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Subsequent Promises to Pay Compensation for Saving Life

Every so often a court is confronted with a case in which there is something in the plaintiff's claim that seems to represent an idea of obligation outside of known legal rights and duties and in which a native sense of justice seems to compel the court to grant judgment for the plaintiff. The search backward through tangled principles for supporting theory always discloses a conflict of ideas.

Such a case is that of Webb v. McGowin. The circumstances were these: The plaintiff, while engaged in throwing lumber from one floor to another, observed the defendant's testator standing directly in the path of a seventy-five pound block which he was going to throw. Faced with an immediate choice of releasing his grasp, which would result in death or permanent injury to the testator, or of preventing this by jumping with the lumber, thus endangering his own life, he chose the latter. The result was permanent injury to himself. Some time later the defendant's testator agreed to pay the plaintiff fifteen dollars twice a month for the rest of the plaintiff's life. Such payments were made until the death of the promisor. His executor, however, refused to continue payments, and the plaintiff brought suit on the testator's promise. To meet the defendant's contention that this would not be a contractual obligation, because the consideration was past, the Alabama court chose to adopt a theory that the acts of the plaintiff, although in the past, constituted a pecuniary benefit sufficient to make the subsequent promise binding. Justice Samford in a concurring opinion recognized the difficulties as presented by the strict rule of past consideration and concluded by quoting Circuit Justice Marshall, "I do not think the law should be separated from justice where it is at most doubtful.'

There is really nothing new under the sun. So-called new decisions can always find support in old principles. The difficulty arises when the right must be defined in order to come within the scope of an established remedy.

In the present case there is a physical act, which in itself has some legal significance, and a promise which also has legal sig-
nificance, each in themselves insufficient to create an obligation. But together, and with aid of a just principle, they moved the Alabama court to find liability. It is therefore of interest to trace briefly some of the ideas in the law which point the way to this decision, in order to clarify the unsaid implications of the concurring opinion.

Preservation of life is necessarily an interest of society, and it follows that in the legal system there will be found rules of conduct governing and protecting this interest. Hence, in every branch of the law certain schemes of control have been established. Generally such schemes accomplish their end through the use of sanctions placing a duty upon persons to forbear from acting so as to cause injury to the life of others. At times, however, circumstances will call for some positive act in order that life may be preserved. The law, if it is to regulate this interest, must then of necessity either place an obligatory duty upon persons to act in such cases, or it must provide some incentive to act. As the law has not yet reached the point where it will compel ordinary persons to come to the aid of others, the latter means, if any, has been employed. The desired result is thus reached through compensating the person acting in preservation of life. To a limited extent this remedy can be found in the law. In such cases, however, another problem presents itself the person benefited is the person who must bear the burden and his interests too must be considered.

The extent to which the legal system will impose this obligation is illustrated by the doctrine of restitution for benefit conferred as established in the law of salvage and quasi contract. Salvage is a remedy found in the law of admiralty. The definite need to encourage the preservation of life and property at sea led to the establishment of a remedy which would give recompense to persons so preserving life and property.3 Commerce at sea is constantly in peril of hazards which may in a short time spell ruin to the owners of the ship or cargo. Admiralty, therefore, had to work out a remedy which would adequately protect the interests of both the person who had come to the aid of a ship in distress and the interests of the ship thereby rescued. Thus, a Roman law doctrine, which gave to the one who preserved or improved the property of another without his request, and even without his knowledge, a right to compensation from the owners

of the property benefited, furnished the desired result and became the basis of salvage.⁴

Although the underlying principle justifying the result reached in such cases is found in the foregoing idea that one person should not be enriched by the acts of another without making compensation therefor, there is another moving principle equally as important; it is one of policy concerning such acts. Thus, under certain circumstances, even though the owner of the ship may not have been directly benefited by the saving of a life, he will nevertheless be required to make compensation. Here, then, the interest recognized in the salvor becomes more important than the interest of the ship owner; and this rests on a policy of the admiralty courts concerning preservation of life.⁵

Basically, there is, from the standpoint of desirability, no distinction between the saving of life and property at sea or on land; in each, the legal system will want to encourage the same thing. However, the factual situation has been different in the common law, which developed distinct from the law of admiralty. The common law has not been faced with as imperative a need to provide a remedy, it has had no comparable theory of lien, and it has always had underlying its theory of obligation the common-law idea of freedom of the individual. Thus it has not only worked out different results from those found in admiralty but also ones which are not so far reaching in their scope.

The law of quasi contract developed late in the common law, coming long after theories of contract and tort were firmly entrenched in the legal system.⁶ It was the need to provide remedies for relationships arising neither in contract nor in tort and in which one person was unjustly benefited at the expense of another which caused the courts also to turn to the Roman law doctrine as a means of providing a theory of recovery.⁷ The same idea of restitution for benefits conferred was therefore adopted, but instead of working out a wholly new remedy, such as salvage, the common law courts expanded the

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⁵ Kennedy, op. cit., pp. 7-8, and see cases cited in footnote 3.
⁷ Moses v. Macferlan, supra, n. 6; Woodward, op. cit., p. 3.
use of an existing contractual action and accomplished, through a fiction, the desired result. As could be expected, certain concepts existing in contract were bound to limit the scope of this new doctrine. Of especial interest here is the influence of the idea of privity of contract resulting in the strong reluctance of the courts to impose this arbitrary obligation upon a person without his consent. Thus, before the courts could feel that restitution should be required of a person, they had to be sure that the person conferring the benefit had not officiously created the relationship; he must have had some cause to act other than his own desire to take part in the affairs of others.

The preservation of another's life is always morally dutiful, and persons so acting cannot be said to be intermeddling. Hence, in certain cases where benefits have been conferred to that end, recovery will be granted. The following will illustrate. The modern tendency of the law is to impose a legal duty upon a father to support his child and, upon breach of this duty, the necessaries for the preservation of the life of the child may be furnished by other persons. In that the furnishing of these relieves the father of a duty entailing expense, he has been benefited and must make restitution, regardless of his will or consent in the matter. As against the infant, capable of avoiding his contract, the recovery will also be granted. Here, however, the restitution is connected with the furnishing of the necessaries themselves. These necessaries, such as food, shelter, clothing, and the like, have a specific value, and under the economic system are ordinarily exchanged for money. The person furnishing them can therefore be presumed to have intended to exchange them; retention then will be unjust, and restitution in value will be required.

Services rendered in an emergency in preservation of life present a somewhat different problem. The fact that the recipient has been benefited may remain the same, and the fact that the law will want to encourage the rendering of such services may remain the same, but the willingness of the law to impose an obligation outside of contract meets with difficulties. Where a doctor, nurse, or hospital renders services in an emergency and without request, the analogy will remain true, for again the duty to preserve life authorizes and requires the act, and again these services have a definite and usual exchange value, rendered

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8 Restatement of Restitution, § 113; Madden on Domestic Relations, p. 584, and cases cited; Woodward, op. cit., p. 316.
9 Woodward, op. cit., p. 316, and cases cited.
with that intent in mind.\textsuperscript{10} But what of the acts of ordinary persons? Was the act of Webb in jumping analogous to the act of a doctor who makes an emergency operation? A comparison shows that the act in neither case was officious, in each there has been a benefit, and in each a life has been saved, but on the one hand the doctor has rendered definite professional services with the presumed intent to exchange them for their value in money, while on the other, the act of jumping has no such ascertainable value or intent. In the one, the law had only to justify the doctor's act in order to establish a known obligation, while in the other something else has to be found, for some value must be placed upon the act itself, and some additional reason for imposing the obligation must be shown. Confronted with such a difficulty, the courts have had to construe intention. The legal relationship, if any, must have been created on the instant, and at that instant what was the intent of the claimant? Obviously no intent, other than to aid the person in peril. This is very close to gratuity, and rather than open the door to an apparently unlimited field of unascertainable claims, the courts chose conclusively to presume such acts to be gratuitous.\textsuperscript{11}

The presumption, however, seems to arise out of difficulties found in the quasi-contractual obligation. It is not that the law frowns upon such acts, or even denies that a benefit has been conferred which prohibits the claim, but rather that the interests of the defendant must also be weighed. It is a reluctance to impose an obligation upon the defendant without his consent that seems to lie at the basis of this presumption.

The question arises: Will a subsequent promise by the recipient of the services cure the defect of want of consent? The Alabama court held it would, but recognition was given to the fact that according to a strict rule of contract law this agreement would not be enforceable. It is therefore of interest to discover the use of a subsequent promise in the law of contract.

The difficulty presented here is mostly a question as to the time of the promise, for had McGowan looked up just before the accident and, seeing his peril, agreed to pay Webb for his act, there is little doubt that the contract would be binding. In the present case the promise had no such relation to the act; its only effect, if any, must be that in legal contemplation it can be said to relate back and thereby create a contract.

In both the common law and the civil law a bare promise has

\textsuperscript{10} Ibid., pp. 314, 315, and cases cited; Restatement of Restitution, § 116.

\textsuperscript{11} Ibid., p. 314.
never been considered sufficient to establish an enforceable contract. In each, the courts have required some additional element in the bargain to make it binding. In the common law, consideration is this necessary element. The doctrine of consideration contains ideas derived from debt and ideas derived from assumpsit, and the history of these remedies and the procedural requirements going to make a good cause of action under them necessarily had a great influence in shaping its concept.

Today it is natural to think of contract in terms of promise, but this was not always so. Long before a promise had received any legal significance in the common law, actions in debt and detinue were established as contractual remedies. The right of action did not arise out of the promise but rather from the principle of ownership. Thus in debt, because a person has a right to some specific thing, he may recover possession of that specific thing, or at least its value in money, when the other has breached his bargain. As an executory promise must have been some part of most bargains, significance might have eventually attached to it. The enforcement of the promise might have developed through the church courts by way of the pledge of faith, or in the lay courts through the action of covenant. But the jurisdiction of the church courts was prevented from expanding to embrace ordinary contracts, and the action on a covenant was narrowed down by the requirement in the King’s courts that the covenant be proved by a sealed writing. Some other scheme for enforcing the simple executory promise had to be found. Strangely enough, a delictual action paved the way.

A brief review of the history of assumpsit as explained by Ames and Holdsworth will best illustrate the growth of the concept of promises in the law of contracts and their relation to the question of consideration. As to the origin of the word assumpsit Ames states:

"The original notion of a tort to one’s person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all

12 Holdsworth, History of English Law, III, 413.
13 Pollock and Maitland, History of English Law, II, 186.
14 Ibid., 190-220.
injurious consequences, unless the other expressly assumed the risk himself. . . ."15

Thus, "assumpsit" is the word that shows the undertaking of the defendant; it was the necessary key to liability where the plaintiff had entrusted something to the defendant. In this delictual action the liability arose because of the wrongful or negligent act of the defendant, but the connection of the assumpsit to this liability furnished the means for the development of another idea of liability. There gradually evolved a theory that recovery should be granted where the defendant had made an assumpsit and refused to act. It is through this idea that the promise grew in significance, for in the action for damages received because of negligent conduct, the wrong in reality does not relate to the assumpsit, while in the case where there is a refusal to act, the promise or assumpsit is the very gist of the action. Hence the transition from tort to contract.16

Two things of interest result from this new concept. First, the new idea of liability, and second, the significance attached to the promise itself. The shift from the feudal period to a social system based on trade and commerce placed the courts in a position where they had to work out remedies adequate to handle the new relations facing them. This was especially so in contract. The actions of debt and covenant were hopelessly inadequate, both in theory and because of procedural difficulties; the new action of assumpsit was a step, but it did not go far enough. It is the promise itself that pointed the way to expansion.17

The first step was to find a usable remedy to take care of those cases in which the action of debt on a simple contract provided the only remedy. How to provide a means for enforcing this obligation in assumpsit without meeting the defense that the plaintiff should sue in debt? To rely on the real promise which was made in the formation of the bargain and sue in assumpsit would be a violation of the rule that the formed action had to be used, if available, in preference to the auxiliary remedy of case. But what of a subsequent promise to pay the pre-existing debt? If a court is willing to grant that a second promise has legal significance, then the way is clear. The common law courts were willing.18 Obviously this subsequent promise was not substantive; the right-duty relation actually existed in the original bargain.

17 Ibid., p. 16.
18 Ibid.
Some years later, after the action had been fully established, the court was able to see this, and cut off the requirement of the second promise by saying that every debt implies a promise to pay.\textsuperscript{19}

Once the promise had been used in this manner, it was only natural that the same idea would be fastened upon as a means of creating liabilities for other relationships suffering for want of a remedy. For example, if a person had left his coat to be mended without making any promise to pay, the tailor was without a remedy. He could not sue in special assumpsit without the promise, and he could not sue in debt without fixing the amount to be paid by agreement. Certainly he should have something for his work, and the solution again lay in the promise. Hence, it was held that a subsequent promise to pay would relate back to a request and create a binding contract.\textsuperscript{20} Here history followed much the same path as in the case of the precedent debt, for again the true legal relationship was created at the time of the request, and it in reality contained the elements of an undertaking to pay. Eventually and after much confusion, the promise was implied.

The foregoing request and precedent-debt cases are easily rationalized today because of the implied promise, but it was the significance placed upon the subsequent promise that brought about this result. This same significance caused the courts to take another step that cannot be so rationalized. Where a debt is barred by the statute of limitations the remedy is gone, and yet, such a remedy is held to be revived by a promise.\textsuperscript{21} In such a case it must be said that the promise operates in one of three ways—that it goes to the defense and waives it, or that it goes back to the old debt and revives it, or that it stands as a wholly new agreement enforced by the courts because of a desire to maintain the obligation. It is apparent that if any of these theories is to be upheld, the promise must be said to have some power in relation to past acts.

Lord Mansfield, never hesitant to expand the common law, took up this idea and promulgated the doctrine of moral obligation. In \textit{Trueman v. Featon}\textsuperscript{22} he allowed the plaintiff to recover

\textsuperscript{22} 2 Cowp. 544, 98 Eng. Rep. 1232 (1777).
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The debts of a bankrupt are due in conscience, notwithstanding he had obtained his certificate, and there is no honest man who does not discharge them, if he afterward have the power to do so. The legal remedy may be gone; the debts are clearly not extinguished in conscience.’’ The promise, to him, then, was to be coupled with anything that might be considered, in conscience, an obligation by the promisor; without the promise there is no legal obligation which can be enforced. In Hawkes v. Saunders, soon following, he more clearly defines his theory:

‘‘As to that point, the rule laid down at the Bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an assumpsit, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only grounds of consideration sufficient to raise an assumpsit.

‘‘Where a man is under legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations: or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing, by the Statute of Frauds.

‘‘In such and many other instances, though the promise gives a compulsory remedy where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration.’’

The difficulty with this doctrine is that it might be extended to such a point that the mere fact of giving a promise would be said to create a moral obligation to perform. The common law had not yet reached a point where it considered a bare promise sufficient. In all of the prior cases some sort of bargain had, in the first instance, existed—in the precedent debt and request cases, a bargain from which a subsequent promise could

truly be implied; in the Statute of Limitations cases and the like, the former obligation at least had been an executed bargain. Thus, the courts found it necessary to call a halt. Two reporters, Bosanquet and Puller, in a note to the case of Wennall v. Adney, criticized the doctrine and pointed the way, saying, "And it may further be observed, that however general the expression used by Lord Mansfield may at first sight appear, yet the instances adduced by him as illustrative of the rule of law do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Lord Mansfield will an express promise have any operation, and there it only becomes necessary, because though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not as in ordinary cases imply an assumpsit against him."

They then promulgated the following rule: "An express promise, therefore, . . . can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

Following this, in 1840, came the case of Eastwood v. Kenyon, which is generally considered as the authoritative turning point. In this case, the plaintiff, as executor to an infant, Sarah Sutcliffe, rendered many services. The defendant afterwards married Sarah and subsequently promised to pay the plaintiff. In the argument, the attorneys for the plaintiff set out the moral obligation theory. Lord Durham first stated, "Indeed the doctrine would annihilate the necessity of any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." He then restated the rule of law as given by Bosanquet and Puller, but, in concluding, he used the following language, which also seems of importance:

"If the subsequent assent of the defendant could have amounted to a ratiohabitio, the declaration should have stated

the money to have been expended at his request, and the ratifica-
tion should have been relied on as matter of evidence; but this
was obviously impossible because the defendant was in no way
connected with the property or with the plaintiff when the money
was expended. If the ratification of the wife while sole were
relied on, then a debt from her would have been shewn, and the
defendant could not have been charged in his own right without
some further consideration, as of forbearance after marriage, or
something of that sort. . . .”

The rule then makes it impossible to create a binding contract
by a subsequent promise, where the past act for which the
promise was given was not an executed consideration furnished
pursuant to a bargain or request. A criticism of this rule might
be that it authoritatively chooses to fix the substantive law of
consideration at a single period in history, when the doctrine
itself had been developing for centuries, and further that it
refuses to recognize the very means by which the law of contract
had been able to develop. Where in the past the courts had
found it advisable to provide remedies for relationships which
they felt ought to be protected by the legal system, they had
been able to do so through the use of the subsequent promise, in
spite of the fact that, at that time, no actual legal obligation had
been created by such relationships. Regardless of the fact that
in most of these instances they were able eventually to imply
the promise, it is clear that some legal significance had always
been attached to a subsequent express promise.

In addition to this, the note seems to place the emphasis and
justification for the use of the subsequent promise upon the
idea of benefit, while Eastwood v. Kenyon seems to recognize
that where certain benefits are conferred upon a defendant, the
person conferring them might allege a request and rely upon
the subsequent promise as sufficient ratification. Certain courts
in the United States have refused to adopt this rule in its full
scope, and have continued to use an express promise as a means
of creating liability in cases where they felt a remedy ought to
be provided. They have been willing to recognize the rule that a
bare promise will be unenforceable, but in cases where the plaintiff
has conferred some recognized pecuniary benefit upon the de-
fendant, although this benefit is not sufficient to create liability
in quasi contract, they have enforced subsequent express prom-
ises to pay.26

26 For American cases, see 17 A. L. R. 1299; 25 A. L. R. 635; 79 A. L. R.
1346. See also, Hugh Evander Willis, “Rationale of Past Consideration and
It is to these cases that the Alabama court turned. Thus, in the case first mentioned, that court found as a fact that the services rendered by the plaintiff constituted a recognized and material benefit and, second, that this constituted an obligation—it called it a moral obligation, but distinguished the pecuniary benefit, found as a fact in this case, from any cause moving purely from the "conscience" of the promisor. Lastly it held that the subsequent promise was an affirmation or ratification of what the plaintiff had done, raising the presumption that these services had been rendered upon request.

Assuming that the courts, when confronted with such cases, will require strict proof of the fact that material and pecuniary benefits were conferred and that the promise of the defendant be given with intent to create a binding contract, it would seem that the resulting decision would supply a reasonable legal remedy. Like the cases of promise to pay a debt barred by the statute of limitations, such decisions must stand in a field distinct from the ordinary contractual bargains, but like the statute of limitations cases the result would be to remedy interests that certainly ought to be protected by the law.

R. L. Huff

CIVIL PRACTICE ACT CASES

ABATEMENT AND REVIVAL—DEATH OF PARTY—PERSONS ENTITLED TO CONTINUE OR REVIVE.—In the case of Schroeder v. Gerlach,1 the court had occasion to consider the effect of Section 54,2 Civil Practice Act, and held that the right of revival of an action on the chancery side of the court after the death of a party is not a matter of right under the aforementioned section, but is a matter of equity in the discretion of the court. The court stated: "Where by reason of marriage, death, bankruptcy, assignment, or other event occurring after the commencement of a cause or proceeding, either before or after judgment and in the trial or reviewing court, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after such commencement, it becomes necessary or desirable that any person not already a party should be before the court, or that any person already a party should be made a party in another capacity, the action shall not abate, but an order may be made that the husband or wife, heir, personal representative, trustee, assignee, or other successor in interest, if any, be made a party in substitution for or in addition to any other party, and that the cause or proceeding be carried on with the continuing parties and such new parties, with or without a change in the title of the cause, on motion of anyone interested. . . ."


1 366 Ill. 596, 10 N. E. (2d) 332 (1937).

2 Ill. Rev. Stat. 1937, Ch. 110, § 178: "Where by reason of marriage, death, bankruptcy, assignment, or other event occurring after the commencement of a cause or proceeding, either before or after judgment and in the trial or reviewing court, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after such commencement, it becomes necessary or desirable that any person not already a party should be before the court, or that any person already a party should be made a party in another capacity, the action shall not abate, but an order may be made that the husband or wife, heir, personal representative, trustee, assignee, or other successor in interest, if any, be made a party in substitution for or in addition to any other party, and that the cause or proceeding be carried on with the continuing parties and such new parties, with or without a change in the title of the cause, on motion of anyone interested. . . ."
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as the petitioners\textsuperscript{3} had contended, but is a right which may be availed of, according to the language of the act, "on motion of anyone interested" to obtain an order permitting the "successor in interest, if any" to become a party and to continue the action. This section in this respect merely restates the law as it existed prior to the passing of the Civil Practice Act.

The petitioner in this case was held without interest to carry on the suit begun by testator to set aside certain deeds when a will made subsequently to the deeds provided for the same disposition and still stood; McGovern v. McGovern,\textsuperscript{4} a case which was decided before the Civil Practice Act, has the identical result and was regarded as controlling this case.

G. W. McGurn

COURTS—COURTS OF APPELLATE JURISDICTION—APPELLATE JURISDICTION DEPENDENT UPON TIME FOR FILING APPLICATION UNDER CIVIL PRACTICE ACT.—In Grand Lodge Brotherhood of Railroad Trainmen v. McClary,\textsuperscript{1} the Appellate Court of the Second District affirmed the judgment of the trial court on September 9, 1937. Since proof of delivering or mailing to the opposite party notice of intention to apply for a rehearing was not filed with the clerk within fifteen days, the decree of the Appellate Court became final according to its Rule 19.\textsuperscript{2} Petitioner desired, however, to appeal to the Supreme Court under the provisions of Section 75\textsuperscript{8} of the Civil Practice Act and filed its petition for this purpose on November 11, 1937.

\textsuperscript{3} Petitioners, four collateral relatives of John Schroeder, deceased, petitioned to revive and continue a suit instituted by John Schroeder's brother as his next friend to rescind a trust agreement and to cancel deeds executed conformably to such agreement.

\textsuperscript{4} 268 Ill. 135, 108 N. E. 1024 (1915).
\textsuperscript{1} 367 Ill. 414, 11 N. E. (2d) 924 (1937).
\textsuperscript{3} Ill. Rev. Stat. 1937, Ch. 110, § 199. (Jurisdiction of Appellate and Supreme courts.) "... (2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final subject, however, to the following exceptions; ... (2) In any such case as is hereinbefore made final in said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it has been carried by appeal to said Supreme Court: Provided ... that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made within forty days after the judgment of the Appellate Court shall have become final, either through denial of a petition for a rehearing or the expiration of the time within which a petition for rehearing might be filed; otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist. ..."
In dismissing the petition, the Supreme Court said that the judgment became final in the Appellate Court on September 24 and that the petitioner had forty days thereafter in which to file its application in accordance with Section 75 and to serve copies of the application upon respondent in compliance with Rule 32; the court further stated that the "forty day period" had expired on November 3. The court merely gave conclusions in its very short opinion and made no reference to the controlling, recent changes.

Section 75 was amended July 2, 1937, so that the time for leave to appeal was changed, and in the October term the Supreme Court amended its Rule 32 to conform to the statutory change.

Seemingly, the petitioner was proceeding under the practice as it existed before the amendments just mentioned, and therefore, petitioner felt quite secure as, under the procedure previously required, the petition would not have been due until November 18, 1937, or one week after this petition was filed. The court had no other course than to dismiss the petition, as Section 75 lays out its jurisdiction and leaves it no discretion.

G. W. McGurn

PLEADING—FORM AND ALLEGATIONS IN GENERAL—PLEADING WRITTEN INSTRUMENTS UNDER CIVIL PRACTICE ACT.—Of interest to the Illinois lawyer is the case of Darst v. Lang, recently decided by the Supreme Court of Illinois, because of its construction of certain portions of the Civil Practice Act. The plaintiffs in that case, parents of the defendant, had given the latter a deed to the premises then occupied by the parties to this action. It was agreed by the several parties that the parents were to reserve a life estate in the property, and that the defendant would not record the deed or assert any right therein until after the death of the parents. Shortly after the delivery, however, the daughter recorded the deed which omitted any reservation of a life estate.

4 The pertinent part of Rule 32 (Ill. Rev. Stat. 1937, Ch. 110, § 259.32) as amended is as follows: "Fifteen printed copies of the petition and abstract, together with proof of service of three copies thereof on the adverse party or his attorney, shall be filed on or before forty days from the day the judgment of the Appellate Court became final. . . ."

5 Before the amendment, that portion of the statute under which this case would have fallen read, as regards time for filing application for leave to appeal, as follows: "... then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court . . ." succeeding time when judgment of Appellate Court became final. Smith-Hurd Ill. Rev. Stat. (1935), Ch. 110, § 199.

1 367 Ill. 119, 10 N. E. (2d) 659 (1937).
Later the plaintiffs filed an affidavit in the office of the recorder of deeds with the intention of giving notice to all persons of their claim to a life estate in the premises.

The complaint prayed for a reformation of the deed by inserting a reservation of a life estate, or in the alternative, that the record of the deed be expunged and the defendant enjoined from again recording it or in interfering with the property. The defendant, after denials of her motion to make the complaint more specific by setting out a copy of the deed and affidavit as exhibits and of her motion to strike the complaint as being insufficient in law, filed an answer, and after hearing, the Chancellor decreed that the deed should be reformed.

As there has been some confusion among lawyers as to whether or not, in an action based on a written instrument, it is necessary that the entire document be set out in haec verba in the complaint, or whether general allegations as to the important parts are sufficient, where the instrument is not attached as an exhibit, the ruling on the denial in the defendant’s motion to make more specific is of particular significance.

In refusing to require the plaintiff to set out a copy of the deed, the court made the following statement: “The statute (Smith-Hurd Ill. Stats. Ch. 110, § 160) requires that when an action is founded upon a written instrument, a copy thereof, or so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader shall attach an affidavit that such instrument is not accessible. The complaint sets out the relevant portions of the deed. That is all that the statute requires. When that is done it is not necessary to recite the instrument in haec verba or to attach a copy as an exhibit.”

Nowhere in the opinion is it definitely indicated whether or not those portions relied on by the plaintiff were copied word for word or if only the substance was given, so it is difficult to determine just how far reaching the decision is. If “set out” is interpreted to mean that it is sufficient if the particular relevant portions of an instrument are copied verbatim, the holding is within a strict interpretation of the language used in the section mentioned and would naturally follow therefrom.\(^2\) An examination of the abstract, however, reveals that the deed was not copied verbatim, but only a summary of it was given in the complaint. It would, therefore, seem that the proper interpreta-

tion is that it is sufficient if only the substance of the instrument is given as was allowed under the older practice. Future decisions must be watched for a clarification of this point. Little light is shed by the law of other jurisdictions as the provision regarding the attachment of exhibits is peculiar to the Illinois code.

After mentioning that whether or not a more specific statement of claim would be required was discretionary with the trial judge, the court also adds, "Moreover, by pleading over, the error, if any, was waived." Where a pleading is uncertain, the Civil Practice Act, section 37, provides that this may be remedied by demanding a bill of particulars; section 45 also makes provision for compelling a pleading to be made more definite and certain, or for a dismissal of the action, if the pleading is substantially insufficient in law.

Although the opinion does not so state, it may be assumed that the motion made by the defendant was under the latter section. Section 48, however, which provides for an involuntary dismissal for certain defects, specifically states that the raising of any one of the defenses mentioned, by motion predicated on that section, shall not preclude the raising of them subsequently by answer, unless the court shall have made a decision thereon, and a failure to raise any of them by motion shall not prejudice raising them by answer. The rules of the Supreme Court further provide that "Where, after denial by the court of a motion under section 48 of the Civil Practice Act, the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion, and the defendant shall have the right to assign such error on appeal from the final judgment." There is, however, no similar provision relating to the other sections mentioned. The particular point does not seem to have been argued, but the court's ruling would appear to be sufficient authority for the proposition that if one pleads over after a denial of a motion to strike or to make more specific, except as provided in Section 48, his right to urge error thereunder on appeal has been waived.

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7 The defendant also objected that the complaint did not charge that a mistake had been made although the action was based thereon. In disposing of this, the court called attention to the fact that while the specific word "mistake" had not been used, sufficient facts were alleged to show that such
PLEADING — MOTIONS — REQUIREMENT THAT OBJECTIONS TO PLEADINGS BE SPECIFIED IN MOTIONS UNDER THE CIVIL PRACTICE ACT.—In *Messick v. Mohr,* 1 the complainant alleged in his complaint that certain conveyances were fraudulent and asked that they be set aside. The defendant filed a motion to strike the complaint on five specific grounds and on the general ground that the complaint did not set forth a cause in chancery; the specific grounds were of little consequence and were overruled; then defendant assigned orally under the general allegation that laches appeared on the face of the complaint. The plaintiff objected that such a defect could not be availed of, if present, because the defendant had failed specifically to allege it as a ground for his motion. However, the lower court ruled against the plaintiff and dismissed the complaint, finding laches in fact. When the plaintiff appealed, the Appellate Court reversed this decision, holding that in accordance with Section 45, 2 clauses 1 and 2, of the Civil Practice Act the defense of laches should have been expressly stated in the pleadings and that on the face of the pleading defendant had not been prejudiced by any delay in the institution of the suit.

The result reached by the Appellate Court seems inescapable due to the clear language of Section 45, and furthermore, seems more desirable than the practice which existed previously and which the lower court sought to reinstate by its decision. Before the Civil Practice Act there were fifteen defects of substance which could be reached by a general demurrer in equity, and since notice to the opposite party is one of the primary objects of the code, 3 to revert to the former practice in the face of the express provisions of Section 45 would be judicial legislation of a most flagrant kind.

was the case. It is fairly obvious that a complaint which states the facts of a cause of action is not open to attack even though terms of art may not be used therein. Ill. C. P. A., Sec. 33 (1).

1 292 Ill. App. 69, 10 N. E. (2d) 870 (1937).
2 Ill. Rev. Stat. 1937, Ch. 110, § 169: “(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of judgment where a pleading is substantially insufficient in law. . . .

“(2) Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient.”
3 49 C. J. 33, Pleading § 6; Clark on Code Pleading, p. 30.
The courts say the reasons for calling for specific objections are to facilitate amendments and arrive quickly at issues based upon the merits and to give the opposite party an opportunity adequately to prepare. The last reason applies strongly in this case. The defendant, after having the complaint for a considerable time, presents certain specific objections of little merit and also includes a "catchall" phrase in his motion; yet claiming the protection of the general ground of the motion, he advances the proposition that the complaint must be dismissed because of the complainant's laches—a defect which, if present, is no more obvious in the court room than in the attorney's office.

The question of whether a general allegation that a complaint is insufficient in law is sufficient compliance with the Civil Practice Act has been considered before in Illinois in Victor v. Kurzon, decided by the Appellate Court for the First District, Second Division, which issued only an abstract opinion in accord with the principal case. In Chicago Title & Trust Co. v. Cohen it was urged that the defects relied on in argument in the lower court were not alleged specifically in the motion, but since this objection had not been raised below, the court refused at that time to consider the effect of Section 45.

While Section 45 is largely taken from the New York Code, it differs very greatly on the point under consideration. New York abolished demurrers and required that objections to pleadings be specific; however, subsequent sections of the code permit the objection that a complaint is insufficient in law so to be stated without further particulars. Section 45, paragraph (2), of the Civil Practice Act of Illinois clearly prohibits this.

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6 287 Ill. App. 634, 5 N. E. (2d) 600 (1936).
7 284 Ill. App. 181, 1 N. E. (2d) 717 (1936).
9 New York Civil Practice Act of 1921, sec. 277: "The demurrer is abolished. An objection to a pleading in point of law may be taken by motion for judgment as the rules provide."
10 New York Civil Practice Act of 1921, sec. 280: "An objection to a pleading must be distinctly specified in the notice of motion. An objection under the last section must point out specifically the particular defect relied upon, except as otherwise provided in this section. An objection to a complaint, or to a separate statement therein of a cause of action, or to a counterclaim, that it does not state facts sufficient to constitute a cause of action, . . . may be so stated without further particulars." See also sections 278 and 279 which preserve this exception in other situations.
WITNESSES—CREDIBILITY, IMPEACHMENT, CONTRADICATION, AND CORROBORATION—RIGHT TO IMPEACH ONE’S OWN WITNESS WHEN ONE CALLS HIS ADVERSARY UNDER THE CIVIL PRACTICE ACT.—In Hadley v. White, the plaintiff called two of the defendants to the witness stand, and appellants contended that the plaintiff was bound by their testimony. The court held that since the witnesses were called pursuant to Section 60 of the Civil Practice Act, the plaintiff was not concluded by their testimony and said that the section just mentioned was remedial and was passed to abolish the very rule for which appellant contended.

The principal case is the first in which the Supreme Court has considered this particular problem since the passage of the Civil Practice Act. However, an appellate court stated the former practice and set forth the change worked by Section 60 in Crowder v. Nuttall, which agrees with the conclusion of the principal case.

Both Crowder v. Nuttall and Hadley v. White overemphasize the binding effect of the testimony of an adverse party under the prior practice, but this is really of little consequence since the Civil Practice Act clearly states what the drafters intended it to accomplish in this respect and the section of the Evidence Act which dealt with this question was expressly repealed by Section 94 of the Civil Practice Act.

Section 60 is almost identical in wording with Section 337 of the Act relating to the Municipal Court of Chicago; the same

1 367 Ill. 406, 11 N. E. (2d) 813 (1937).
2 Ill. Rev. Stat. 1937, Ch. 110, § 184, which is as follows: “Upon trial of any case any party thereto, or any party for whose immediate benefit such action is prosecuted or defended, or the officers, directors, or managing agents of any corporation which is a party to the action, may be examined as if under cross examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby but may rebut the testimony thus given by counter testimony.”
4 Chance v. Kinsella, 310 Ill. 515, 142 N. E. 194 (1924); Luthy & Co. v. Paradis, 299 Ill. 380, 132 N. E. 556 (1921); Kovell v. North Roseland Motor Sales, Inc., 275 Ill. App. 566 (1934); Coombs v. Younge, 281 Ill. App. 339 (1935). These cases construed the law as it existed while Sec. 6 of the Evidence Act was in effect to be that one calling an opposing party as his own witness was not bound by his testimony, but could rebut it by any competent evidence; however, the person calling the opposing party could not attack the latter’s credibility. And if no countervailing evidence was introduced, whatever testimony the party called gave favorable to himself had to be taken as true.
7 Ill. Rev. Stat. 1937, Ch. 37, § 388.
provision is Section 19 in the general act for the establishment of municipal courts in cities and villages and was taken from the Minnesota Code. Thus, decisions of the Minnesota courts should have considerable weight in any controversy arising under this type of provision, and decisions of Illinois courts construing Section 33 should be considered in controversies arising under Section 60.

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ERRATA

The quotation on page 64 of the December, 1937, issue of the CHICAGO-KENT REVIEW which reads, "Executors and administrators shall be allowed as compensation for their services a sum not exceeding six per centum on the money arising from the sale of real estate, with such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable" should read:

"Executors and administrators shall be allowed as compensation for their services a sum not exceeding six per centum on the amount of personal estate, and not exceeding three per centum on the money arising from the sale of real estate, with such additional allowance for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable."1

8 Ill. Rev. Stat. 1937, Ch. 37, § 466.
10 Minnesota decisions in accord with the principal case are: Schmidt v. Durnham, 50 Minn. 96, 52 N. W. 277 (1892); Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072 (1896); Uhlmann v. Farm Stock & Home Co., 126 Minn. 239, 148 N. W. 102 (1914). Under the same statute South Dakota reached the same result in Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889 (1912). There are numerous other decisions by the Supreme Court of Minnesota on different questions arising under this provision.