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Recent Illinois Decisions

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ABATEMENT AND REVIVAL — ANOTHER ACTION PENDING — WHETHER PRESENCE OF PENDING ACTION ON SAME CLAIM IN A FOREIGN JURISDICTION SERVES AS GROUND FOR DISMISSING COMPLAINT—Construction of a portion of the Illinois Civil Practice Act was called for in the recent case of *F & F Laboratories, Inc.* v. *Chocolate Spraying Company.*[1] The proceeding began as a state court suit in equity for an accounting, to which the defendants filed a counterclaim. The plaintiff then moved, under Section 48(d) of the Civil Practice Act,[2] to dismiss the counterclaim on the ground that the cause of action set forth therein had been made the subject of a prior suit then pending between the parties in a federal district court sitting in the same locality. The trial court sustained this motion and dismissed the counterclaim. On appeal, the Appellate Court for the First District affirmed this order, declaring that the statute was broad enough to be applied to all cases wherein another action is pending without regard to whether the same is pending in another court of the same state or not.

It has long been the doctrine of the common law that a litigant should not be subject to the harassment of being obliged to defend multiple suits on the same claim at the same time when one suit would serve the purpose, so a defense by way of abatement has been developed to prevent that possibility. Before abatement could be had, however, it has been the uniform rule, until now, that the person objecting should, by plea or answer, demonstrate that the earlier action was (1) based on the same facts; (2) ran between the same parties, or their privies; (3) was of the same general nature, both suits being either legal or equitable in character; (4) was designed to procure the same relief; and (5) was pending in the same jurisdiction.[3] If, therefore, the earlier pending action had been instituted in some other state, this type of objection was not available.[4]

[1] 6 Ill. App. (2d) 299, 127 N. E. (2d) 682 (1955). Leave to appeal has been granted. Attention is also called to the decision of the Illinois Supreme Court in Ginther v. Duginger, 6 Ill. (2d) 474, 129 N. E. (2d) 147 (1955), where the court held that the presence of a pending suit in ejectment involving the same parties and the same premises would not operate to stay a later action in equity designed to quiet title as the two actions were essentially different in character.

[2] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(d), specifies that a motion to dismiss will lie where "there is another action pending between the same parties for the same cause." Ibid., § 172(2), provides for a similar motion against a counterclaim. The Revised Civil Practice Act of 1955, H. B. No. 439, § 48, contains similar provisions but the specified ground appears therein as § 48(1)(c).

[3] In general, see Clephane, Handbook of the Law of Equity Pleading and Practice (West Publishing Co., St. Paul, 1926), p. 179.

[4] Allen v. Watt, 69 Ill. 655 (1873); McJilton v. Love, 13 Ill. 486 (1851).

Modern procedural methods permit the use of a motion, offered in advance of pleading, to raise objections of this nature[5] but it would normally be supposed that the substance of the objection would not have been changed, despite the fact that other procedural methods may have been devised,[6] since the purpose is the same, that of bringing about no more than the abatement of the later suit.[7] Nevertheless, the court concerned with the instant case, on the basis of reasoning that if the legislature had intended to adopt or to place limitations around the specific ground it could have done so by suitable language, now takes the position that when the legislature said "another suit pending" it meant "pending anywhere."[8] As it has been held that the pendency of a case in a state court is no bar to additional proceedings in a federal court,[9] it does seem gratuitous to engraft a contrary limitation on state court authority when the initial proceeding has been commenced in a federal court.[10]

The court did, however, exercise a degree of ingenuity when it took the doctrine of *forum non conveniens,* often utilized to prevent a plaintiff from litigating out of context,[11] as the basis for a determination that much the same principle could be applied to a defendant offering a counterclaim. Since the defendant in the instant case was not obliged to present the counterclaim,[12] it could have been omitted from the suit without caus-

5 See Clark, Handbook of the Law of Code Pleading (West Publishing Co., St. Paul, 1947), 2d Ed., pp. 545-67.

6 Ill. Civ. Prac. Act Anno., p. 118, notes that the objection in question would, at common law, have been raised "by a plea in abatement." There is no indication given therein that the framers had in mind any change in the substantive requirement but merely contemplated a new, and different, way of presenting the objection.

7 Hinton, Illinois Civil Practice Act (University of Chicago Press, Chicago, 1934), p. 80, notes that the grounds specified in Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172, clauses (a) to (d) inclusive, are "all defenses in abatement. They would not result in any event in a judgment on the merits, but simply a dismissal."

8 In Culbertson v. Midwest Uranium Co., 132 F. Supp. 678 (1955), a motion to dismiss, based upon the fact that another suit was pending between the parties in a federal court in another district, was rejected on the ground the two suits were lacking in identity since one sought damages for a conversion and the other sought specific performance in equity. The federal court did, however, treat the motion as one to stay the proceedings in the second suit, and granted relief accordingly.

9 Premier Malt Products Co. v. Ackerman, 24 F. (2d) 89 (1927).

10 The New York court concerned with the case of Zenie v. Miskend, 245 App. Div. 634, 284 N. Y. S. 63 (1936), affirmed in 270 N. Y. 636, 1 N. E. (2d) 367 (1935), did not hesitate to reject a motion to abate a state court proceeding because of the presence of an earlier pending suit in a federal court. The decision therein was attained after the adoption of the Illinois Civil Practice Act of 1933, so the case cannot be considered as a controlling precedent under the rule announced in Hansen v. Raleigh, 391 Ill. 536 at 547, 63 N. E. (2d) 851 at 857 (1945). It should be remembered, however, that the language of the Illinois statute was taken from Thompson Cons. Laws N. Y. 1939, Civil Practice Act, § 278, and N. Y. Rules 106-10.

11 See, for example, Whitney v. Madden, 400 Ill. 185, 79 N. E. (2d) 593 (1948).

12 Compare the permissive counterclaim authorized by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 162, with the mandatory one required by Fed. Rules Civ. Pro., Rule 13(a). Under the latter, the defendant is excused from presenting a counterclaim which is already the "subject of another pending action."

ing prejudice. Nevertheless, in the light of the section of the Civil Practice Act dealing with judgments,[13] a practical injustice could be done if a court should be permitted to adjudicate upon the plaintiff's case because it believes the forum to be a convenient one while, at the same time, rejecting the protection afforded by a counterclaim simply because the court conceives that some inconvenience may be present therein. In the absence, therefore, of a clear-cut and substantial reason for dismissing the counterclaim, the result reached in the instant case would appear to be lacking in support.

ADOPTION—INHERITANCE BY ADOPTED CHILDREN—WHETHER CHILD, ON SECOND ADOPTION WHILE FIRST ADOPTING PARENTS ARE STILL LIVING, RETAINS RIGHT TO INHERIT BY DESCENT FROM FIRST ADOPTING PARENTS—The situation involved in the recent case of *In re Leichtenberg's Estate*[1] posed a new problem for Illinois courts in the field of family law. The appellee therein, a nephew of the deceased person whose estate was in probate, had, with the consent of his natural parents, been adopted by his paternal aunt and her husband many years prior to the action in question.[2] A short time thereafter, the appellee was, again with consent, readopted by his natural parents at a time when the adopting parents were still living. After the death of the aunt, her husband having predeceased her, the appellee sought to be declared her sole surviving heir and, as such, to be entitled to a preference in inheritance over her blood relatives. The probate court held otherwise; the circuit court reversed; and, on further appeal, the Appellate Court for the First District reinstated the finding of the probate court when it held that the nephew, following readoption, lost all potential rights to inherit from the first adopting parents.

Prior to the instant decision, no Illinois reviewing court appears to have had occasion to consider this particular problem although, in the case of *In re Estate of Tilliski*,[3] it had been held that a child, on adoption, would not cease being a potential heir of the natural parents. Despite the novelty of the issue from the Illinois standpoint, the problem is not

[13] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 174(3), which directs that, in case a counterclaim is filed, the judgment "shall be so drawn as to protect the interests of both parties." This provision was deleted in the Revised Civil Practice Act of 1955, but the essence thereof has been retained: Laws 1955, H. B. 439, § 50(2).

[1] Sub nom. Remich v. Mueller, 5 Ill. App. (2d) 336, 125 N. E. (2d) 277 (1955). Leave to appeal has been granted.

[2] There was evidence tending to prove that one of the reasons for the adoption was that the male adopting parent, who was eligible for draft during World War I, believed that he could avoid being inducted into military service by claiming that the appellee was a dependent child. The readoption occurred not long after hostilities were over.

[3] 390 Ill. 273, 61 N. E. (2d) 24 (1945), affirming 323 Ill. App. 490, 56 N. E. (2d) 481 (1944).

a novel one in a number of other jurisdictions and diametrically opposite results have been obtained.[4] The Appellate Court, recognizing that the readoption would not jeopardize rights already vested,[5] chose to follow the view which would deny a continuance of the potential rights of the adopted child on the ground that, in Illinois, any expectancy could be rendered worthless in the event the first adopting parents were to take action to nullify the same.

The court did not, however, take into consideration the holding of the Court of Appeals for the Seventh Circuit in the case of *Carter Oil Company* v. *Norman*[6] wherein the federal court, construing the Illinois statute on the point,[7] declared that, upon adoption, a legal relationship between the adopting parents and the adopted child was created equivalent to the one which would exist if the child had been born into the family of the adopting parents. It being settled, in Illinois, that the child does not lose the right to inherit from the natural parents when adopted but gains additional rights in the adopting parents, it would seem somewhat unusual to resolve that these additional rights should be lost when the child, without its consent,[8] is readopted. About all that could be said in favor of that view is that the Appellate Court appears to have felt itself constrained to give weight to the particular foreign readoption decree which had declared that the child should be fully restored to the natural parents "as though no prior adoption had ever been made."[9] In the absence of such a provision, the better solution would seem to be one contrary to the holding reached in the instant case.

ATTORNEY AND CLIENT — COMPENSATION AND LIEN OF ATTORNEY — WHETHER ATTORNEY IS ENTITLED TO ASSERT LIEN AS BASIS FOR REFUSAL TO PRODUCE RECORDS AND PAPERS SUBPOENAED IN CASE AGAINST CLIENT FOR FEES—The Appellate Court for the First District was recently asked,

[4] In favor of loss of rights of inheritance are the cases of In re Zaepfel's Estate, 102 Cal. App. (2d) 774, 228 P. (2d) 600 (1951); In re Carpenter's Estate, 327 Mich. 195, 41 N. W. (2d) 349 (1950); In re Klapp's Estate, 197 Mich. 615, 164 N. W. 381 (1917); In re Hack's Estate, 166 Minn. 35, 207 N. W. 17 (1926); and In re Talley's Estate, 188 Okla. 338, 109 P. (2d) 495 (1941). Contra: Hawkins v. Hawkins, 218 Ark. 423, 236 S. W. (2d) 733 (1951); Holmes v. Curl, 189 Iowa 246, 178 N. W. 406 (1920); Viller v. Watson's Adm'x, 168 Ky. 631, 182 S. W. 869 (1916); and In re Estate of Egley, 16 Wash. (2d) 681, 134 P. (2d) 943, 145 A. L. R. 821 (1943).

[5] See Patterson v. Browning, 146 Ind. 160, 44 N. E. 993 (1896).

[6] 131 F. (2d) 451 (1942).

[7] Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 165.

[8] Ibid., Ch. 4, § 3—3, requires the consent of the child only in the event the child to be adopted is "of the age of fourteen years or upwards."

[9] On the point of the effect to be given to a foreign decree of adoption, see McLoughlin v. People, 403 Ill. 493, 87 N. E. (2d) 637 (1949).

in the case of *Ross* v. *Wells*,[1] to decide whether an attorney was entitled to refuse to produce his records and the like, when called for by a *subpoena duces tecum*, simply because the production thereof might annul the benefit of his retaining lien. The facts in that case indicate that the attorney had been employed to render services and had performed for a period until his discharge. When the attorney instituted suit to recover his fees, the defendants, desiring to take a discovery deposition,[2] caused a subpoena to be issued calling for the appearance of the plaintiff and the production of certain books, records and papers pertaining to the legal services so rendered. The plaintiff appeared and testified but refused to furnish the subpoenaed matter, claiming that to do so would destroy his right of lien. After a court order on the point had been secured, the attorney still refused to obey, so proceedings to show cause were instituted. On hearing, these proceedings were dismissed by the trial court but, on appeal, the judgment of the lower court was reversed when the reviewing tribunal held that the plaintiff was not entitled to refuse to produce his records for examination when called for by subpoena.

The right of an attorney to a lien on the papers, books, records, and other documents of his client has been recognized at common law[3] as well as in cases arising under the Illinois statutory provisions on the subject.[4] It is clear, therefore, that the client may not deprive the attorney of his lien by discharging the attorney, except for good cause;[5] but the precise question here presented has never before been passed upon by a reviewing court in the state. For that matter, the authorities cited by the plaintiff in support of his position do not touch on the exact point.[6] In the presence of this total dearth of precedent, the court found it necessary to turn to general principles governing the attorney-client relationship to support its holding. Noting that the material subpoenaed reflected upon the nature of the services rendered and the time and effort expended, hence became a matter of importance to the action, the court seized upon the principle that the burden of proof as to such services rested on the attorney.[7] As the client is not required to show fraud or imposition by

[1] 6 Ill. App. (2d) 304, 127 N. E. (2d) 519 (1955).

[2] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 82, and § 259.19.

[3] Scott v. Morris, 131 Ill. App. 605 (1907).

[4] See Ill. Rev. Stat. 1955, Vol. 1, Ch. 13, § 14, and Needham v. Voliva, 191 Ill. App. 256 (1915).

[5] Cohen v. Kirchheimer, 285 Ill. App. 583, 2 N. E. (2d) 592 (1930).

[6] Wigmore, Evidence, 3d Ed., Vol. 8, § 2211, at p. 155, states that the court may decline to compel disclosure of matter under lien when the litigant seeking disclosure is the person against whom the lien runs. See also The Flush, 277 F. 25 (1921), and Davis v. Davis, 90 F. 791 (1898), in which cases it was the litigant-plaintiff, against whom the lien ran, who was seeking disclosure.

[7] Warner v. Flack, 278 Ill. 303, 116 N. E. 197, 2 A. L. R. 423 (1917). See also Goranson v. Solomonson, 304 Ill. App. 80, 25 N. E. (2d) 930 (1940), in which case the court said the attorney would be obliged to show that the client had been fully advised as to his rights.

the attorney, but the latter must assume the responsibility of showing fairness,[8] the court concluded that a compulsory revelation of the records was consistent with the attorney's duty to make a full disclosure as to all transactions with his client. This, the court said, would serve to maintain a high level of professional ethics, drawing upon impressive language used in the case of *Comerford* v. *Loewenbein*.[9] It could be added that the instant holding does not limit the scope or value of an attorney's retaining lien but rather points up the fact that such a lien is treated as being no longer of value once the attorney brings suit to recover for his services, hence he must, and should be compelled to, use the data in his possession to substantiate his claim.

DIVORCE—JURISDICTION, PROCEEDINGS, AND RELIEF—WHETHER PARTY TO DIVORCE ACTION MAY SEEK VOLUNTARY DISMISSAL AFTER TRIAL BEGUN WITHOUT COMPLYING WITH TERMS OF CIVIL PRACTICE ACT—An issue with respect to a matter of consequence regarding civil procedure was recently generated in the case of *Gonzalez* v. *Gonzalez*.[1] The wife's complaint for divorce, to which the defendant-husband had filed a counterclaim, had been set for trial before a jury.[2] During the course of the trial and prior to the submission of the case, the defendant offered a written special motion to dismiss his counterclaim on the ground that the securing of a divorce was repugnant to his religious beliefs. This motion was denied by the trial judge. Following return of a jury verdict in his favor on both the complaint and the counterclaim, the husband renewed his motion to dismiss but this time the trial judge dismissed the counterclaim with prejudice while also dismissing the wife's complaint for want of equity. On appeal by the husband, the Appellate Court for the First District held that, under the circumstances, it was prejudicial error to enter a decision on the counterclaim amounting to a determination on the merits and that, because of the public policy involved in divorce actions, voluntary dismissals were to be encouraged notwithstanding the fact the party may have failed to comply with Section 52 of the Civil Practice Act.[3]

[8] Ankrom v. Doss, 270 Ill. App. 464 (1933).

[9] 227 Ill. App. 321 (1923). At page 327, the court said: ". . . the law watches with particular care all transactions had between an attorney and his client during the period of existence of their relationship . . . Presumably, the attorney is learned in the law and appreciates all that may result from a given transaction with his client, while, on the other hand, a client is ignorant of the law and does not appreciate the full consequence of the transaction."

[1] 6 Ill. App. (2d) 310, 127 N. E. (2d) 673 (1955).

[2] Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § S, authorizes trial by jury in divorce cases.

[3] Ibid., Vol. 2, Ch. 110, § 176. Except for the addition of a provision regarding counterclaimants and third-party plaintiffs, the text of the Revised Civil Practice Act of 1955, H. B. No. 439, § 52, remains substantially the same as before.

It is clear that, under the present procedural system, a litigant who desires to dismiss his suit[4] or a defendant who wishes to take a voluntary nonsuit on his counterclaim,[5] whether in an ordinary civil action or in some form of statutory proceeding,[6] must generally comply with statutory requirements concerning the presentation of a stipulation to dismiss or else offer a verified special motion, otherwise the case, once trial has been begun, must proceed to final judgment. It would also be thought, on the basis of earlier holdings in divorce cases[7] as well as by reason of a provision in the Divorce Act assimilating the procedure in such suits to that utilized generally,[8] that much the same considerations would apply to a suit for divorce.[9] Nevertheless, beginning with the holding in the case of *Norwood* v. *Norwood*,[10] there has been an indication that, at least as to matters of divorce, a too rigid insistence upon statutory requirements could militate against the settled policy of the state to expend all efforts toward the maintenance of the marital relation.[11] The instant holding, while doing some violence to procedural methods by creating a special exception for use in divorce cases, does support that policy so the view taken therein is probably the one to be lauded rather than criticized.

4 For cases concerning the right of the plaintiff to secure a voluntary dismissal after trial or hearing has been begun, see Gilbert v. Langbein, 343 Ill. App. 132, 98 N. E. (2d) 140 (1951); Glick v. Glick, 338 Ill. App. 637, 88 N. E. (2d) 509 (1949); Bernick v. Chicago Title & Trust Co., 325 Ill. App. 495, 60 N. E. (2d) 442 (1945); Gunderson v. First National Bank, 296 Ill. App. 111, 16 N. E. (2d) 306 (1938).

5 See Wilhite v. Agbayani, 2 Ill. App. (2d) 29, 118 N. E. (2d) 440 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 339.

6 In Perry v. Waddelow, 351 Ill. App. 356, 115 N. E. (2d) 348 (1953), a forcible entry and detainer action, the court held that Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 176, was controlling despite a specific provision in ibid., Vol. 1, Ch. 57, § 17, which also dealt with dismissal of the suit.

7 See, for example, Gifford v. Gifford, 154 Ill. App. 416 (1910), denying the plaintiff the right to dismiss her bill without prejudice, after verdict in favor of the defendant, because of non-compliance with Hurd's Ill. Rev. Stat. 1908, Ch. 110, § 70, which required that the motion to dismiss be offered before the jury retired from the bar. Accord: Frankenberg v. Frankenberg, 190 Ill. App. 444 (1914). See also Vaughn v. Vaughn, 197 Ill. App. 611 (1916), as to the right of the plaintiff to dismiss the bill of complaint after a cross-bill had been filed.

8 Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 7.

9 The headnotes to the memorandum opinion in Galter v. Galter, 323 Ill. App. 297 (1944), as set out in 55 N. E. (2d) 405, particularly headnote 4, disclose that compliance with Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 176, would be required before a defendant could be entitled to withdraw a counterclaim for divorce from determination.

10 333 Ill. App. 469, 77 N. E. (2d) 552 (1948).

11 Actually, the court there found the petition to dismiss the complaint did meet with statutory requirements: 333 Ill. App. 469 at 472-3, 77 N. E. (2d) 552 at 553. The further language in the opinion of the case as to this point must, therefore, be considered to be dictum.

HUSBAND AND WIFE — SEPARATION AND SEPARATE MAINTENANCE — WHETHER WAIVER BY WIFE OF RIGHT TO SUPPORT RENDERS ENTIRE SEPARATION AGREEMENT INVALID—Rights arising under a separation agreement were considered in the recent case of *Laleman* v. *Crombez*.[1] In that case, a husband and wife had entered into a separation agreement adjusting their property rights and providing for mutual releases of claims in the property of the other whether then held or subsequently acquired. By a separate clause of this instrument, the wife agreed that the husband was not to pay her any money for support and she covenanted to incur no debts in his name. The parties complied with the agreement for a number of years but, on the wife's death, the husband began a partition proceeding against the wife's executrix and devisees asserting an undivided one-half interest, as heir, in land which had apparently been acquired by the wife subsequent to the separation. An answer setting forth the separation agreement as a defense was stricken on motion by the husband and a partition decree was entered in his favor. On direct appeal by the executrix,[2] the Illinois Supreme Court reversed the decree when it concluded that the presence of an invalid clause in the separation agreement did not force a conclusion that the whole instrument was void. It also held that, as the husband had enjoyed the benefit of the waiver of support, he could not be permitted to avoid compliance with the other covenants as they were not affected by any considerations of public policy.

The conclusion so achieved represents a direct departure from views expressed by the same court in the earlier case of *Lyons* v. *Schanbacher*[3] and reiterated by it about seven years ago in the case of *Lagow* v. *Snapp*.[4] In those cases, also involving separation agreements, it was held that the release of support provisions were not only invalid but were considered to be so material to the consideration as to render the entire contracts invalid for, as the court once said, that "which is bad destroys that which is good, and both perish together."[5] Until the holding in the instant case, therefore, it was possible to say that a waiver by a wife of her right to support, being against public policy, served to invalidate the entire agreement, particularly so since a release of this nature would operate as a material consideration for the making of the instrument.

[1] 6 Ill. (2d) 194, 127 N. E. (2d) 489 (1955).

[2] Direct appeal was proper as a freehold was involved: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 75.

[3] 316 Ill. 569, 147 N. E. 440 (1925).

[4] 400 Ill. 414, 81 N. E. (2d) 144 (1948).

[5] See the opinion of Farmer, J., in Lyons v. Schanbacher, 316 Ill. 569 at 574, 147 N. E. 440 at 442. See also Berge v. Berge, 366 Ill. 228, 8 N. E. (2d) 623 (1937).

By deciding the way it did, the court appears to have acted in a more equitable manner than it had done in its prior decisions wherein strict and arbitrary doctrines were relied on. Certainly, the outcome of the instant case was no doubt affected by the fact that the plaintiff husband had enjoyed the benefit of the waiver of the right to support for a number of years, a fact which would make it obviously unfair to now allow the plaintiff to reap a further benefit by rejecting the burdens of the agreement.

Nevertheless, the court would have been more forthright if it had declared, as a Pennsylvania court recently did,[6] that there is nothing objectionable in law to a separation agreement which provides for a complete abnegation of all right to support between the spouses at the time they make a full division of their property rights, both present and future. Those who possess a sense of fear over the possibility that either of the spouses might, at some future time, become a burden on the public treasury ought to take comfort in decisions such as the one attained by the New York court concerned with the case of *Kyff* v. *Kyff*.[7] It was there held to be the rule that, after exhaustion of the property forming the basis of the settlement, the indigent spouse might still appeal to the courts to enforce the support obligation, despite the private arrangement to the contrary. The rationale there relied upon is comparable to that which has been followed in Illinois in connection with adopted children.[8] If that is not what the parties want, then their only relief is, and should be, through channels leading to an absolute divorce where the court, at the time it dissolves the marital status, may determine the public as well as the private interest in the retention or dissolution of the support obligation.

NEW TRIAL—PROCEEDINGS TO PROCURE NEW TRIAL—WHETHER JUDICIAL ADDITUR TO AN INADEQUATE VERDICT MAY PROPERLY DEPRIVE LITIGANT OF RIGHT TO SEEK NEW TRIAL—By means of the case of *Yep Hong* v. *Williams*,[1] the Appellate Court for the First District was presented with the necessity of deciding the question as to whether or not a trial court may constitutionally condition the right to a new trial upon the defendant's refusal to consent to an increase by the court in the amount of the verdict

[6] Commonwealth ex rel. Jablonski v. Jablonski, — Pa. Super. —, 118 A. (2d) 222 (1955).

[7] 286 N. Y. 71, 35 N. E. (2d) 655 (1941).

[8] Thus, in Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), it was held that the obligation of the natural parent to support his child was not destroyed by the fact of a judicial adoption of his child by another in the event the adopting parent proved to be incapable of discharging the burden.

[1] 6 Ill. App. (2d) 456, 128 N. E. (2d) 655 (1955).

rendered. In that case, a suit for personal injury, the jury had returned a verdict against the defendant but for an amount less than the plaintiff's out-of-pocket expenses. The trial judge indicated that plaintiff's motion for a new trial would be granted unless the defendant would consent to an increase in the amount of the verdict. When the defendant refused to so consent, a new trial was granted. The defendant appealed from that order[2] but the holding was affirmed when the Appellate Court concluded that, in tort actions to recover unliquidated damages, the trial court could not constitutionally condition an order for a new trial on the plaintiff's acceptance of, or the defendant's refusal to submit to, a judgment in an amount greater than that fixed by the verdict.

In order to achieve that result, the court relied on a majority opinion in an earlier case decided by the United States Supreme Court which had condemned the practice of adding to a verdict in the federal courts as tending to deprive the litigant of a constitutional right to trial by jury,[3] and upon views expressed in some Illinois cases not clearly in point.[4] It would be expected, however, that when a court is, in fact, squarely faced with a problem for the first time, it would, in the light of the often expressed public policy favoring the expedition of litigation, study the issues closely.[5]

Very briefly, the argument against the use of an additur is said to lie in the fact that it permits a judge to decide a question of fact in a way not sanctioned at common law,[6] but both the additur and the remittitur, a conditioning of a new trial on the plaintiff's refusal to submit to a decrease in a verdict, were in use at common law prior to the adoption of the federal constitution although the justices of the United States Supreme Court could not agree as to the legitimacy of these devices. It is clear, however, that by 1870, when the present Illinois constitution was adopted, the use of the remittitur had come to be a common and respectable practice in many jurisdictions as well as in Illinois.[7] If this fact could

[2] For this purpose, an order granting a new trial is declared to be a "final" order by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 201. The recently revised Civil Practice Act contains a substantially similar provision: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 77.

[3] Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1934). Stone, J., wrote a dissenting opinion, concurred in by Hughes, Ch. J., and Brandeis and Cardozo, JJ.

[4] The court cited Carr v. Miner, 42 Ill. 179 (1866), and James v. Morey, 44 Ill. 352 (1867). In these cases an additur was allowed but the suits were based on contract claims and the damages were liquidated in character. In the first of these cases, however, the court did say that the practice should be closely restricted.

[5] See note in 44 Yale L. J. 318.

[6] Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1934). See also Carlin, "Remittiturs and Additurs," 49 W. Va. L. Q. 1 (1942), particularly pp. 15-24.

[7] Blunt v. Little, 3 Mason 102 (U. S., 1822); Miles v. Weston, 60 Ill. 316 (1871); McCausland v. Wonderly, 56 Ill. 410 (1870); McAlister v. Mullanphy, 3 Mo. 38

be said to determine the constitutionality of the remittitur, the constitutionality of the additur should follow because the two, in essence, are indistinguishable.[8] To allow the one without the other would not only be incongruous but would leave a plaintiff with a choice not available to a defendant. It having been held that a plaintiff in a tort case is not entitled to a new trial as a matter of right when the jury have returned an inadequate verdict,[9] it would seem that there should be no constitutional objection to resort to the additur.

But even if the grant of a new trial is not entirely a matter of grace, an Illinois court might find the additur device a permissible incident to the wide discretion always accorded trial judges in the matter of new trials,[10] for which purpose it might also consider the desirability of basing the amount of either the additur or the remittitur on the trial judge's determination as to the minimum or maximum verdict that a reasonable jury could obtain.[11] As the unconstitutionality of the additur is by no means obvious, the next Illinois court which grapples with the problem should do so at much closer quarters than did the court in the instant case.

(1831); Tenant's Ex'r v. Gray, 5 Munf. 494 (Va., 1841). In that connection it might be noted that Ill. Const. 1870, Art. II, § 5, says that the right of trial by jury "as heretofore enjoyed" shall remain inviolate.

8 Carlin, "Remittiturs and Additurs," 49 W. Va. L. Q. 1 (1942), at p. 3.

9 Bolles v. Bloomington & Normal Ry. E. & H. Co., 130 Ill. App. 263 (1906); Hackett v. Pratt, 52 Ill. App. 346 (1893).

10 The dissenting judges in Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1934), thought it was. Stone, J., said: "What the trial court has done is to deny a motion for a new trial, for what seemed to it a good reason: that the defendant had given his binding consent to an increased recovery, which the court thought to be adequate, and thus to remove any substantial ground for awarding a new trial." See 293 U. S. 474 at 488, 55 S. Ct. 296, 79 L. Ed. 603 at 612.

11 This is the practice followed in Wisconsin. See Risch v. Lawhead, 211 Wis. 270, 248 N. W. 127 (1933); Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 N. W. 245 (1908).