics," primarily a military expression, has been
Much bandied about and often improperly used. The author, long a prominent member of the Illinois bar, as well as being dean-emeritus of a mid-western law school, uses the term in its strictly proper sense. It has been defined as the "art of handling troops in the presence of the enemy" from whence comes the secondary meaning of "any method of procedure, especially of adroit devices or expedients to accomplish an end." Viewed in that light, the work most ably discusses and illustrates the strategic uses to be made of available trial materials. It relies upon tested courtroom procedures.

The scope of the contents of this book is broad. It delves into historical backgrounds, elucidates upon the right to jury trial, and comments on the selection of jurors, both from the standpoint of their qualifications and their challenge. It advises on the preparation and presentation of a case, with unusually authentic treatment of the subject of direct examination. It is honest, realistic and complete in its treatment of the process of cross-examination. It covers other aspects of the trial, yet finds space in which to deal with such specialized matters as the use of expert testimony, opinion evidence, jury argument, instructions and verdicts. Each point made is replete with citation to authority and, whenever possible, verbatim excerpts from actual trial records, in question and answer form, have been used for illustrative purposes. The book is both scholarly and practical, as might well be expected from one with Mr. Busch's background. All in all, it is as complete and authoritative a work as may be found between the covers of a single volume.

R. S. Bauer


A conventional law textbook usually purports to provide answers to all the questions apt to develop in the given field, the answers being arranged in schematic fashion by subjects. Here is an unconventional work. It takes up the problem of organizing a business enterprise, whether in corporate or other form, but it provides a parallel rather than a topical discussion of the relative advantages and disadvantages of each type of business arrangement. The reader is left to decide for himself, not asked to accept the author's judgment in the matter. It should not be inferred that the author lacks judgment; he is, in fact, a practicing lawyer, a writer of legal articles and a law teacher of graduate
rank. It is the suggestive, instead of the exhaustive, character of the publication which provides one of its finest features.

The entire field is surveyed, from the preliminary discussions, through protection against disclosures, problems of promotion, selection of domicile, incorporation procedures, and capitalization and financing. Organization is not limited to the creation of the utterly new but includes discussion of the taking over of existing enterprises. Just as the preacher contemplates the grave at moment of baptism, so the lawyer is urged and shown how to give attention to death and its attendant consequences on the business being organized at the moment of its birth. No small part of the book is devoted to tax matters. In fact, some eighty pages have been turned over to tables disclosing the tax expense or saving attendant upon the choice of one form of enterprise over another, material not readily available elsewhere. The argument which has been raging over whether dividend rights on preferred stock should be vested or not has been aptly summarized and tendencies in the law have been charted. Other expected features in a work of this character have not been overlooked. The lawyer may here well find guidance in a not uncomplicated field.

W. F. Zacharias