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After Moore v. Moyle, Then What

John D. DeFeo
AFTER MOORE v. MOYLE; THEN WHAT?

John D. DeFeo and Richard M. Spencer

WITHIN SEVEN months after the decision of the Illinois Supreme Court in the case of Moore v. Moyle, the Supreme Court of the State of Iowa re-examined the state of its own views on the subject of the immunity granted to a charitable corporation for the torts of its agents and, in the case of Haynes v. Presbyterian Hospital Association, found that a complete change in the public policy of that state had occurred from the time when the immunity had first there been recognized. As a consequence, it rejected all earlier holdings and proclaimed that immunity, whether based on the trust fund, the implied waiver, the nonapplicability of respondeat superior, or the public policy theories, no longer prevailed in that state and the incorporated charity there concerned was ordered to respond "as do private individuals, business corporations, and others, when [they do] good in the wrong way." The fact that the law's emphasis is now generally toward

* LL.B., LL.M., George Washington University School of Law, member of the bar of Connecticut, District of Columbia and Illinois; LL.B., Chicago-Kent College of Law, member of Illinois bar, respectively.


2 — Iowa —, 45 N. W. (2d) 151 (1950). The result therein may have been forecast on the basis of language expressed in Langheim v. Denison Fire Dept. Swimming Pool, 237 Iowa 386, 21 N. W. (2d) 295 (1946), where the court recognized a growing tendency to limit or abrogate the doctrine of immunity.


4 — Iowa —, 45 N. W. (2d) 151 at 154.
liability for wrongdoing, rather than immunity, was said to require that result. The forthright character of the opinion in the Iowa case, together with other recent holdings along the same line,6 in contrast to the attitude displayed in Illinois, invites even further comment on a problem already well discussed.6

Whatever the score may one time have been, a quick look around the American jurisdictions today reveals that only ten states still adhere to the doctrine that the charitable corporation possesses full immunity from tort liability for the acts of its servants or agents, regardless of the relationship of the injured person to it.7 Three other states appear to have no deci-

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5 The Supreme Court of Vermont, for example, in Foster v. Roman Catholic Diocese of Vermont.—Vt.—, 70 A. (2d) 230 (1950), refused to embark on the muddled sea of charitable immunity when called on to declare the law on the subject for that state.


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sions at all on the point. The rest of the states fall into differ-
ing categories, from complete abolition of the immunity in all
cases, on the one extreme, to retention thereof in certain limited
areas on the other. For example, seven states and the District
of Columbia impose unqualified liability. Eight states permit
strangers and paying beneficiaries to recover, but presumably
may still retain the immunity in cases involving recipients of
true charity. Fourteen others permit strangers to sue the char-

8 The states are Delaware, New Mexico, and South Dakota.
9 See Geiger v. Simpson M. E. Church, 174 Minn. 389, 219 N. W. 463 (1928),
as to a member, and Maki v. St. Luke's Hosp. Ass'n, 122 Minn. 444, 142 N. W.
705 (1913), for liability to servant. The full respondeat superior doctrine applies
in New Hampshire: Sandwell v. Elliott Hospital, 92 N. H. 41, 24 A. (2d) 273
(1942), an invitee; Welsh v. Frisbie Mem'l Hospital, 90 N. H. 337, 9 A. (2d)
761 (1939), a paying beneficiary; Hewett v. Woman's Hospital Aid Ass'n, 73
N. H. 556, 64 A. 190 (1906), a servant. The same thing is true in New York;
Dillon v. Rockaway Beach Hospital, 284 N. Y. 176, 30 N. E. (2d) 373 (1941),
paying patient; Van Ingen v. Jewish Hospital, 182 App. Div. 10, 169 N. Y. S. 412,
affirmed in 227 N. Y. 665, 126 N. E. 924 (1920), a stranger; Hordern v. Salvation
Army, 199 N. Y. 233, 92 N. E. 626 (1910), a servant. The North Dakota case of
Rickbell v. Grafton, 74 N. D. 525, 23 N. W. (2d) 247 (1946), concerned defama-
tion of a stranger to the charity. In Gable v. Salvation Army, 186 Okla. 687,
100 P. (2d) 244 (1940), a servant recovered. The case of Sisters of Sorrowful
Mothers v. Zeldler, 188 Okla. 454, 92 P. (2d) 896 (1938), involving a paying
patient, is important for the court there said that if exemption is to exist it must
be granted by the legislature. Perhaps the most outstanding decision is that in
Pres. & Directors of Georgetown College v. Hughes, 130 F. (2d) 810 (D. C., 1942),
wherein Rutledge, J., prior to his appointment to the United States Supreme
Court, reviewed all of the cases and theories on the subject. In addition to the
foregoing, the recent decisions in Haynes v. Presbyterian Hospital Ass'n, — Iowa
—, 45 N. W. (2d) 151 (1950), and Foster v. Roman Catholic Diocese of Vermont,
— Vt. —, 70 A. (2d) 250 (1950), must be considered as placing these two states
in this category.
10 See Baptist Hospital v. Carter, 226 Ala. 109, 145 So. 443 (1932), a stranger
case, and Tucker v. Mobile Ins. Ass'n, 191 Ala. 572, 68 So. 4 (1915), involving a
(2d) 802, 167 P. (2d) 729 (1946), and England v. Hospital of Good Samaritan,
14 Cal. (2d) 791, 97 P. (2d) 813 (1939), permitted a servant and a paying patient,
respectively, to recover but there is dicta that the rule of immunity would be
applied, on the implied waiver theory, as to non-paying beneficiaries. The Florida
view is illustrated by Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So.
344 (1940), actually involving a paying patient but reviewing the entire law of
that state. Although the paying patient may recover in Georgia, provided trust
funds are not disturbed, under Robertson v. Exec. Comm. of Baptist Convention,
55 Ga. App. 469, 190 S. E. 432 (1937), the stranger may recover only if he can
show specific negligence in selecting or retaining incompetent employees: Jackson
Utah rule is illustrated in Brigham Young University v. Lillywhite, 118 F. (2d)
836 (1941), and in Sessions v. T. Dee Memorial Ass'n, 94 Utah 460, 78 P. (2d)
645 (1938). Recovery in Colorado, Illinois and Tennessee, together with the
divided view in Georgia, is confined to non-trust assets but extends to both
259, 96 P. (2d) 835 (1939); Moore v. Moyle, 406 Ill. 555, 92 N. E. (2d) 81 (1950),
and Wendt v. Servite Fathers, 352 Ill. App. 618, 76 N. E. (2d) 342 (1947); Spivey v.
St. Thomas Hospital, 31 Tenn. App. 187, 213 S. W. (2d) 286 (1949), a beneficiaries
cause, and Anderson v. Armstrong, 150 Tenn. 56, 171 S. W. (2d) 401
(1943), a stranger.
itable corporation but withhold permission as to beneficiaries,\textsuperscript{11} while eight others, denying liability as to beneficiaries, have not yet dealt with the problem as it relates to outsiders.\textsuperscript{12} In certain of these states, where recovery is permissible, the action succeeds only if the charity or its officials can be shown to have been negligent in the selection or retention of incompetent employees; in others, the ordinary doctrines relating to respondeat superior are applied. Few, however, have adopted the view now made applicable in Illinois, that is one which permits recovery where non-trust property may be made available to satisfy the


\textsuperscript{12} Southern Methodist Hospital, etc. v. Wilson, 51 Ariz. 424. 77 P. (2d) 458 (1948); Wilcox v. Idaho Falls Latter Day Saints, 59 Ida. 350, 52 P. (2d) 849 (1938); Jensen v. Maine Eye & Ear Inf., 107 Me. 406, 78 A. 988 (1910); Miss. Inf'l Ordeal of Twelve v. Barnes, 204 Miss. 333, 37 So. (2d) 487 (1948); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Borgeas v. Oregon Short Line R. R. Co., 73 Mont. 407, 236 P. 1069 (1925); Bruce v. Y. M. C. A., 51 Nev. 372, 277 P. 798 (1929); Roberts v. Ohio Valley Gen. Hospital, 98 W. Va. 476, 127 S. E. 318 (1925); Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 P. 385 (1916).
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claims of the injured person but denies recourse against the trust funds.

In achieving that result, the majority of the Illinois Supreme Court took the position that, no matter what the interpretations might have been over the years, the holding in Parks v. Northwestern University\(^1\) did no more than "exempt the trust funds of a charity from any liability for the torts of its agents and employees."\(^1\) It did not, and it is now claimed it was never intended, to "impose a disability to be sued in tort," for the immunity was said to be one which might be waived, particularly if not aggressively asserted,\(^1\) even to the point where trust assets as well might be depleted.

The clarification, if it may be called such, provided by the decision in the Moore case, now opens the door to the consideration of other problems, for at least four new and major questions will have to be decided. In the first place, since there is to be no absolute immunity against the bringing of suit, the plaintiff will have to determine whether the complaint should, or should not, contain necessary allegation with reference to the existence of non-trust property from which satisfaction could be obtained in order to be able to state an actionable case. Secondly, if such allegation is or is not necessary, the plaintiff may or may not be faced with the requirement of proof thereof, in case denial be entered, at the time he attempts to establish his prima facie case of wrong and injury. If the issue is a pertinent one, but not pertinent at that time, the element of proof may become important when related proceedings, such as garnishment, creditor's bill or the like, are brought to enforce the judgment. The third problem, parcel of the first two, involves a question as to whether or not it will be the responsibility of the charitable enterprise, rather than the plaintiff, to plead and prove not only

\(^{13}\) 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (1905).

\(^{14}\) 405 Ill. 555 at 560, 92 N. E. (2d) 81 at 84.

\(^{15}\) In Marabia v. Mary Thompson Hospital, 309 Ill. 147, 140 N. E. 836 (1923), the corporation failed to respond to a summons served on one of its employees and suffered a default judgment. Its attempt to secure relief from such judgment was denied because of its culpable failure to assert the defense of immunity.
the nature of the organization but also that its assets consist solely of trust funds so as to prevent either the rendition or the satisfaction of a judgment. In that connection, the unwillingness of Illinois courts to permit mention of such things as insurance in the presence of a jury\textsuperscript{16} and the indifference of the Illinois legislature with respect to permitting direct suit against, or joinder of, the insurance carrier will bring about the formulation of subsidiary problems. Perhaps the most important area in which conflict can arise, however, will be in the field of spelling out the difference or distinction which supposedly exists between trust and non-trust funds.

Answers to the first two issues may have been provided by the language of the majority opinion in the Moore case. The court said:

It is argued that this would give rise to a situation which would create liability only in the event the charitable institutions were insured, and it is suggested that liability is predicated upon the absence or presence of liability insurance. It is apparent that such is not the case, due to the fact that the question of insurance in no way affects the liability of the institution, but would only go to the question of the manner of collecting any judgment which might be obtained, without interfering with, or subjecting the trust funds or trust-held property to, the judgment. The question as to whether or not the institution is insured in no way affects its liability any more than whether a charitable institution holding private nontrust property or funds would affect its liability. These questions would only be of importance at the proper time when the question arose as to the collection of any judgment out of nontrust property or assets.\textsuperscript{17}

It would seem to follow, therefore, that it is not necessary for the plaintiff to allege or prove that the defendant corporation has


\textsuperscript{17} Moore v. Moyle, 405 Ill. 555 at 564-5, 92 N. E. (2d) 31 at 36.
non-trust funds from which satisfaction may be obtained, but that his complaint would follow along ordinary lines. That conclusion, at least, is supported by the decision of the Supreme Court of Tennessee in Anderson v. Armstrong, a case referred to by the Illinois Supreme Court with some degree of approval, and conforms to the rule that the plaintiff should not, in his complaint in a law action, anticipate or seek to overcome an expected defense.

It cannot be said, however, that there is clear precedent in Illinois on the subject for different approaches were made in the two Illinois cases in which any degree of success has been attained to date. The case of Wendt v. Servite Fathers was modelled along the line suggested, for the complaint therein was an ordinary negligence complaint with no specific reference to the charitable nature of the defendant corporation or to the presence of insurance. After defendant interposed the defense of immunity by way of answer, the plaintiff then filed a reply asserting the presence of liability insurance and waiving all right to a judgment for any sum larger than the policy proceeds so as not to endanger any trust property. In direct contrast, the complaint in Moore v. Moyle not only contained the usual tort allegations but, recognizing the character of the corporate defendant, alleged the institution was fully insured as well as owned other non-trust property so that a judgment could be satisfied without exposing trust funds to possible impairment. The whole issue being revealed in the complaint, the case was ripe for the use of a motion to dismiss on the ground of a failure to state a cause of action. In passing on the ruling predicated on that motion, the Supreme Court expressed no comment as to the propriety of the course of pleading, confining its remarks to the fundamental issue of whether or not liability could exist.

The method of pleading utilized in the Moore case was the

18 180 Tenn. 56, 171 S. W. (2d) 401 (1903).
21 405 Ill. 555, 92 N. E. (2d) 81 (1950).
same as that which had been followed in the earlier Appellate Court case of *Myers v. Young Men's Christian Association of Quincy*\(^{22}\) wherein the court concluded the complaint had been properly stricken because the allegation of insurance coverage would call to the attention of the jury an element of fact they were not entitled to learn as well as because no actionable cause existed against the charity. That rationale was criticised in later cases, even where recovery on the fundamental issue was denied, on the ground that the cases which condemned attempts to convey improper information to the jury were cases in which the effort had been made during the selection or impanelling of the jury or in the course of the trial.\(^ {23}\)

In that regard, the court deciding the case of *Piper v. Epstein*\(^ {24}\) stated:

In none of the cases was the question of insurance an issue affecting the right of plaintiff to recover or the liability of the defendant. It was an irrelevant matter prejudicing the defendant. If carrying insurance by a charitable institution creates a liability not otherwise existing, the fact that such insurance was carried and the nature and terms of the policy become material issues, and evidence relating thereto, although prejudicial to the defendant, is competent.\(^ {25}\)

Either form of allegation, therefore, would seem permissible but preference is expressed, in the interest of clarity of pleading, to the first method.

The second question, one intimately connected with the burden of proof, would seem to be answered in much the same form, for the plaintiff should not, at least in the primary personal injury or contract suit against the charity, be obliged to prove any more than what he is forced to allege. In that way, at least from the plaintiff's standpoint, there will be no fear that forbidden in-


\(^{23}\) See cases cited in note 16, ante.


\(^{25}\) 326 Ill. App. 400 at 406, 62 N. E. (2d) 139 at 142.
formation respecting the defendant's ability to satisfy a judgment, or of the presence of insurance, will reach the ears of the jury and infect their verdict with prejudice.\textsuperscript{26} The materiality of proof of the existence of insurance or non-trust funds could well be held in abeyance until attempt is made to enforce the judgment, should one be obtained. There is ample room, in a garnishment proceeding,\textsuperscript{27} a creditor's bill, or a proceeding for trial of the right of property\textsuperscript{28} to thrash out all questions concerning the right to secure satisfaction from the particular source against which seizure is directed.\textsuperscript{29}

The answer to the third question, one which concerns itself with the duty of the charitable corporation to interpose the defense of immunity, would seem to be answered not only by the logic of the foregoing but by pleading requirements concerning the setting forth of affirmative defenses.\textsuperscript{30} Bearing in mind the rationale of the Moore case, to-wit: an immunity is one of defensive character only, if it exists at all, it could well be said that a charitable corporation should not be entitled to the advantage thereof unless it sees fit to present the same in an appropriate fashion.\textsuperscript{31} The Supreme Court's revised ideas relating to the Parks holding would tend to confirm this view, for it said the Parks case "seems to have provided a defense only" and did not destroy the right of action. Following through with that line of argument, the charitable corporation which sees fit, by affirmative defense, to spread before the court the fact that it carries insurance or other forms of indemnity, particularly in order to limit

\textsuperscript{26} That possibility appears to have influenced the outcome of the case of Myers v. Young Men's Christian Association of Quincy, 316 Ill. App. 177, 44 N. E. (2d) 755 (1942). If the complaint containing an allegation of insurance coverage is read to the jury as the basis of an opening argument, a violation of the rule laid down in Mithen v. Jeffery, 259 Ill. 372, 102 N. E. 778 (1913), might well occur from oversight. It could not happen if no statement as to the presence of insurance appears in the complaint.

\textsuperscript{27} Ill. Rev. Stat. 1949, Vol. 1, Ch. 62, § 1 et seq.

\textsuperscript{28} Ibid., Ch. 77, § 70 et seq.

\textsuperscript{29} At that time, the plaintiff's demand has been established by the judgment and prejudicial error is unlikely to occur from any reference to insurance.

\textsuperscript{30} Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 167(4), directs that "any ground or defense, whether affirmative or not, which if not expressly stated would be likely to take the opposite party by surprise" must be plainly set forth in the answer.

\textsuperscript{31} Marabia v. Mary Thompson Hospital, 309 Ill. 147, 140 N. E. 836 (1923).
the judgment to the extent of policy coverage, could hardly complain that such fact has thereby become known. The skilful trial judge and alert counsel will still see to it that no improper use is made of such information.

The fourth question, one having to do with the difference between trust and non-trust funds, is the one on which there is little guide provided by the Illinois law. The opinion in the Moore case lays down no definite rules other than to note that recourse against the proceeds of an insurance policy would seemingly produce no impairment or depletion of the trust fund. Cases in other jurisdictions have taken up the issue. In Louisiana, for example, where direct suit against the insurer is permitted by statute, it has been held that an injured licensee may reach the policy proceeds, and much the same result appears to have been obtained in Arkansas where the trust fund theory of immunity has been accepted. The proposition has been urged in other states which also, to some extent, accept the trust fund theory, however the decision in the Tennessee case of Vanderbilt University v. Henderson flatly asserts that "such insurance is not trust property and may be appropriated to the satisfaction of such judgment," Nisi prius decisions in Illinois, prior to the holding in the Moore case, have been to that effect and at least one Appellate Court opinion turns on the same view.

33 Michael v. St. Paul Mercury Indemnity Co., 92 F. Supp. 140 (1950). It was there argued that Ark. Stat. Anno. 1947, § 66.517, which permits direct suit against the insurer where "any co-operative non-profit corporation, association or organization . . . [is] not subject to suit for tort," did not apply because the hospital in question was open to suit. The court held otherwise.
36 A memorandum opinion of Judge Frankhauser, in Shaleen v. Newberry Library, Case No. 39-S-11479, Superior Court of Cook County, noted in 21 CHICAGO-KENT LAW REVIEW 8, rejected the claim of immunity where an insurance policy was in existence on the ground that "when the fund is not jeopardized and cannot be reached to satisfy a judgment against the institution, the question of non-liability manifestly disappears." See also the decision of Judge Fisher in Well Cartage Co. v. Sisters of the Holy Family of Nazareth, Case No. 38-C-3374, Circuit Court of Cook County, noted in 20 Chicago Bar Rec. 141 (1939), and that of Judge Fulton, prior to his elevation to the Illinois Supreme Court, in McCuiston v. Hinsdale Hospital and Sanatorium, Circuit Court of DuPage County.
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There is every reason in the world for holding that insurance protection, if present, should not be denied to the injured person, but it does not follow that other non-trust assets are not also within reach. In the absence of insurance, the existence of property of that character would be vital. Few cases exist on that point, but two holdings, one from Georgia and one from Tennessee, may help throw light on the subject. In the Georgia case of Morton v. Savannah Hospital it was said that if a hospital receives, or has due to it, money from paying patients such money does not constitute a trust fund. The Tennessee case of Hammond Post v. Willis would subject all general operating funds to execution.

Dictum in the Moore case would indicate a purpose to class “all” non-trust assets as a source from which satisfaction might be obtained, so it is likely that only those funds or property held under a strict trust, sometime referred to as fixed endowment, will be given the benefit of exemption. To treat all property or money in the hands of the charitable corporation as impressed with a trust for the effective carrying out of the corporate purpose, simply because the same rests in corporate hands, would nullify the steps already taken to abrogate the immunity doctrine. As retreat is not likely to occur, the court will be pressed to settle these questions as they arise. The pressure may result in a total destruction of the dike of immunity. If that is not what charitable corporations want, they would be wise to secure adequate liability insurance coverage to satisfy all reasonable claims and prevent the necessity for further interpretations of the law. Not only will a good public relations policy be subserved thereby but risk of a complete obliteration of the immunity will be obviated.

It should not be assumed that the mere presence of insurance will answer all problems. After insurance coverage has been

38 148 Ga. 438, 96 S. E. 887 (1918).
39 179 Tenn. 226, 165 S. W. (2d) 78 (1942).
40 In that regard, see Ill. Rev. Stat. 1949, Vol. 1, Ch. 22, § 49, as to the right to reach assets held in trust to secure satisfaction of a judgment pronounced against a beneficiary when the trust fund was furnished or created, in good faith, by some one other than the beneficiary.
obtained still other areas may be left open for dispute, particularly if insurance contracts issued hereafter follow along the line of those which have been used in the past. The case of Kos v. Catholic Bishop of Chicago\(^4\) would indicate that certain charitable corporations have accepted, or insisted upon, policies containing a clause to the effect that the insurance company is not to use, either in the adjustment of claims or in defense of suit, any claim of immunity unless requested so to do by the insured charitable corporation. If no such request is made, the injured party, as third-party beneficiary or garnisheeing creditor, could readily obtain advantage from the policy coverage. What, however, should be the result if the charity were to demand assertion of the defense of immunity in its behalf and if no other non-trust funds existed from which satisfaction could be obtained? Some court would, undoubtedly, be obliged to decide whether such a clause was valid or whether it would be improper to allow the question of liability or no liability to rest in the hands of the defendant, to be suffered or not as it wished. Granted that no charitable corporation is required to provide true financial responsibility, still should it not, if it insures at all, be required to secure complete as well as adequate coverage?

Suppose, further, that the case has progressed successfully to the point of a verdict favoring the plaintiff and all post-trial motions have failed to disturb the finding. What, now, of the judgment that should be entered? If that judgment is pronounced without qualification as to the manner of its enforcement, how is the charitable corporation to act in order to protect its trust assets? No statute provides it with the right to claim an exemption, as is true in the case of homestead, unless it may have the benefit of the provisions of the Chancery Act.\(^42\) No sheriff would know whether the execution he receives is, in any way, limited. It

\(^41\) 317 Ill. App. 248, 45 N. E. (2d) 1006 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 258.

\(^42\) Ill. Rev. Stat. 1949, Vol. 1, Ch. 22, § 49. But see Young v. Handwerk, 179 F. (2d) 70 (1949), noted in 1950 Ill. L. Forum 269, as to the effect of bankruptcy on the interest of a beneficiary under a trust otherwise protected by the provision aforesaid. There is a possibility that the same rule could be applied to the charitable corporation which became bankrupt.
is likely, therefore, that recourse to further proceedings, possibly in equity to enjoin the levy and sale, would become necessary, entailing further dispute as to whether immunity existed at all. What if the judgment were expressly limited so as to permit recovery out of the non-trust assets alone, in much the same way as a judgment against an administrator or executor is limited to payment from the assets of the estate? Is it to be the duty of the trial court, as part of the hearing on the primary issue, to ascertain whether any non-trust assets exist and, if so, compile a detailed record thereof for the guidance of its officers? Or must other, and separate proceedings, be entertained for that purpose? The Moore case provides no answer to these questions, nor can one be found readily in the law.

Nor can it be assumed that what has been said covers all issues or settles all questions implicit in the holding in the Moore case, for other disputed points might well arise. Enough has been said, however, to show that the Illinois law is still in a definite state of flux, with thorny problems likely to face the Illinois Supreme Court in the future. That court may yet come to the belief that it would have been wiser if it had, as the dissenting judge suggested, examined again into the reasons and justifications said to support the doctrine of immunity. Had it done so, and, upon examining, found those reasons to be inadequate, it would have done much to remove areas of confusion which still mark the law of Illinois.

43 Citation procedure is now available under Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.26A.

44 The dissenting opinion of Crampton, J., in Moore v. Moyle, 405 Ill. 555 at 567-8, 92 N. E. (2d) 81 at 87-8, states: "... the primary issue of immunity should be frankly faced ... The fact that this Court has in the past adhered to the doctrine of immunity is highly persuasive. But it is not conclusive ... I think the crucial policy of exempting charitable institutions from tort liability is of sufficient gravity to require a further appraisal ... The issue here presented should be resolved upon the merit of those reasons rather than upon the adoption of criteria which merely purport to extend or modify the doctrine and which I believe can result in little but confusion in the law."
WAREHOUSE REGULATION SINCE MUNN v. ILLINOIS

J. R. Blomquist*

OVER EIGHTY YEARS ago, midwestern farmers were driven into organized revolt against their almost complete dependence upon outside markets for the disposal of their produce and upon corporately owned elevators and railroads for its handling. Rates as high as fifty-eight and one-half cents per bushel for the shipping of grain from the Mississippi basin to the Atlantic seaboard, and nearly half as much for the short haul from an Iowa farm to Chicago, brought about rumblings which were heard in the midwestern legislative halls in 1869 as well as in the Illinois Constitutional Convention held during that same period. Those farmers who had bound themselves together in a lodge known as the Patrons of Husbandry, and a host of unaffiliated farmers' clubs, asserted new-found political power while they exhorted their neighbors to elect only those who shared in the view that nothing less than state regulation of railroads and elevators could rid them of the stifling practices of those enterprises.¹

The success of the Granger Movement was first felt by the warehouse operators when the framers of the Illinois Constitution of 1870 embraced the cause of the grain shippers and inserted in that document a provision denoting grain elevators and storhouses as public warehouses, and directing the General Assembly to pass laws for the protection of producers, shippers, and receivers of grain.² In the following year, a comprehensive body

* A. B., LL. B. Member, Illinois bar. Assistant Professor of Law, Chicago-Kent College of Law.


² Ill. Const. 1870, Art. XIV. The Illinois Supreme Court, in Hannah v. People, 198 Ill. 77 at 82, 64 N. E. 776 at 777 (1902), adverted to the fact that "the framers of the Constitution deemed the matter of protection of producers and shippers of grain against wrong, fraud, and imposition on the part of those engaged in the business of providing storage for grain of great importance is demonstrated by the fact that they devoted an entire article of the Constitution to that subject." That the framers included such material at all would seem sufficient evidence of the importance they attached to the matter, inasmuch as no other state constitution touches on the subject of warehousing.

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of regulation was enacted by the Illinois legislature pursuant to this directive. Maximum rates for grain storage were established and operators of public warehouses were required to obtain licenses and to post bonds. Believing they were engaged in a private business not subject to such regulation, two Chicago elevator operators continued to charge the same storage rates as they had previously done, rates which were in excess of the new maximum imposed by the statute. The Supreme Court of the United States was thereby led to decide the case of *Munn v. Illinois* and to make its first significant pronouncement on the public utility concept.

That the pricing practices of grain storage companies together with the concentrated control of the business in Chicago influenced the court to uphold the Illinois enactment cannot be doubted. Warehouses, the court said, stood "at the very gateway of commerce to take toll from all who passed," for which reason anyone who devoted his property to such a use in effect granted "to the public an interest in that use, and must submit to be controlled by the public for the common good." Oddly enough, these familiar words taken from the opinion in *Munn v. Illinois*, although spoken with reference to the operation of grain warehouses, have rarely been mentioned since in relation to that activity. Based on an almost forgotten work written two centuries earlier by Chief Justice Hale, the doctrine of property affected with a public interest had never been applied to a statute like this one, but the words became a formula. Warehouses, however, were forgotten except insofar as the warehousing activity had been the incidental vehicle for an important decision. Regulation of warehouses by state legislatures, though, was to continue and to be expanded on all sides for seventy years.

The words of the Supreme Court relating to the suscepti-

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4 94 U. S. 113, 24 L. Ed. 77 (1877).

5 94 U. S. 113 at 126, 24 L. Ed. 77 at 84.

6 94 U. S. 113 at 126, 24 L. Ed. 77 at 84.

7 *De Portibus Maris*, 1 Harg. L. Tr. 78.
bility of warehouses to governmental control have proved surprisingly durable in the seventy-three years since they were spoken. Few voices have risen to challenge the wisdom of Justice Waite in the interim, despite a lusty prediction at the time that *Munn v. Illinois* would toll the death knell for unregulated individual enterprise in the United States. It is, therefore, not surprising that the next important occasion on which warehouse regulation was brought into focus by the Supreme Court resulted from another conflict based upon other constitutional considerations. Accepting the premise that they must submit to regulation, the warehouse operators turned their attention to the matter of identifying the tormenter, realizing that they might gain if they were free to ignore oppressive state regulation while complying with federal enactments on the subject.

Although warehouse acts were conceived by state legislatures, the court deciding *Munn v. Illinois* had not ignored the relation of elevators to interstate commerce. Indeed, it recognized the possibility that Congress might institute a system of controls when it said:

The warehouses of these plaintiffs in error are situated and their businesses carried on exclusively in Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are not more necessarily a part of commerce itself than the dray or the car by which, but for them, grain would not be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.  

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9 94 U. S. 113 at 135, 24 L. Ed. 77 at 87.
But Congress, apparently, was not then ready to take up the subject of regulating interstate commerce, not at least so far as regulating grain warehousing was concerned.

With the impetus provided by the decision in *Munn v. Illinois*, the states got down to serious business. Many of the midwestern and northwestern states, where the Granger Movement had flourished and where the abuses by elevator operators had been felt most acutely, adopted legislation patterned, in varying degree, on the Illinois Warehouse Act.\(^\text{10}\) By 1914, some fifteen states required a license for all who engaged in the activities of a public grain warehouse.\(^\text{11}\) Seven states allowed the fixing of rates for the storage of grain,\(^\text{12}\) and others applied like regulation to the storage of cotton and tobacco.\(^\text{13}\) Six states fixed maximum storage rates.\(^\text{14}\) In addition to the matters mentioned, many statutes included provisions relating to inspection, weighing, rendering reports, grading, discrimination, and the like.\(^\text{15}\) Those states which passed up the opportunity to enact such statutes were, by and large, those which had no extensive grain elevator business within their bounds.

The jurisdiction of states to exercise police powers in this fashion remained unchallenged by Congress for many years and, seemingly, all were content to leave the matter in the hands of

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\(^\text{10}\) See Mohun, Warehousemen (Nickerson & Collins Co., Chicago, 1914).


\(^\text{15}\) The statutes referred to in notes 11 to 14 inclusive are those which achieve regulation relating specifically to warehouses. Other statutes, where regulation may be accomplished under powers granted over public utilities generally, are not included in the tabulation.
state agencies for the evils sought to be curbed were felt mostly at the local level. However, no one questioned the power of Congress to act with reference to the interstate relations of the warehousing business and, in 1916, with the enactment of the United States Warehouse Act, Congress asserted that power. That statute authorized the Secretary of Agriculture to license grain warehouse operators, to investigate weighing procedures, to inspect elevators, to require bonds of licensees, to prohibit discrimination, to require standardized reports of licensees, and to impose other miscellaneous restrictions on the freedom of operators.

Three features of this action were significant. In the first place, the act did not require a license of any operator whose operations affected interstate commerce, but only permitted the licensing of those operators interested enough to make application for the same and who were willing to comply with the act and the regulations imposed thereunder. Secondly, as originally enacted, the statute set the record straight with regard to the status of existing state laws by declaring that nothing "in this Chapter shall be construed to conflict with or to authorize any conflict with, or in any way impair the effect of operations of the laws of any state relating to warehouses, warehousemen, weighers, graders, or classifiers." Thus it is apparent that state regulation of warehouses had become so important a part of the economic and political fabric that Congress was especially careful not to uproot the extensive network of state controls which had been effectively established following the decision in the Munn case. A third factor, useful in evaluating the United States Warehouse Act, is to be found in the purpose of the legislation, for that pur-

16 In U. S. v. Darby, 312 U. S. 100 at 118, 61 S. Ct. 451 at 459, 85 L. Ed. 609 at 619 (1940), the court declared that "power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them an appropriate means to the attainment of a legitimate end, the exercise of the granted powers of Congress to regulate interstate commerce."


18 7 U. S. C. A. § 244.

19 Ibid., § 269.
pose appeared to be one to provide a glorified warehouse receipts law, written with the Uniform Warehouse Receipts Act in mind. It was designed to enhance the value of grain and similar receipts for collateral purposes by assuring bankers and credit men that grain which had been stored in a federally licensed warehouse would be subject to added controls planned for their protection.  It would seem clear, as has been stated, that Congress did not undertake any general affirmative regulation of warehouses even remotely comparable to the scope of regulation it has provided for other public utilities.

Co-existing state and federal control seemed to be sanctioned both by the United States Warehouse Act and by federal court decisions for a considerable period of time following 1916. It was held by the Circuit Court of Appeals, in Independent Gin & Warehouse Company v. Dunwoody, that Congress did not intend to occupy the whole field of law in relation to the storage of agricultural products moving in interstate commerce, so as to exclude the jurisdiction of the states, even though such regulation should tend to affect interstate commerce, for an Alabama statute which required a license of a cotton warehouser was there upheld. The Supreme Court itself stated that the purpose of the federal act was not to supersede state law but was intended to provide a form of co-operation with state officials in the control of the activity. In a few years, therefore, twenty-one states had laws requiring licenses of all public warehousers, and five others had laws with exacted similar compliance from

20 See the dissenting opinion of Mr. Justice Frankfurter in Rice v. Santa Fe Elevator Corp., 331 U. S. 218 at 242, 67 S. Ct. 1146 at 1158, 91 L. Ed. 1447 at 1465 (1946).
21 40 F. (2d) 1 (1930).
operators of cotton, tobacco, or cold storage warehouses. In four additional states, warehousemen could obtain a license if they wished to do so. The number of states controlling storage rates under warehouse acts had increased to eleven, while a number of others exercised the same regulation under powers granted over public utilities generally. Some state statutes contained clauses exempting operators from state regulation if they had secured a license under the federal Warehouse Act. But the complexity of state enactments ranged from extensive regulation of all phases of the pursuit, on the one hand, to toothless acts having to do with little more than fire prevention on the other.

Such diversity in types of control could lead to but one result. Once more the cry was heard that credit transactions were being endangered by such a state of affairs. Bankers admitted that they were unable to keep pace with the laws of forty-eight states, hence were unable properly to estimate the security value of the warehouse receipts with which they dealt. At their insistence, in 1931, Section 269 of the United States Warehouse Act was amended and language was used which made it unmistakable that the intent of Congress was to substitute the federal system for those which had been developed under the various state statutes.

It is difficult to estimate with what degree of enthusiasm state agencies enforced their local controls after the amendment of

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25 To the statutes mentioned in note 14, ante, there should be added statutes enacted in Arkansas, Nebraska, North Dakota, South Dakota, Utah, Virginia, and Wisconsin. Citations thereto appear in notes 23 and 24, ante.

26 Examples of comprehensive regulation may be found in the Minnesota, Montana, North Dakota and South Dakota statutes cited in note 23, ante.

27 See, for example, the statutes of Arizona, Idaho, Michigan, New Mexico, and Oklahoma referred to in notes 23 and 24, ante.


29 46 Stat. 1465, 7 U. S. C. A. § 269, omitted the clause quoted in the text at footnote 19, ante, and added "but the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Chapter shall be exclusive with respect to all persons securing a license hereunder so long as said license is in effect."
Section 269. Some indication is to be found, in the few reported cases decided since then, that warehouse operators ignored state regulations when they chose to obtain a federal license. One Illinois company, for example, owning twenty of the forty-one elevators in Chicago and storing approximately 35,000,000 bushels out of the total capacity of 47,757,000 bushels, licensed twelve of its warehouses under the federal act but only three under the Illinois statute, the remaining five not being public warehouses. The Supreme Court of South Dakota seemed to feel that state control had been displaced entirely by the federal act which granted discretionary power to the Secretary of Agriculture to exercise exclusive federal control without co-operation with the states. When a defendant failed to secure a state license, but did possess a federal one, the South Dakota court met the head-on collision by holding that the state must bow out and defer to the United States Warehouse Act.

It might be said to be appropriate, or ironic, that the showdown in the argument of state in contrast to federal regulation of grain warehouses should have its situs in the same state, and concern substantially the same warehouse act, which had been involved in Munn v. Illinois. The Granger Movement had long since been forgotten, but the threat of oppressive practices by unregulated, or inadequately regulated, terminal grain elevator operators must have been in the mind of the petitioner, an owner, dealer, and shipper of grain, when, in Rice v. Santa Fe Elevator Corporation, he charged the elevator corporation with maintain-

32 In re Farmers Co-op Ass'n, 69 S. D. 191, 8 N. W. (2d) 557 (1943).
33 69 S. D. 191 at 199, 8 N. W. (2d) 557 at 561. The court held that it was necessary to look to the impact, on the national economy, of the country elevator business as a whole in determining whether its effect on interstate commerce was substantial. The fact that the particular co-operative elevator's own effect was trivial was not enough to remove it from the rule since the contribution of the entire industry would be great. This theory was discussed in Wickard v. Filburn, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1922). See also Federal Compress Co. v. McClean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622 (1933), a case holding that a non-discriminatory state tax on warehouses was not prohibited by the United States Warehouse Act since that statute had not assumed to tax the business nor had exercised any control over state taxation.
ing excessive rates, engaging in discriminatory practices, operating without a state license, rendering inadequate service, mixing public grain of different grades, as well as perpetrating other violations of the Illinois Warehouse Act. The corporation sought to enjoin further proceedings on the basis that the right of the State of Illinois to enforce its regulations had been superseded by the federal act. The Supreme Court of the United States, on certiorari, affirmed the warehouseman's position and granted the injunction, with the result that the shipper was unable to have his remedy for the alleged violations of the state law.

By that decision, state regulation has now been foreclosed where the warehouseman has elected to obtain a federal license, at least as to those matters which are "in any way regulated by the federal act," and dual regulation has been eliminated. For those operators who do not choose to secure a federal license, and in those aspects of warehousing which the federal act does not "touch," however meagerly and indirectly, state law may continue in force. However, the areas so retained for control by the states appear to be of negligible importance.

In the Rice case, for example, nine aspects of regulation by both agencies were compared. Under the Illinois statute, public utility rates must be just and reasonable and the state commission may fix rates which meet that standard, and maximum storage charges are set by statute. The federal act, in contrast, permits the revocation or suspension of a license if it appears that rates are "unreasonable or exorbitant," but does not permit of rate-fixing nor provide adequate sanction against the charging of excessive rates. Discrimination between persons applying for the use of facilities is forbidden by both acts. The Illinois law prohibits the operator from acting in a dual position by storing his own grain while doing the same thing for the public, but

36 Ibid., Ch. 114, § 202.
39 Ill. Const. 1870, Art. XIV. See also Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902).
the federal act requires only that receipts issued for such grain must disclose the true relationship when an operator stores his own grain.\textsuperscript{40} The mixing of grain of different grades is regulated by both acts, as is the practice of sacrificing or rebating storage charges.\textsuperscript{41} Extensive regulation of inadequate, inefficient and unsafe facilities is provided for under both acts.\textsuperscript{42} Operation without a state license is, of course, forbidden in Illinois,\textsuperscript{43} but no federal license is compulsory.\textsuperscript{44} Abandonment of warehouse service is possible, under the state law, only with commission approval,\textsuperscript{45} but is spoken of only with reference to "termination" in the federal act, one ground for which is "ceasing to do business."\textsuperscript{46} The filing and publishing of rate schedules have been subjected to control under both.\textsuperscript{47}

By the test previously stated, each of the nine matters outlined was held, by the Rice case, to be beyond the reach of the Illinois Commerce Commission, since Congress had declared a policy on each of the subjects in the federal Warehouse Act. Yet, the court has not held that an elevator operator is altogether acquitted of responsibility to state law for he must still conform to matters of regulation imposed by the state which are not touched by Congress. State regulation, however, is prohibited as to all matters "touched," even though lightly, by federal law, for the prohibition is not limited to those subjects where there is direct conflict or where there is a precise concurrence in control.\textsuperscript{48} The Rice case, then, leaves a little power in the state while serving to wipe out a great deal of the power formerly enjoyed.

\textsuperscript{40} 7 U. S. C. A. § 250(i).
\textsuperscript{44} 7 U. S. C. A. §§ 243-5; 7 C. F. R. §§ 102.3-102.12.
\textsuperscript{46} 7 U. S. C. A. § 246; 7 C. F. R. § 102.9.
\textsuperscript{47} The state provisions are set out in Ill. Rev. Stat. 1949, Vol. 2, Ch. 111½, §§ 33 and 35. For the federal stipulations, see 7 C. F. R. § 102.5.
\textsuperscript{48} That position was advanced by Mr. Justice Frankfurter in his dissenting opinion in Rice v. Santa Fe Elevator Corp., 331 U. S. 218 at 238, 67 S. Ct. 1146 at 1155, 91 L. Ed. 1447 at 1463 (1946).
The legislative history of the state and federal acts indicates that there existed two distinct purposes to be subserved in the regulation of grain warehouses. The primary objective of federal regulation has been to enhance and stabilize the value of warehouse receipts for use as collateral in financial transactions. The states, by contrast, have intended their acts as a means by which to protect the producer and the public from abuses by warehousemen who occupy a strategic position in the flow of grain from producer to consumer. Notwithstanding this variation in purpose, Congress and the Supreme Court have now wiped out a goodly portion of the accumulation of state legislation which had been permitted to flourish in the train of *Munn v. Illinois*.

Advocates of uniformity might well seek to justify the more recent development. But the cold truth is that the United States Warehouse Act was not designed to accomplish, nor is it capable, without implementation, of serving, those ends sought by the states. While Congress has "touched" upon certain subjects to the exclusion of the states, it has not seen fit to provide adequate enforcement provisions, nor has it developed an agency equipped with either manpower, funds, or the will to enforce its policies. The abuses which the petitioner in the Rice case complained about probably still persist, the operators having withdrawn to the protection of uniform non-regulation by the Secretary of Agriculture through the simple and convenient expedient of obtaining a federal license. It is true that there is a residue of control left in the states, but the possibility of using such power in an effective manner is absent because of the withdrawal of all the important means by which state law could achieve effective control.49

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49 Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1946), also involved three regulatory measures imposed by the Illinois statute designed to prevent an unwarranted drain on utility funds and the creation of unsound financial structures. These provisions required commission approval of all contracts between the utility and its "affiliates," of contracts between the utility and other public utilities, and for the issuance of certain securities. See Ill. Rev. Stat. 1949, Vol. 2, Ch. 111½, §§ 8(a) (3), 21 and 27. It was held that Congress had not excluded state action on these matters since no provision of the United States Warehouse Act related to these subjects. The problem of determining whether other specific state provisions may be valid or not is simply one of examination to see if the federal act, or the regulations thereunder, have touched on the particular subject.
An overworked Secretary of Agriculture has found himself handed the job of regulating grain warehouses in all major particulars by an amendment designed to bring about one thing, that is the strengthening of warehouse receipts. Laissez faire has been introduced outside the scope of his very narrow powers. As things now stand, any energetic effort to regulate must be made by the federal government, since an attempt by the state to do so will merely force the operator into the arms of the federal licensing agency and out of the reach of the state. The fact remains, however, that history shows that at no time has Congress deemed it advisable to introduce compulsory uniformity. The obvious suggestion, therefore, is that Congress should repeal the federal law, so as to reinstate local regulation, or provide for an adequately manned and financially able federal agency to take over active enforcement of a law comparable to the ones of which the states have been deprived.

Until that happens, there is not much left for the states to do in the limited opportunities for regulation left to them. It might be wise for the states to avoid conflict entirely by exempting federal licensees from all applications of state law, as has been done in Idaho, New Mexico and Oklahoma. In the four and one-half years since the Rice case was decided, however, no state has made any effort to revise its warehousing laws in the light of that decision. This may be an indication that the need for state regulation has diminished or ceased to exist. Perhaps warehouse regulation has shifted into another phase. But whether or not times have changed as much as the Rice case would imply will be known when, and if, the voices of dissatisfaction heard prior to Munn v. Illinois are again raised against the prevailing system of non-regulation of the warehousing business.
VII. PUBLIC LAW

ADMINISTRATIVE LAW

Where the legislature has authorized an administrative tribunal to exercise a degree of discretion in a particular field, it is fundamental that the courts, upon a review of the agency's decision, cannot substitute their judgment for that of the administrative tribunal. On the other hand, it is equally true that the reviewing court may determine whether or not the administrative ruling or decision was in conformity with the powers delegated. On several occasions in the past year, the Illinois courts found it necessary to analyze orders of Civil Service Boards in respect to this particular problem and these decisions are important for they define the extent of the authority of such boards in what were previously uncharted areas.

The first case, that of People ex rel. Polen v. Hoehler, involved the removal of the plaintiff who enjoyed civil service status as an employee in the Illinois Soldiers & Sailors Children's School. The plaintiff had left her assigned post to attend an ailing sister without giving personal notice to any of her immediate superiors or to the superintendent of the institution. This failure arose because none of these individuals were available at the time of plaintiff's departure, but she did leave a message, to be forwarded to the superintendent, to the effect that she was taking advantage of a portion of her vacation allowance. Upon plaintiff's return, she was notified of her dismissal under a ruling previously adopted by the Commission to the effect that an employee "absent from duty without leave for a period of three successive days or longer, without proper written notice to and approval by his superior officer of the reason for such action, shall be considered to have resigned."

1 Parts I to VI of this survey appeared in 29 CHICAGO-KENT LAW REVIEW pp. 1-104. Limitations as to space required carrying over the balance of the material to this issue.

1 405 Ill. 322, 90 N. E. (2d) 729 (1950).
The statute governing the powers of the State Civil Service Commission allows that agency to discharge a civil service employee for cause but, upon proper application of the affected party, requires the granting of a hearing in reference to the reason for the removal. In accordance with this provision, the plaintiff sought a hearing which the Commission refused to grant on the theory that, as a resignation and not a discharge was involved, the hearing requirement was not applicable. Plaintiff thereupon petitioned for, and was granted, a writ of mandamus. Upon direct appeal to the Supreme Court, the decision was affirmed. That tribunal found the rule so promulgated to be in direct contravention of the statute since it contemplated a discharge without the necessity of affording a hearing, even though requested. The theory that the plaintiff's actions amounted to a resignation was said to have no logical foundation as the severance of the individual from her employment occurred automatically, without reference to her own desires or wishes. The merit of the decision cannot be questioned since the statute clearly manifests a legislative intent to require a hearing on reasons for discharge, where one is requested, and any attempt to circumvent such a requirement should be thwarted.

Two companion cases, those of Drury v. Hurley and Connelly v. Hurley, involved individuals who have recently made newspaper headlines. It may be recalled that Drury and Connelly, members of the Police Department of the City of Chicago, were assigned to investigate a number of unsolved murders including the shooting of one James Ragen. In due course several witnesses were located who claimed that they could identify Ragen's assailants. Signed statements were obtained and, based thereon, an indictment was handed down. The witnesses later recanted and, because of their recriminations, the two police officers were summoned before the grand jury for interrogation.

3 Direct appeal was proper since the state was a party to the litigation.
5 339 Ill. App. 54, 88 N. E. (2d) 736 (1949). The subsequent history is the same as that noted in footnote 4, ante.
concerning their activities during the investigation. They were asked to sign immunity waivers but refused so to do. They were immediately suspended and charges were filed against them before the Civil Service Commission.

The commission, pursuant to statutory authorization empowering it to dismiss any municipal civil service employee for "cause," determined that the refusal on the part of the police officers to sign immunity waivers constituted such a cause and the officers were, as a consequence, discharged. Separate proceedings for writs of certiorari were then instituted and the trial court, upon reviewing the record, reversed the decision. The Civil Service Commission appealed directly to the Illinois Supreme Court, but the cases were subsequently transferred to the Appellate Court because no constitutional question was involved. That court, in reversing the lower court, pointed to the fact that the statute under which the commission had proceeded contained no definition of "cause," hence left it to the discretion of the agency to determine the exact meaning to be given to that term. This would not be an instance of uncontrolled discretion, for it has been decided that the reason for the discharge must bear some relation to the welfare of the public and the service. It was, therefore, within the scope of judicial review for the court to ascertain whether any such relationship existed. The discharge was upheld on the theory that, as the police officer's primary duty is to protect the public, the refusal to divulge information which might aid in the enforcement of law and order is inconsistent with that duty. It was, of course, argued that the officers had not refused to testify but merely declined to sign immunity waivers. The court felt that both types of refusal were equally reprehensible since, in either case, the main aim of those called upon to disclose information would be to protect themselves from a subsequent criminal prosecution. If the officers had testified without signing the immunity waiver, it is doubtful that criminal

6 Ill. Rev. Stat. 1949, Vol. 1, Ch. 24½, § 51. As to whether the same type of conduct would be "cause" for the removal of a judge, see In re Holland. 377 Ill. 346, 36 N. E. (2d) 543 (1941).
8 Murphy v. Houston, 250 Ill. App. 385 (1928).
prosecution would have followed because of the constitutional provision against self-incrimination. By so refusing, the police officers were, in effect, placing self-interest before the interest of the public. They were, therefore, guilty of action detrimental to the welfare of the citizenry and the service.

In still another decision, that found in *People ex rel. Hurley v. Graber*, the Supreme Court recognized two legal devices by which an administrative tribunal can be prevented from overstepping its statutory authority. It appeared that, in 1947, the state legislature amended the City Civil Service Act to allow war veterans additional promotional credits based upon service in the armed forces. In accordance with this provision, certain ex-servicemen in the Chicago Police Department had been given promotions which, in the absence of the added credits, would have gone to non-veteran members. The Supreme Court subsequently decided the amendment was unconstitutional because it was vague and indefinite, thereby leaving the validity of the already consummated promotions in doubt. The City Civil Service Commission finally took the position, based upon an opinion furnished by the Corporation Counsel, that the advancements were invalid. It then made a public announcement that all veterans who had received promotions based on the added credits would be demoted and restored to their former positions. Two groups of those who would have been adversely affected by such an order instituted actions to prevent the demotion. One group sought a writ of prohibition; the other, an injunction. Both prayers were granted. The commission then filed an original action in the Illinois Supreme Court for a writ of mandamus designed to compel the trial judge to expunge these orders from the record. The Supreme Court, comparing the commission's power with its contemplated action, determined that the latter was in clear violation of its statutory authority. It decided that the power to discharge for "cause" would not support a re-

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9 405 Ill. 331, 90 N. E. (2d) 763 (1950), noted in 38 Ill. B. J. 367.
consideration or a demotion after an appointment had been completed. The commission was, therefore, in no position to question the validity of the advancements it had ordered, even though the same were consummated under an unconstitutional statute.

The remainder of the opinion is concerned with the more interesting and significant procedural questions concerning the availability of an injunction and the use of a writ of prohibition to forestall invalid administrative action. The court, when upholding the injunctive relief, was forced to overcome the simple proposition that, as an individual possesses no property right in a public office, equity would lack jurisdiction to issue an injunction in order to prevent his ouster.\textsuperscript{12} It did so, in the particular case, by establishing equity jurisdiction upon the basis of a necessity to prevent excessive litigation which might otherwise result from the many demotions there contemplated. As to the writ of prohibition, the court acknowledged the existence of two rules governing its use, to-wit: (1) the writ could only be addressed to an inferior tribunal exercising judicial power, and (2) the judicial power about to be exercised had to be one in excess of its jurisdiction. An administrative agency is ordinarily thought of as an arm of the executive rather than of the judicial branch of the government; consequently, it might logically be assumed that a writ of the type sought should not have been granted. The court, however, looked to the function performed by the Civil Service Commission and characterized it as being at least quasi-judicial, thereby finding the first essential element to be present. That approach is not as startling as it sounds for the Supreme Court has recognized the quasi-judicial aspects of commissions of this type when permitting review by means of certiorari.\textsuperscript{13} The existence of the second element was declared satisfied by the finding of a lack of authority to demote.

In permitting the utilization of both the injunction and the writ of prohibition, the court appears to have overlooked certain other factors which have previously governed the availability of these two remedies. Thus, the issuance of the extraordinary

\textsuperscript{12} Marshall v. Board of Managers, 201 Ill. 9, 66 N. E. 314 (1902).

\textsuperscript{13} Bartunek v. Lastovken, 350 Ill. 380, 183 N. E. 333 (1932).
writ of prohibition has been conditioned upon the fact that the litigant has lacked any other method for obtaining relief. Similarly, equity usually intervenes only in the absence of an adequate legal remedy. Since the court found that injunctive relief was available, it might logically have refused the writ. On the other hand, as the legal remedy of prohibition was deemed appropriate, it would have been equally logical to have denied the injunction. The court, by not discussing this aspect of the case, has simply added to the mist of uncertainty surrounding the use of extraordinary legal and equitable devices in the field of administrative law.

While the reports are void of any significant decisions dealing with the Illinois Administrative Review Act, there have been several which simply reiterate a position previously taken by the Supreme Court with reference to the weight to be accorded administrative findings of fact. The Act provides such findings and conclusions are to be considered prima facie true and correct. Soon after the enactment of the statute, the Illinois Supreme Court interpreted this particular provision as limiting the reversal of agency findings to situations where they were against the manifest weight of the evidence or unsupported by substantial evidence. This view has been adhered to in an assortment of decisions handed down during the period of this survey, an

14 People v. Circuit Court of Wash. County, 347 Ill. 34, 179 N. E. 441 (1931).
15 Typically, prohibition has been denied where an ordinary legal remedy such as a writ of error, etc., could have been utilized. It might, therefore, be argued that since an injunction does not fall within this classification, its presence as a possible method of attack should not affect the availability of the extraordinary writ. This argument was apparently rejected in State v. Perry, 113 Ohio St. 641, 150 N. E. 78 (1925), where the court refused to issue a writ of prohibition on the ground that relief by injunction was adequate.
16 However, it might be reasonably urged that the extraordinary aspect of the writ of prohibition took it out of the realm of customary adequate legal remedies and therefore its availability would not bar the issuance of an injunction.
18 Drezner v. Civil Service Commission, 398 Ill. 219, 75 N. E. (2d) 303 (1947). The failure to adopt the classical "manifest weight of the evidence" rule or the "substantial evidence" rule was due to the fact that a previous attempt to utilize the former in restricting judicial review of agency findings was held unconstitutional as a usurpation of judicial power: Otis Elevator Co. v. Industrial Commission, 302 Ill. 90, 134 N. E. 19 (1922).
indication that the Illinois courts have adopted the classical view concerning the scope of judicial review of findings of fact. That view had previously existed in this state before the enactment of the new statute and is typical of the one found elsewhere.

**CONFLICTS OF LAW**

Federal courts sitting in this area were called upon to decide two interesting and complicated conflicts of law problems of first impression in this jurisdiction. The case of *Hynes v. Indian Trails, Inc.*, \(^{20}\) involved the applicability of a particular provision in the Illinois Workmen’s Compensation Act. The plaintiff, a motorman for a Chicago street railroad, sustained injuries when a motor bus operated by one of the defendant’s employees collided with his street car. He instituted an action sounding in tort to which the defendant pleaded Section 29 of the Illinois Workmen’s Compensation Act as a bar to the suit.\(^{21}\) If the defendant was bound by the Illinois act, dismissal of the plaintiff’s action would be proper for he would have no right to maintain a common law action and would have to be satisfied with his statutory remedy. In an effort to prove that the Illinois statute controlled the case, the defendant submitted that it was a Michigan corporation with an office in Chicago; that it operated buses across Michigan and Indiana into Illinois; and that it had complied with the provisions of the Illinois Compensation Act, which covered many of its employees.

Plaintiff, on the other hand, noting that the driver of the vehicle was a resident of Michigan, had been hired in that state, and was covered by its statute, pointed to the fact that, as the defendant was not bound by the Illinois act in its relation to the particular employee, defendant could not have the advantage of Section 29. The federal district court agreed with plaintiff and that decision was sustained by the Court of Appeals for the Sev-


\(^{21}\) Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, directs that when a compensable injury arises without the negligence of the employer or his employee, and is caused under circumstances creating a legal liability for damages in some other person, other than the employer, then the employer is the one to bring legal proceedings against the third person.
enth Circuit. The latter pointed out that the subjection imposed on the defendant by the Illinois statute as to some of its employees did not extend to all injuries arising in this state but that the test to determine the applicability of Section 29 was whether or not the employee at fault could have secured an award under the Illinois act if he had been the one who had been injured.

The defendant asserted that, even using such test, it was entitled to plead the applicable provision since the specific employee, if he had been injured, could have recovered an award under the Illinois statute. In support of that premise, the defendant cited United States Supreme Court decisions which declare that a state wherein the injury occurs is free to apply its own compensation laws to the exclusion of the law of the state of the employer and employee. The existence of such decisions was acknowledged by the court but it was noted that the same were permissive rather than mandatory in character. It then pointed to the fact that a policy had been developed in Illinois under which its courts would refuse to apply the Illinois statute in cases where the only contact with Illinois lay in the fact that the injury occurred within its limits. From this, it easily followed that the defendant was not in any position to take advantage of the defense offered by the Illinois statute.

The second case, that of Anderson v. Linton, was one commenced by the plaintiff as administratrix of her husband's estate for his alleged wrongful death and for her own personal injuries sustained in the same accident. It appeared that the collision occurred when a trailer, being transported through the state of Iowa, became detached from the tractor pulling it, veered across the highway, and came into contact with the automobile in which the plaintiff and her husband were driving. The defendants were the transport company and the manufacturer and assembler of the house trailer, the latter being joined on the theory that the accident was the direct result of their negligence in so unskilfully welding the hitch to the trailer that it snapped.

24 178 F. (2d) 304 (1949), noted in 38 Ill. B. J. 339.
The second defendant contended that the welding which constituted the alleged negligence had been done in Illinois, a state which was said not to permit recovery unless a contractual relationship exists between the manufacturer and the injured party. The court declined to pass on the state of the Illinois law on this particular point, because the actual injury had been inflicted in Iowa and Iowa law was said to control.25 No Iowa decisions specifically in point could be found but it was said to be the law of that jurisdiction to permit suit against a manufacturer despite the absence of contractual privity. Other contentions, such as one based on the absence of an Iowa wrongful death statute and another concerning the appropriate statute of limitations for the personal injury aspects of the case, were readily answered.26

The wrongful death portion of the action, however, produced a more difficult problem as to choice of law. The limitation period controlling death cases is typically found in the wrongful death statute itself so as to be part and parcel of the remedy, hence a matter of substantive law rather than of procedural law. Such being the general case, the lex loci delicti normally would govern and would have required the court to apply the Iowa limitation period. But, the situation was not susceptible to that solution for the Iowa survival statute, unlike the usual wrongful death act, does not contain a limitation provision. The court then fell back on the ordinary practice of applying the statute of limitations of the forum. Not even this solved the problem for Illinois possesses two limitation periods; a general two-year provision as to most torts,27 and a one-year requirement for wrongful death actions.28 The court saw fit to utilize the latter and barred the suit brought by the administratrix.

25 This was no more than an application of the familiar doctrine calling for reference to the lex loci delicti in tort cases.
26 The Iowa survival statute was, on the authority of Major v. Burlington, C. R. & N. Ry. Co., 115 Iowa 309, 88 N. W. 815 (1902), held to warrant suit by the administratrix to recover for the wrongful death. On the accepted principle that the law of the forum controls as to procedural matters, Horan v. New Home Sewing Machine Co., 289 Ill. App. 340, 7 N. E. (2d) 401 (1937), the Illinois limitation period was utilized to settle the question of whether the personal injury suit had been instituted in apt time.
28 Ibid., Vol. 1, Ch. 70, § 2.
The decision on this phase of the case would appear to be remarkable. While the action was instituted upon an Iowa law allowing recovery for wrongful death, the court applied the limitation period fixed by the Illinois statute. As the remedy for wrongful death cannot usually be separated from its period of limitation, is it logical to separate the limitation period from the remedy? If any rationale exists, it might lie in the fact that the court may have felt that a policy had been established in Illinois to restrict wrongful death actions to a period of one year which should be applied to suits commenced under the laws of a sister state where no contrary policy has been manifested.

CONSTITUTIONAL LAW

Aside from constitutional issues presented in People ex rel. Bernat v. Bicek\(^\text{29}\) over legislative attempts to create special divorce divisions in the judicial circuits of the state, only two other cases possess significance and they deal with the constitutionality of taxing provisions as applied to non-residents of the state. The first, entitled Board of Regents of University of Wisconsin v. State of Illinois\(^\text{30}\) involved the state inheritance tax. The controversy arose when the deceased, a resident of Cook County, died testate and left the residue of his estate to the University of Wisconsin. The County Court entered an order assessing an inheritance tax at normal rates to which an objection was filed based on the proposition that as the Board of Regents was actually the State of Wisconsin it would be improper to impose a tax upon a legacy payable to a sovereign state. The lower court ruled against the contention and, on direct appeal to the Supreme Court because a question of revenue was involved, the decision was affirmed.

It having been determined that the tax provisions were applicable to the Board of Regents, even though it was an instru-

\(^{29}\) 405 Ill. 510, 91 N. E. (2d) 588 (1950). See discussion thereof ante under the heading of Family Law.

mentality of the State of Wisconsin, because it was a corporate entity,\(^{31}\) the court then considered the various constitutional arguments. The first of these revolved around the contention that the right of the State of Wisconsin to receive a legacy arose from its sovereignty which Illinois could not constitutionally restrict. The Supreme Court quickly disposed of this contention by pointing out that the right to acquire property under the will of an Illinois resident owes its existence to the law of this state, from which it followed that Illinois could impose any reasonable restriction and regulation upon the right.\(^{32}\) It was then urged that the Illinois inheritance tax, being based upon the right to receive a legacy,\(^ {33}\) constituted a direct burden upon the sovereign state. The Supreme Court, however, noted that the tax “is extracted from the legacy before it passes and therefore the tax assessed here is not a direct burden upon the Board of Regents of the University of Wisconsin or upon Wisconsin even though it incidentally reduces the legacy.”\(^ {34}\) This being the very reasoning applied by the United States Supreme Court in upholding the validity of inheritance taxes imposed in identical situations,\(^ {35}\) the decision of the Illinois court appears to be based upon a firm foundation.\(^ {36}\)

The Retailers’ Occupational Tax Act was the other provision to come under judicial surveillance. In *Norton Company v. Department of Revenue*,\(^ {37}\) the plaintiff filed a claim with the defendant alleging that, in the computation of its tax liability, receipts from certain types of sales should not have been included

\(^{31}\) Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 375, is made to apply to a “person,” an “institution,” or to a “corporation.”

\(^{32}\) *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321 (1897).

\(^{33}\) Ibid.

\(^{34}\) 404 Ill. 193 at 201, 88 N. E. (2d) 489 at 493.

\(^{35}\) *U. S. v. Perkins*, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287 (1895). Reference to that case was made by the United States Supreme Court when it dismissed the appeal in the instant case: 339 U. S. 906, 70 S. Ct. 571, 94 L. Ed. (adv.) 454 (1950).

\(^{36}\) The Illinois legislature, in 1945, amended the Inheritance Tax Act to allow the same exemption to institutions of sister states as is enjoyed by those organized in Illinois, if reciprocal exemption is granted: Ill. Laws 1945, p. 1242, S. B. No. 183. The provision was inapplicable to the particular case as the controversy arose before the amendment took effect.

in the final figure utilized as the tax base. The plaintiff was a Massachusetts corporation with its plant and main office in that state, but it maintained a branch office and a small warehouse in Chicago. The controverted sales fell into one or the other of two types: (1) those wherein the orders were sent by Illinois customers direct to Massachusetts, were filled there, and the goods were then shipped to the purchasers; or (2) those wherein orders were transmitted from the Chicago office to Massachusetts to be filled from the last mentioned place because the items requested were not kept in stock in the Illinois warehouse. The Department of Revenue rendered a decision adverse to the plaintiff and, upon appeal under the provisions of the Administrative Review Act, the trial court affirmed the decision. Again, on direct appeal to the Illinois Supreme Court because a question of revenue was involved, the judgment was affirmed.

The mere fact that a state levies a tax upon transactions which are merely a part of interstate activity does not necessarily mean that the tax is unconstitutional. It must reach the point of being a burden on interstate commerce before invalidity will be declared. In cases of this kind, courts have usually considered two factors: (1) whether the tax discriminates against interstate transactions; and (2) whether the activities occurring in the taxing state are of sufficient magnitude to warrant the assessment, for extensive operations receiving the benefit of state protection should share the tax burden. As the company was obligated to pay no more than the same tax required of residents and citizens, there was no discrimination. The court also concluded that, since the plaintiff maintained an office and warehouse in Illinois, it conducted a sufficient amount of its interstate activity here to warrant a tax upon its gross receipts from Illinois purchasers even though some of the orders were filled in Massachusetts. The plaintiff was obviously doing more than simply soliciting orders in the state.

38 Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 441, states that the tax is to be computed upon the gross receipts from the sale of tangible personal property.

39 Ibid., Vol. 2, Ch. 110, § 264 et seq.

40 It has been held that the activity of doing no more than soliciting orders in the state cannot be taxed: Allis Chalmers Mfg. Co. v. Wright, 383 Ill. 363, 50 N. E. (2d) 508 (1943).
MUNICIPAL CORPORATIONS

Attention has been directed, in another section of this survey, to two important cases respecting the discharge of municipal police officers for refusal to sign immunity waivers when called before the grand jury to be examined concerning their activities.\(^4\) Other aspects of the law relating to municipal corporations have also been settled during the past year. The case of *People v. Levinson*,\(^4\) for example, received almost as much attention from the press because the Supreme Court there reversed the conviction of the parents of a seven-year old girl who had been charged with a violation of the compulsory school attendance law.\(^4\) It found the child to be in attendance at a "private school," inasmuch as the child's mother was supplying it with instruction at home comparable to that given in the public schools. Parents who send their children to established private schools are, of course, exempt from the compulsory school attendance law. It should be noted, however, that the burden of showing the home-taught substitute is adequate in terms of prescribed courses of instruction rests upon parents who would wish to take advantage of any such exemption.

Two attempts by cities to impose licenses upon particular pursuits led to decisions of interest. While the statute does not empower cities to license, tax or regulate insurance agents,\(^4\) it was held, in *City of Chicago v. Barnett*,\(^4\) that a license may properly be required of an insurance broker. The decision was based upon the fact that the word "broker" was used in the statute and that term was said to include within its meaning all persons who bore that relationship, regardless of the type of business in which they might engage. Greenhouse operators, according to *Youngquist v. City of Chicago*,\(^4\) are "wholesalers" within

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\(^4\) 404 Ill. 574, 90 N. E. (2d) 213 (1950).


\(^4\) Ibid., Vol. 1, Ch. 24, § 23—91.

\(^4\) 404 Ill. 136, 88 N. E. (2d) 477 (1949).

\(^4\) 405 Ill. 21, 90 N. E. (2d) 205 (1950).
the provision of a city ordinance and a statute empowering the city to license florists, but are also entitled to the benefit of a statute granting immunity to farmers, gardeners, and the like, from tax or license on the theory that the operators thereof qualify as "gardeners."

Further indication of the territorial limitations which exist on the powers of a city to regulate milk production is contained in three cases decided during the year. Although the ordinances there concerned were dissimilar, all three attempted, to some degree, to restrict the sale of milk products produced beyond the corporate limits. All three were declared void by reason of attempts to exercise extra-territorial powers which had not been conferred upon the municipalities by the legislature.

One case in the field of municipal tort liability took still another situation out of the group of incidents which are neither fish nor fowl until a decision makes them so. The Supreme Court, in Johnson v. City of East Moline, upheld the judgment of a lower court which had imposed liability on a city for its negligent failure to replace a damaged traffic signal, the absence of which had caused the plaintiff to enter an intersection protected only by signals controlling traffic from the three other directions. Such maintenance was said to be a corporate, rather than a governmental, function despite the fact that the weight of authority in other states is to the contrary. The decision, however, may be said to in harmony with a long-followed tendency in Illinois to squeeze many activities into the corporate function category so long as the activity bears some connection with street maintenance.

Worthy of at least brief mention is the case of Daniels v.

48 Ibid., Vol. 1, Ch. 5, § 91.
49 Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N. E. (2d) 751 (1949); Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N. E. (2d) 827 (1949); Dean Milk Co. v. City of Elgin, 405 Ill. 204, 90 N. E. (2d) 112 (1950). See also comments in 28 CHICAGO-KENT LAW REVIEW 173, 1950 Ill. L. Forum 142, and 38 Ill. B. J. 235.
51 See Green, "Freedom of Litigation," 38 Ill. L. Rev. 355 (1944), and comment in 45 Ill. L. Rev. 124.
Cavner, a decision of first impression. It was there determined that a statute which requires the filing with the clerk of the municipality of nomination papers at least thirty-five days previous to the date of election is not satisfied by an attempted filing with the clerk at his home after business hours on the last day for filing. Cases from other jurisdictions were followed in the course of a discussion which indicated that the "filing" must be done at the clerk’s official place of business during the usual business hours.

The only significant case involving any element of tax law happened also to be one with aspects of municipal law. An attempt by a village to exact a sum equivalent to three per cent. of the gross receipts of all firms who had been granted authority to maintain pipes, poles, conduits, and the like, in streets or public places, was declared improper in Village of Lombard v. Illinois Bell Telephone Company. While both the litigants were in some doubt as to the nature of the charge, the Supreme Court held it invalid regardless of terminology. If it was intended to be a rental arrangement, it was improper because the municipality had no power to rent the streets. Viewed as an occupation tax, the lack of legislative authority for such an enactment was clearly fatal to its success.

TRADE REGULATION

No novel concepts are involved in the only decision having bearing on the law of trade regulation but it is appropriate to note that the Supreme Court affirmed a trial court decision holding the Mandatory Fair Trade Act to be invalid. The question of the power of the legislature to enact the controls intended thereby, and to impose uniform price standards on retailers of liquor, was

52 404 Ill. 372, 88 N. E. (2d) 823 (1949).
54 405 Ill. 209, 90 N. E. (2d) 105 (1950).
55 Other tax cases, such as Board of Regents of University of Wisconsin v. Illinois, 404 Ill. 193, 88 N. E. (2d) 489 (1949), and McLaughlin v. People, 403 Ill. 493, 87 N. E. (2d) 637 (1949), are discussed ante under the headings of Constitutional Law and Family Law, respectively.
not reached. Instead, the court found the act to be an attempt to amend the Liquor Control Act in a manner violative of Section 13 of Article IV of the Illinois Constitution or, if not, was incomplete in its provisions, hence ineffective to stand as an independent statute.

VIII. TORTS

Traditional tort questions concerning the liability of owners of animals for injury done by their beasts still receive attention in states where open range conditions exist, but rarely does an Illinois court have trouble with the matter. One recent Appellate Court decision would indicate that general principles of negligence have taken charge of situations where, at common law, absolute liability might have been imposed as well as in cases where statutes have tended to place strict liability on motorists who tangle with animals found running at large. In Guay v. Neel,\(^1\) it was decided that a motorist was not entitled to recover for damage sustained in a collision with an escaped horse, provided the owner of the animal had used due care in restraining it.\(^2\) With equal detachment, the court said the owner would be unable to recover on a counterclaim for damage to his livestock if the motorist was free from negligence.

Recognizing a trend away from the doctrine which permits of an immunity in favor of a municipal corporation for the torts of its agents while acting in the course of a governmental activity, the Appellate Court for the First District added its bit to the mounting collection of objections to that theory by its holding in Both v. Collins.\(^3\) The court there construed the 1945 amendment to the Cities and Villages Act,\(^4\) one which placed a municipality in the position of indemnitor as to judgments recovered against policemen, to presuppose liability on the part of the policeman. As a consequence, it denied the defendant officer's contention that immunity attached to his actions. The section of the

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\(^1\) 340 Ill. App. 111, 91 N. E. (2d) 151 (1950).
statute in question had previously implied that personal immunity existed because of the presence of the words "the municipality only . . . shall be liable." There is reason to wonder why a statute with so obvious a purpose cannot be drawn by which to leave no doubt about the position of the city and its employees on the question of liability or immunity. Section 1—13 of the same chapter expressly immunizes firemen, putting liability on the municipality for the negligent operation of motor vehicles used by the fire department. The considerations seem to be identical in the two cases, hence one can only speculate over the necessity of two or three amendments, each accompanied by confusion caused by a switching of theories, to accomplish so simple an objective as the stating of the liability or the immunity attaching to the city and its employees.

A unique challenge to the inference of negligence arising in res ipsa loquitur cases was presented in Siniarski v. Hudson. In that case, three workmen of the defendant had been killed while replacing a boiler, so that the defendant was as much in the dark as to the cause of the explosion as was the plaintiff. The defendant urged that, as the doctrine of res ipsa loquitur had been founded on the premise that those in control when the mishap occurred would best be able to explain how it occurred, the death of the three workmen prevented defendant from having knowledge of the circumstances superior to that of the plaintiff, as is posited by the rule. The attempted qualification was rejected and the court ruled that the question of negligence was properly submitted to the jury, irrespective of the fact that the defendant's difficulty in seeking to overcome the inference of negligence would be as acute as would be that of the plaintiff in establishing it.

Disparagement, or slander of title, received attention in the case of Pendleton v. Time, Incorporated, when the painter of the first portrait of Truman, as president, brought an action for alleged injury sustained when the defendant published another portrait with a caption identifying it as the first such product.

The plaintiff alleged loss of advantage accruing to him by virtue of his priority in execution; loss of sale value of the portrait; and loss of commissions to do further portrait work. A majority of the court felt that the plaintiff had complained of sufficient damage to state a cause of action. The dissenting opinion, however, more nearly sets forth the requirements, as they are generally stated, for an action of this type. It points out that the great weight of authority requires one to allege the special damage with particular care, so that the complaint of pecuniary injury must result from the failure of a specific sale or the loss of definite customers.\(^7\)

The more conventional type of libel came up for consideration on three occasions when plaintiffs complained that they had been described as communists, fascists, pro-Nazis, and the like.\(^8\) In none of the cases could the court find that the plaintiff had actually been named as a communist. In one of them,\(^9\) however, the Appellate Court for the First District, by way of dicta, recognized that characterizing a person as a communist and as an un-American disciple of fascism would be libellous \textit{per se}, citing federal decisions in support of that position.\(^10\) A careless defendant may yet make some Illinois law on the point.

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\(^7\) See comments on the decision in the instant case appearing in 30 Boston U. L. Rev. 278, 35 Corn. L. Q. 809, 12 Det. L. J. 154, and 38 Ill. B. J. 588.


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RAIN MAKING AND THE LAW

The advent of recent technological advances in the field of meteorology, frequently referred to as rain-making or weather control, have propounded new and interesting problems to the lawyer as well as to the scientist. It is clear, from a description of the methods employed in weather control, that not only will the environment of the social group be affected, but that the rights of individuals are also likely to be concerned. The technique used most generally, at the present time, is one by which iodide particles are injected into rain clouds, either by dispersal from aircraft or by sending the same up from the ground in the form of smoke. These dispersed particles, due to their temperature and mass, hasten the coming of the point at which the moisture in the clouds normally condenses and falls as rain or snow. The accelerated precipitation induced thereby then falls upon the terrain beneath, which land area might not, by reason of the movement of the clouds, otherwise receive the benefit of such moisture.

It is obvious that rights in land, air and water may be affected by such activity. Benefits, unquestionably, are to be derived from the new technique. In California, for example, many acres of valuable timber land were recently saved from forest fire in this way. Water-parched communities in the east have replenished water sources in advance of normal dates. But there is no doubt that "wrongs" done by these rain makers will bring problems to the attorney's office for solution and courts will be faced with the job of making new law.

At present, the attorney faced with a problem concerning rain-making

* This comment summarizes the arguments advanced by a team representing Chicago-Kent College of Law in the 1950 National Law School Moot Court Competition. The team, consisting of John P. Demling and Russell L. Engber, with Alan D. Katz and David S. Pochis on the brief, defeated representatives of the University of Illinois College of Law, the University of Chicago Law School and the University of Notre Dame School of Law to win the championship both in Illinois and the area covered by the Court of Appeals for the Seventh Circuit.

2 Rain making activities may have an adverse effect upon the operator of aircraft although this phase of the problem is not discussed herein. See, for example, Section 5 of the Uniform Aeronautical Regulatory Act, 11 Unif. Laws Anno., p. 177.
3 The blessings are not always unmixed, even to the rainmakers. Time Magazine, Vol. LVII, No. 11, p. 54, under date of March 12, 1951, reports the experience of two California weather consultants who ascended a mountain near Santa Barbara to fulfill a contract with the city. Their machinery worked too well. When they were ready to quit for the day they found they were snowbound. Rescue squads summoned by radio had to bulldoze their way through four-foot drifts for three days before it was possible to bring the snowmakers down to civilization.
will, unfortunately, find little to aid him in the form of reported precedent bearing directly in point. One decision has served, thus far, to introduce the problem to the law reports. In the case of Slutsky v. City of New York, a hotel resort owner sought to enjoin the city from carrying on its rain-making activities on the ground that the same were endangering his resort business. The court, denying relief, stated: "The relief which the plaintiffs ask is opposed to the general welfare and public good; and the dangers which plaintiffs apprehend are purely speculative. This court will not protect a possible private injury at the expense of a positive public advantage." Because of the superior public interest involved, and because the plaintiffs had not otherwise shown themselves sufficiently damaged, or even in danger of being damaged, the case is one of limited value.

Lacking direct precedent upon the point, a pure logical analysis of the problem may be made in an effort to understand the issues likely to be raised by weather control as well as to point the way toward their solution. In much the same way, the existing body of the common law may be examined in order to achieve the same goals. To a limited extent, this note is directed to that end but in any discussion of pertinent principles of the common law it will be assumed that the rights involved are private rather than public, at least to the extent that those concepts may be disconnected. It will also be assumed that the "wrongs" complained of have arisen from an individual's relationship to his real property, for the initial problems in this field will arise when one person, in his successful effort to supply himself and his land with water, has thereby either deprived another person of that water or has, without that intention, over-supplied the other with it. Again, the problem will be considered primarily from the point of view involved.

The question first presents itself, upon learning that rain making involves an alteration in both cloud formation and cloud constituency, whether one may, in any way, lay claim to a legal title to the clouds themselves so as to be in a position to claim damages, even if nominal, from the rain maker who has "seeded" the clouds. The layman, it is submitted, would have little difficulty giving an answer to such a query. He would say that, clouds being but a part of things natural, only nature, or the deities, might lay claim to them. The essence of such thinking is also found in the law. Some things have been said to be the proper subject of private ownership; other things are not. According to Blackstone, most things are naturally subject to private ownership, but other things,

5 197 Misc. 730, 97 N. Y. S. (2d) 238 (1950).
6 The City of New York was, at the time, suffering from a severe water shortage: New York Times, August 18, 1950, p. 23.
7 197 Misc. 730, 97 N. Y. S. (2d) 238 at 240.
8 Just. Inst., Lib. 2, Tit. 1.
at least while in their natural state, are not. These latter, he has said, must be reduced to possession before they may be classified as being subject to private ownership. Among such things, he has categorized light, air, water, and animals *ferae naturae*. Upon this ground, it may be said that clouds, in their natural state, are not the proper subject of private ownership, hence one may not claim injury to his property in the clouds themselves for he has no such property. But what of the rain maker? May he be said to act so as to reduce the clouds to his possession? Beside the extreme burden of proving such a possession, it would seem that one can never be said to possess that which he cannot contain, either as fish are caught in a net or as land is circumscribed by a boundary. It is submitted, then, that one may not be said to possess clouds, as that term is used in the common law, they being of such vague and fugitive nature as to remain among those things which can never be subjected to private ownership.

Denying that one might claim legal title to the clouds as such, does it follow that the individual may not claim a beneficial interest in the use of the clouds? The common law theory of natural rights derived from one’s ownership of land is not limited merely to the right to exclusive occupancy of the surface. It embraces many aspects of property rights, often designated by special names, such as the right to enjoyment, to lateral support, to riparian rights, and others. May ownership not also encompass another natural right to the uninterrupted fall of rain thereon? It is possible that analogy may be found in the law respecting water rights which may indicate the extent to which one may enjoy rights to the fall of rain. The fact that clouds are essentially nothing more than floating bodies of tiny droplets of water causes the mind to look first to the latter possibility.

The law concerning natural watercourses, a portion of the law of water, defines a natural watercourse as a body of water which flows in a known and defined channel. Generally speaking, if land touches upon such a watercourse, the owner thereof is called a riparian owner and, as such, is entitled to certain benefits in the water supply. He may use the stream flowing past his land for "domestic" or agricultural purposes, but may not, according to the common law, divert the water for other pur-

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9 Bl. Com., Vol. 1, Book 2, *14. The theory of ownership of even tangible personality, at common law, involved occupancy as an element: 2 Co. Litt., § 416. See also Holmes, The Common Law, p. 216. An example of this element of occupancy, at least as to the ownership of animals *ferae naturae*, may be found in Pierson v. Post, 3 Caines (N. Y.) 175, 2 Am. Dec. 264 (1805).


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The basis of such a rule lies in the fact that the owner of land situate upon a watercourse is said to have a "natural" right, from his favored position adjacent thereto, to the use of the water as a concomitant to his use of the land. In addition, he is said to have a right to have the stream flow along its natural course at its natural rate. This common law view has been expanded into the "reasonable user" rule, which doctrine contemplates that he will make no more than a reasonable use of the riparian stream so as to allow others to enjoy its benefits. One attempting to find analogy in this body of law to the situation here considered, may find substantiation to a large degree in the exercise of common sense.

A farmer who owns land considers himself as owning more than the mineral and carbon compounds of the soil itself. He considers the adjacent stream a necessary element to the beneficial use of that soil. It may well be said that rain is no less a necessary element. To deprive him of the rain that would ordinarily fall on his land is to injure him; to aid him by causing the proper amount of rain to be deposited on his soil benefits him. The artificial rain-maker may act so as to produce either result. But is the similarity of situation one of sufficient degree to warrant the application of the law of natural watercourses to the art of rain making? It should be remembered that that body of law grew out of the idea that watercourses follow defined channels; that they flow with sufficient constancy as to enable the taking of a measurement of the degree of interference with their natural states. Clouds seldom flow, over a period of time and over a single parcel of land, at anything near so constant a form or at so constant a rate. They are vague and wandering things; now here, now gone. This factual difference should cause the attempted analogy to fail, for the mind would have little trouble distinguishing between the two factual situations.

There exists, however, in addition to the common law views concerning rights in natural watercourses, another view known as the doctrine of prior appropriation. This doctrine, followed in many of the western states, treats water as belonging to all people in common but permits one to acquire preferential rights in the water if he can (1) show an intent to apply the water to some beneficial use; (2) demonstrates that he has

13 Taylor v. Rudy, 99 Ark. 128, 137 S. W. 574 (1911); Druley v. Adams, 102 Ill. 177 (1882); Lawrence v. Whitney, 115 N. Y. 410, 22 N. E. 174 (1889).
made a diversion thereof from the natural channel, as by a canal; and (3) has made an application of the water, within a reasonable time, to some useful industry.\textsuperscript{17} Under this view, if one has met the requirements in order to be a prior appropriater, he may appropriate the entire stream.\textsuperscript{18} Now, what of the rain maker? May he be said to be a prior appropriater? It would seem not. He may have intended to appropriate the water in the clouds, may wish to make an appropriation thereof for some useful purpose, but he could hardly be said to have diverted the "natural stream" of moisture from its course, as by some canal or conduit. He has no control over the rain after it begins to fall. He hopes that the force of gravity, and the wind, will cause "his" rain to fall where he desires it, but there is no assurance that it will do so.\textsuperscript{19}

Having thus seen that the law as to natural water courses provides a seeming, but nevertheless inexact, analogy to the problem of weather control, one should consider whether some other aspect of water law provides a better analogy. If clouds are vague and wandering things, not apt to travel in well-defined courses, may the law as to percolating waters be of help? Waters of that character move beneath the surface of the earth but are not confined to any known and well defined channel.\textsuperscript{20} To that extent, they possess characteristics similar to those of clouds and, unlike the waters flowing along natural watercourses or underground streams, they also possess the characteristic of not being readily accessible for the purpose of measurement either as to quantity or rate of flow. If land be likened to air space, and percolating water within the land considered to be like the moisture within the clouds, a rather persuasive analogy begins to appear. Now what would be the result if the law of percolating waters were to be applied to the activities of the rain-maker?

In the first place, two distinct views exist as to the right to claim enjoyment of percolating waters. The common law rule treats such percolating waters as being at the absolute disposal of the owner of the land where the same may be found. According to that rule, the land owner

\textsuperscript{17} McDonald v. Bear River Min. Co., 13 Cal. 233 (1859); State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P. (2d) 23 (1939); Tammer v. Provo Reservoir Co., 99 Utah 139, 98 P. (2d) 695 (1940).

\textsuperscript{18} Hammon v. Rose, 11 Colo. 524, 19 P. 466 (1888); Boltar v. Garrett, 44 Ore. 304, 75 P. 142 (1904).

\textsuperscript{19} It is precisely this lack of control over the fall of rain water which may lead to the institution of tort actions. An extremely effective job of rain making may cause the inundation of land owned by one who has not bargained with the rain maker for any rain at all and who may resent the damage so caused. The case of Slutsky v. City of New York, 197 Misc. 730, 97 N. Y. S. (2d) 238 (1950), may have reached a different result if the resort proprietor had been able to show a real injury to his seasonal prospects from too much rain making in his area.

\textsuperscript{20} Barclay v. Abraham, 21 Iowa 619, 96 N. W. 1050 (1903); Williams v. Ladew, 161 Pa. 283, 29 A. 54 (1894); Herriman Irrigation Co. v. Kell, 25 Utah 96, 69 P. 719 (1902).
would not be liable, in damages, if his taking of the water prevents, or injures, others in their use of the percolating waters. Most courts in this country, however, have followed a doctrine described as the "reasonable user" rule,22 one which limits the right to take percolating water to the extent that the taking thereof is necessary for some useful purpose having a relation to the land from within which the water is taken.23 Either aspect of the rule could possess usefulness in the rain making situation. For example, one who seeks to cause rain clouds to condense over his land could claim, under the common law doctrine, that he had an absolute right to appropriate the water if he could extract it from the clouds. The other, injured by being deprived of his prospective rain, might complain under the "reasonable user" doctrine. The outcome would, of course, depend on the court's acceptance of the analogy and also, assuming proof to be possible, on the particular version of the doctrine followed in the jurisdiction. It is submitted, however, that the analogy between percolating waters and waters present in rain clouds has some persuasion in reason. There is value also in the fact that the law relating to percolating waters provides a substantial and well-known body of precedent ready for application in suit based upon the use or deprivation of rain water.

There is the further possibility that the law relating to surface waters may also be applied, by analogy, to the problem at hand. Waters of that kind, as the name implies, exist on the face of the earth but not contained in defined streams, channels, or basins, and the nature thereof is such that the landowner may make use thereof absolutely.24 Particularly pertinent may be that portion of the law relating to the obstruction of surface waters. In that regard, three general rules have been developed. One such rule, evolved at common law, holds that a landowner may, at will, prevent surface waters from coming onto his land.25 In contrast, the civil law rule declares that all land is under a servitude to receive the


22 See, for example, O'Leary v. Herbert, 5 Cal. (2d) 416, 55 P. (2d) 834 (1936); Meeker v. City of East Orange, 77 N. J. L. 623, 74 A. 379 (1909); Forbell v. New York, 164 N. Y. 522, 58 N. E. 644 (1900).


flow of surface water. While these rules may be of little value in determining the right of the rain-maker to remove moisture from the clouds, they may be helpful in determining his liability, if any, to adjacent landowners upon whose land the excess waters may be cast. The particular rule to be urged, on the basis of analogy, will, of course, depend upon the given facts and the interest sought to be advanced or protected.

It is not possible to leave the subject without making some reference to the law relating to oil and gas, a body of principles which, at least in the early stages of its development in this country, sprang to a large degree from analogy to common law principles. It may be remembered that a landowner may appropriate all the oil and gas which he can reduce to his possession, even though, by so doing, he may exhaust the supply beneath his neighbor's land, for oil and gas are of fugacious nature. The only qualification that has been expressed to that doctrine, except for statutory regulation, has been based on the idea that the landowner may not wastefully or unnecessarily injure the common reservoir of oil or gas. Decisions respecting oil and gas may have utility, but cases concerning percolating and surface waters should prove more useful. Since they have to do with water, they should possess an inherent psychological effect which might not be gained from the use of cases concerning other fluids or gases.

To this point, the problem has been considered as one arising between individuals. History records that nations have collapsed, entire civilizations have been blotted out, for lack of rainfall or access to water. It is easy to see, therefore, that the public at large has an interest in the supply of rain. Since the public interest may be involved, there is just reason for application of the principle of sovereignty reflected in the exercise of the power of eminent domain. Rain-making activities, from their very nature, take effect beyond the land boundaries of but a few persons; in fact, may well extend beyond the boundaries of a state. Interstate compacts over the use of waters in certain transcontinental rivers are not unknown, so it well may be that the art of rain-making presents a field ripe for legislature regulation. Of necessity, that regulation should be by the federal government to avoid internecine conflict. No attempt will be made to discuss constitutional and policy questions inherent in such a proposal. It is only submitted that, if put to the test, the common law may furnish a working

26 Gormley v. Sanford, 52 Ill. 158 (1869); West v. Taylor, 16 Ore. 165, 13 P. 665 (1888).
basis for the solution of problems which could arise out of litigation between private parties; but, due to the far-reaching effect which weather control may have on the nation, the common law will probably fall short of furnishing a solution for all of the conceivable situations which might arise.²⁹

R. L. ENGBER

²⁹ For other discussions on the subject, see Brooks, "Legal Aspects of Rainmaking," 37 Cal. L. R. 114 (1949); Ball, "Shaping the Law of Weather Control," 58 Yale L. J. 213 (1949); and notes in 1 Stan. L. Rev. 43 and 508.
DISCUSSION OF RECENT DECISIONS.

BILLS AND NOTES—RIGHTS AND LIABILITIES ON ENDORSEMENT OR TRANSFER—WHETHER OR NOT ENDORSEMENT OF A NEGOTIABLE INSTRUMENT BY AN IMPOSTER PAYEE SERVES TO PASS TITLE TO A HOLDER IN DUE COURSE—Following the modern trend of authority, the rights of a holder of a negotiable instrument, in Illinois, have again triumphed over those of the drawer. In the recent case of Greenberg v. A. & D. Motor Sales, Inc.,1

1 341 Ill. App. 85, 93 N. E. (2d) 90 (1950).
the Appellate Court for the First District was presented with a fact situation which revealed that the defendant, a corporate dealer in used automobiles, was offered an opportunity to purchase a used car from one who was unknown to it. He represented himself to be the owner of the automobile, one Wallace Gross, when in fact he had no interest therein. Relying on this representation, as well as on a driver's license produced by the imposter, defendant accepted the offer and delivered its check, payable to "Wallace Gross", drawn on a local bank, to the purported vendor. That person then endorsed the instrument, using the name of the payee, and presented the check to the plaintiff at the latter's currency exchange. Plaintiff discounted the instrument only after first communicating with the defendant by telephone, receiving confirmation as to the identity of the imposter and being assured that the instrument would be honored by the drawee bank upon proper presentation. Prior to the time permitted for presentation of the check to the drawee for payment, defendant discovered the automobile was owned by one other than the person to whom it had delivered its check and ordered the instrument returned as bearing a forged endorsement. Plaintiff brought an action on the check, alleging the issuance thereof by the defendant to one purporting to be the named payee, followed by plaintiff's purchase thereof from such payee in good faith, for value, and without notice of any defect in the payee's title. The defendant, relying on Section 43 of the Illinois Negotiable Instruments Act, asserts that no title passed because of the forgery. The trial court held the defense inapplicable, particularly since the defendant did not deny issuance of the instrument to the person who purported to be the named payee, and rendered judgment in favor of the plaintiff. The Appellate Court, on review, affirmed the decision, applying the so-called "imposter" rule, one well known in the law relating to commercial transactions.

The principal contention of the drawer, advanced in cases of this type, has been that the endorsement of the imposter is a forgery under which no title can pass as against the drawer. In order that there be a forged instrument, however, the signature or endorsement must have been made by one other than the person intended by the drawer as the party entitled to receive payment. It is obvious, therefore, that the intention of the drawer becomes the true issue in each of these cases. In that regard, the general rule adhered to by the majority of the courts is that where the drawer delivers a check, draft, or bill of exchange to an imposter as payee,

2 Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 43, declares: "Where a signature is forged or made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."
supposing that he is the person he has falsely represented himself to be, the imposter’s endorsement in the name by which the payee is described is regarded as a genuine endorsement, both as between the drawer and drawee and as to subsequent holders in due course.

On the issue of intent, if it appears that the drawer has dealt with the imposter, in his physical presence, and has personally delivered the instrument to him, as in the case under discussion, it has generally been held that it would not be unreasonable to conclude that the drawer intended the person of the imposter to be the real payee. If, however, the imposter was not physically before the drawer, but has induced delivery of the instrument to himself through the employment of an intermediary agency, such as correspondence, a few of the courts have concluded that the probable intent was to make the person named the real payee, rather than the person of the imposter. The additional fact that the drawer had previously known one bearing the name used in the instrument has been of significance in leading to the same conclusion. Furthermore, where the


6 That idea is expressed in Boatsman v. Stockmen's National Bank, 56 Colo. 450, 138 P. 764 (1914), and in Metzge v. Franklin Bank, 119 Ind. 350, 21 N. E. 973 (1889), but both hold that the intermediary agency employed had no effect on the drawer’s intent to deal with the person of the imposter.


8 Rossi v. National Bank, 71 Mo. App. 150 (1897). An illustration of this distinction, drawn from the law of sales, may be found in Cundy v. Lindsay, 3 A. C. 459 (1878).
drawer has added a special description to the name of the payee," or has added a title thereto; the courts have been of the opinion that it was not the imposter that was intended as the proper party to receive payment, but the person of that description or title.

While most courts are content to construe the rights of the parties after having determined the drawer’s probable intent, at least one court has proceeded one step farther. Having concluded that the drawer did not intend the imposter as payee, that court proceeded to suggest that the “imposter” rule had no application to the circumstances of the case before it, leading to a denial of recovery as against the drawer. The statement, however, would seem unnecessary and probably accomplishes little in view of the fact that the same result would be reached by a determination of the controlling issue of intent.

An argument often utilized to bolster certain of these decisions is that the drawer, having been negligent in failing to require sufficient identification of the imposter, is therefore estopped to deny validity of the holder’s title. The latter, having been entirely innocent throughout the transaction, has been said to be under no duty to the drawer to determine the genuineness of the imposter’s signature. While one case rests solely on this theory of negligence or estoppel, it would seem that the proper theory to apply would be the “imposter” rule.

Can it be said, in retrospect, that the Negotiable Instruments Act of Illinois is adequate to cope with the illustrated problem? The Appellate Court, in the instant case, said that Section 43, which had been relied on

9 But see Bryant v. McGowan, 151 Pa. Super. 529, 30 A. (2d) 667 (1943), where the court found the words added to the name used were merely descriptive, the payee being described to be “Mrs. Catherine Nelson, as unremarried widow of Chas. Nelson.”

10 In Mercantile National Bank v. Silverman, 7 Hun. (N.Y.) 317, 132 N. Y. S. 1017 (1911), the payee was described as “Lieutenant Colonel Frederick Marsh.” The court found no intent to deal with the imposter, the drawer having had previous acquaintance with a person of the name used.


12 McHenry v. Old Citizen’s National Bank, 85 Ohio St. 203, 97 N. E. 395 (1911), treated the drawer as estopped to deny validity of the imposter’s endorsement. In Hockett Co. v. Simmonds, 84 Ohio App. 467, 87 N. E. (2d) 739 (1949), however, the negligence of the holder in due course in accepting the instrument after regular banking hours was said to affect his right of recovery. The Minnesota case of Montgomery Ward & Co. v. Central Co-op. Ass’n, 201 Minn. 425, 276 N. W. 731 (1937), also treated the negligence of the drawer as sufficient to preclude a denial of the validity of the imposter’s endorsement.


by the defendant, had no application to the circumstances presented. Forgery being thereby ruled out as a defense, there would seem to be no other section in the statute which could have direct application. As a result, the court was forced to fall back on common law doctrines with all the varying distinctions thereon which call for interpretation. Fortunately, the precise situation contained the important fact of physical presence before the drawer, making it possible to apply the majority or so-called "imposter" rule with ease. But what of the future when an intermediary agency is drawn into the picture? Will the Illinois court then add to that class of cases which draw fine distinctions of fact? Now that the court has seen fit to declare the "imposter" rule to be applicable, would it not be advantageous for the legislature to aid this progressive step by an appropriate amendment or addition to the statute? If the purpose of the statute is one designed primarily to codify the law so as to afford protection to the holder in due course, such an amendment or addition would, without question, serve that end.

R. O. DRTINA

HUSBAND AND WIFE—ACTIONS—WHETHER, IN VIEW OF ENACTMENT OF MARRIED WOMEN'S ACTS, A WIFE MAY MAINTAIN AN ACTION FOR LOSS OF CONSORTIUM BASED ON NEGLIGENT INJURY CAUSED TO HER HUSBAND—In the case of Hitaffer v. Argonne Company, Incorporated, the United States Court of Appeals for the District of Columbia was presented, for the first time since the passage of the Married Women's Act for that district, with the situation of a wife attempting to recover an alleged loss of consortium brought about by defendant's negligence producing injury to her husband. The husband, an employee of defendant, had been seriously injured while at work. He applied for, and received, full compensation for his injuries. Thereafter, the wife filed the instant action, relying on the ground that the defendant's negligence had deprived her of her husband's aid, assistance and sexual relations. The lower court dismissed the action on defendant's motion for summary judgment and plaintiff


16 341 Ill. App. 85 at 90, 93 N. E. (2d) 90 at 92.


2 D. C. Code 1940, § 30-208.

3 Bouvier, Law Dict., Rawle's 3d Rev., defines consortium as the "right of the husband and wife respectively to the conjugal fellowship, company, co-operation and aid of the other."
appealed. The Court of Appeals, in an unprecedented decision which examined into and rejected every major contrary decision bearing on the subject, reversed the holding and said the complaint stated an actionable case. To reach that decision, the court examined every reason advanced to support the unanimous refusal pronounced in other jurisdictions to permit a suit of this character and declared every reason so examined to be unsound.

The first such theory followed elsewhere appears to be one predicated on the premise that the material elements of consortium are the only elements on which a recovery can be had. From this point, courts have deduced two reasons for concluding that the wife cannot recover for loss of consortium. The first of these reasons rests on the ground that, while a husband is entitled to the services of his wife, the wife in turn has no such right to her husband's services, without which right she is not entitled to recover. A typical case in which this reasoning was said to control is to be found in the Indiana case of Boden v. Del Mar Garage where the court argued that there was "no authority in law which gives her a right to recover for loss of consortium alone and it is expressly held in this state that she cannot recover . . . And the cause of action which the husband has against one who has negligently injured him is presumed to fully compensate him for all losses sustained, and this includes the loss of support for his wife and family."  

The other line of cases, illustrating the second reason, based on a materialistic conception of consortium, reject the wife's right to recover on the ground that any interference with the husband's duty of support, which may fairly be said to be the converse of the wife's duty to render services, is fully compensated for in the action brought by the husband, at least in so far as his ability to support his wife has been diminished as a result of his injury. It follows therefrom that to allow the wife to recover for loss of consortium in addition would result in a double recovery.  

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5 205 Ind. 59 at 70, 185 N. E. 860 at 863. Some courts have held that the Married Women's Acts have given the wife the right to the fruits of her own services and, as a result, the husband is no longer entitled to her services. If this reasoning is sound, the conclusion, reached by these courts, quite properly follows that the husband may no longer maintain an action for the loss of that aspect of consortium: Marri v. Stamford Street Ry. Co., 84 Conn. 9, 78 A. 582 (1911); Harker v. Bushouse, 254 Mich. 187, 236 N. W. 222 (1931); Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Pointing to fallacies inherent in this major line of cases, the court in the instant case made the following statement: "The difficulty with adhering to these authorities is that they sound in the false premise that in these actions the loss of services is the predominant factor. This distinction lacks precedent. It is nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action."

Continuing, the court also said: "Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity. And, although loss of one or the other of these elements may be greater in the case of any one of the several types of invasions from which consortium may be injured, there can be no rational basis for holding that in negligent invasions suability depends on whether there is a loss of services. It is not the fact that one or the other of the elements of consortium is injured in a particular invasion that controls the type of action which may be brought but rather that the consortium as such has been injured at all." In this manner, the court dismissed that line of reasoning.

Another series of cases, while giving recognition to the existence of other and sentimental elements implicit in the word "consortium," have, for one or more reasons, nonetheless, refused to allow the wife to recover. These reasons proceed on a variety of grounds. It has been said that the injury to the wife, not being direct, is not compensable; that such injuries, being too remote, are incapable of ascertainment; that no recovery for loss of consortium has ever been allowed without a showing of loss of services, any injury to the sentimental elements acting only in aggravation of damages; and that the Married Women's Act have given no new cause of action to the wife. The court in the present case, answering these varied arguments, clearly establishes the inconsistency of this line of thought by calling attention to the fact that courts which have looked with favor on these theories have, nevertheless, allowed the husband to recover

7 183 F. (2d) 811 at 813.
8 Ibid., p. 814.
where the wife’s injury has been due to the defendant’s negligence. Decisions of the latter type would make it apparent that the validity of an argument to the effect that the injury is too remote and indirect to allow a recovery is made to turn on the sex of the injured party.\[10\]

In still other cases, courts have refused to protect the wife’s interest in such an action as this on the theory that the wife’s interest in the marital relation is not a property right, derived from bargain and sale, but rather lies in an area into which the courts should not intrude, except when necessity dictates that the wilful wrongdoer be punished, such as in cases based on criminal conversation or alienation of affections. These courts have theorized that the reason for allowing suits of that character lies in the fact that the recovery is granted more as a form of punishment than with thought of compensation to the injured party.\[11\] Again, in denying the efficacy of such reasoning, the instant court stated: “The civil side of the court cannot permit an award of punitive damages except as incidental to an actionable civil wrong.”\[12\] The comment so made effectively rebuts the argument that suits of the type here under consideration can be, and are to be, maintained solely for the purpose of punishing the wrongdoer.

The court deciding the instant case did not merely rely on inadequacies in the opposing arguments. Having shown the inconsistencies in the aforementioned contrary theories, it turned to affirmative factors supporting a recovery by the wife. In that regard, the court said that “logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot

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10 Along much the same line, it might be noted that courts have allowed the husband to recover, in suits based on criminal conversation, even though the husband has condoned the conduct and no loss of services has occurred, the recovery being based on sentimental elements alone. The fallacy of forbidding a similar suit to the wife should be equally obvious. The injury to the sentimental areas of consortium would be the same whether the injury arose from an intentional act, as is required in actions for criminal conversation or alienation of affections, or from negligent injury.


estimate any loss thereof . . . Under such circumstances it would be judicial fiat for us to say that a wife may not have an action for loss of consortium due to negligence. 13

It was not without some judicial support for the view so expressed. The North Carolina Supreme Court, in the case of Hipp v. E. I. Dupont DeNemours Company, 14 had held that a wife possessed a right to recover for a loss of consortium occasioned by a negligent injury to her husband, only to reverse itself, however, a short time later. Dissenting justices in two other jurisdictions have pointed up the inadequacies in the stand taken by the majority view, 15 but the most recent support for the proposition sustained herein is to be found in the case of McDade v. West. 16 It is true that the judges of the Georgia Appellate Court considering that case were equally divided on the question of whether or not a wife should be allowed such a recovery, 17 but three of the judges subscribed to the view that the "wrong" is a direct wrong to the valuable interests of the wife, whether intentional or not, the damage for which the husband cannot sue, and in these days of enlightenment, her rights should be recognized and enforced. 18

Far more important than the limited extent of acceptable authority is the eminently sound reasoning which underlies the present decision. It is axiomatic that the law, insofar as is possible, should give a remedy for every violated right. It is also a well accepted proposition that, since the adoption of the Married Women's Acts, both the husband and wife have equal rights before the law, at least in all other areas. 19 Keeping these statements in mind, it is only necessary to recognize the conceptualistic


17 The division necessitated affirmation of a trial court refusal to permit recovery.


19 This was, of course, not true under the common law because of the disabilities which attached to the woman at the time of marriage. Bl. Com., Book 3, § 143, states: "We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least to the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." Such reasoning is, of course, no longer applicable in view of modern statutes on the subject.
unity which is a part and parcel of the word "consortium" to appreciate the validity of the court's findings in the instant case. Consortium, although consisting of several distinct rights running in favor of the husband and wife, is, in and of itself, a completely independent right. The proper recognition of consortium as an independent right leads to a further recognition that an injury to any one of the several component parts of the right of consortium constitutes a proper ground upon which recovery may be had. The refusal of the majority of the courts to recognize this basic fact has been the greatest stumbling block, heretofore, in the path of allowing a recovery in cases of this nature. It should, now, be removed.

There is, however, one danger that must be avoided. The danger of allowing a double recovery is, without question, a strong possibility; but it is one that can be avoided. The possibility of a double recovery may be circumvented by appropriate instruction confining the jury to a consideration solely of those elements of consortium which are claimed injured by the defendant's conduct. If, for example, the husband has already recovered adequate damages to compensate for the loss of his ability to support his wife, jury consideration may be limited to the remaining injured and uncompensated portions of the wife's right to consortium. True, it may be difficult to measure, in monetary terms, the extent of the injury suffered by the invasion of these other elements, but this should not constitute ground for refusing to allow a recovery. If the damage is certain, the fact that the extent of the damage is uncertain is not enough to bar a recovery.20

The desirability of having courts in other jurisdictions follow the path marked out by the present case is self-evident. It has been said that a "rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience."21 So apt is this statement to the present situation that, with the clear and forceful opinion of the court in the instant case to guide them, it should be expected that other courts will follow suit and abandon earlier views. Those views, seen from the standpoint of modern enlightenment, represent at best nothing more than archaic custom.

A. L. Wyman, Jr.

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT AN EMPLOYEE IS ENTITLED TO UNEMPLOYMENT COMPENSATION BENEFITS FOR THE PERIOD WHEN THE PLANT IS CLOSED FOR VACATION—The final toot of the factory whistle, signalling the cessation of plant operations for a vacation period, and the subsequent exodus of employees to their local unemployment compensation offices, has produced a flurry of decisions evaluating the right of such workers to share in the benefits provided under various state unemployment compensation acts. Representative of these cases are the two Michigan decisions in Renown Stove Company v. Michigan Unemployment Compensation Commission\(^1\) and Hubbard v. Michigan Unemployment Compensation Commission.\(^2\)

In the first of these cases, the employer laid off the employees for an indefinite period. They immediately began drawing upon their unemployment benefits but, as the employer had designated the time between July 5 and July 18 as vacation time and had issued "pay" for this period, the employer protested against the simultaneous issuance of benefits. After administrative action had confirmed the employees’ right to the benefits, the employer appealed to the Supreme Court of Michigan. That court, after investigating the underlying sentiment which stimulated the enactment of unemployment compensation legislation and finding that "the objective sought to be gained is protection against evils incident to involuntary unemployment and the fostering of social and economic security by the payment of benefits to individuals who have suffered loss of pay resulting from involuntary unemployment,"\(^3\) declared that certain of the employees were incapacitated from receiving benefits for the stated period but that others were entitled thereto. The court found that the legislative purpose had been codified in a provision of the Michigan statute which disqualified an individual for benefit in any week with respect to which he received payments in the form of "vacation with pay".\(^4\) To discover whether the checks disbursed by the employer constituted a "vacation with pay," the court had recourse to the union contracts under which the employees were working and discovered that, under one contract, the period "from July 5, 1948, to July 18, 1948" was expressly designated as a vacation period.\(^5\) The contract covering the rest of the employees provided that the vacation was to be taken at a time to be mutually agreed

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3 328 Mich. 438 at 439, 44 N. W. (2d) 1 at 3.
5 Certain of the employees in the Renown Stove Company case were members of the International Stove Mounters’ Union. The contract with that union contained the clause in question. Its members were the ones held disqualified as to benefits.
DISCUSSION OF RECENT DECISIONS

upon but permitted the employees to receive from forty to eighty hours' pay in lieu of a vacation.\(^6\)

Employees covered by the first contract were held incapacitated from receiving unemployment benefits for they had received a "vacation with pay" within the meaning of the statute. Those under the latter contract were held to have an option to take a vacation, the exercise of which could not be dictated by any arbitrary and unilateral action on the part of the employer. As the checks tendered to these employees could not be connected with the period in dispute, they were permitted to recover provided they met other eligibility tests laid down by the statute.

The problem and solution in the second case ran parallel to the first. The company there, in the face of a refusal of the union to agree to a vacation plan,\(^7\) closed the plant for a fixed period. The union contract provided for "compensation in lieu of a vacation" at the employee's option, entitling him to payment whether or not he availed himself of a respite from work. In the light of such a contract, the court held that the employees became involuntarily unemployed when the employer closed the plant and were, therefore, eligible to receive unemployment compensation benefits.\(^8\)

The inherent purpose of the various unemployment compensation acts is one designed to alleviate the physical and economic suffering likely to be visited upon an individual who loses the security guaranteed by his weekly pay check through involuntary unemployment.\(^9\) It follows, therefore, that an applicant should not be entitled to unemployment benefits where, although he has been forced to leave the work harness for a period of time, he has received remuneration for that period. Where an employee is forced, by an imposition of the employer's will, to take a vacation but receives an amount of money from the latter, the character of that payment will have much to do with whether or not compensation is allowable. If the sum can be termed "wage" or "salary" or, whatever its designation, is connected with the layoff period, additional compensa-

\(^6\) These employees were members of the International Molders and Foundry Workers Union.

\(^7\) Vacation periods had formerly been staggered throughout the year but the employer, in the interest of increased plant efficiency, sought a simultaneous vacation period for all help. The union indicated a preference for a continuation of the former plan.

\(^8\) The union contract conferred vacation benefits only on those who had worked for a stated minimum period. As to the right of a new employee, one who had not been employed for a sufficient time to receive a paid vacation, to seek unemployment compensation benefits when temporarily forced out of work by a vacation shutdown of the plant pursuant to the union contract calling for paid vacations, see Claim of Rakowski, 276 App. Div. 625, 97 N. Y. S. (2d) 309 (1950).

tion should not be obtainable.  

On the other hand, if the remuneration has no nexus to the vacation period, the party should be entitled to benefits provided other statutory requirements are satisfied. In order to determine the nature or character of the payments, then, the employment contract itself must be subjected to scrutiny.

Where the contract requires the granting of a vacation period but the right of the employer to specify the period of such work holiday has been retained by him, or where the employer and employees have designated a specific non-work period, cases prior to the instant decisions have been unanimous in denying to the employee the privilege of simultaneous receipt of both unemployment benefits and vacation compensation.  

Obviously, such a result is correct and proper. The issuance and delivery of pay checks in such situations can have no other office than to provide remuneration for the layoff period. As the employee receives a payment from his employer which is definitely connected with the period of unemployment, he has no right to additional compensation. The reasoning of the Michigan court in the first cited case, at least as to those individuals employed under the first contract mentioned, is so obviously right that the decision, in this respect, provides little more than added weight to the existing law.

The other contracts involved in the instant cases, however, did not force the employees to take a respite from work. On the contrary, the employment agreements allowed them the choice of working for the full year with the right to receive "compensation in lieu of a vacation." Under this situation, the Michigan court found that a forced layoff, even though accompanied by the issuance of checks, did not deprive the employees of unemployment benefits for the work holiday. It was reasoned that since the employer had contracted away his right to declare a vacation period, the payments received by his employees could have no connection with the period of unemployment and had to be treated as some form of bonus. Such being the case, there was a period of involuntary

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10 The drafters of the various state acts have expressed the idea in different, yet not contradictory, language. Some define the term "employment" expressly as including periods of vacation with pay, or leave with pay: Burn's Ind. Stat. Ann. 1933 (1951 Replace.), § 52-1532(a)(f). Others describe "total unemployment" as that period with respect to which no wages are payable and during which no services are performed. The word "wages," in turn, is defined to cover every form of remuneration, including salaries, commissions, and bonuses: N. H. Rev. Laws 1942, Ch. 218, § 1, para. N(1) and P. In Illinois, the terms "unemployment" and "wages" carry similar definitions: Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 218(k) and § 218(g).

unemployment without the required contractual compensation, thereby permitting access to payments under the state statute.

Even where the employee receives no check from the employer for the vacation period, he may still be precluded from unemployment benefits. The unemployment insurance acts generally prevent the payment, or in some jurisdictions the immediate payment, of benefits where the unemployment is produced by the employee’s conduct in voluntarily leaving work without good cause.\textsuperscript{12} Clearly, where the closing of the plant is brought about by the arbitrary action of the employer alone, this segment of the law cannot negate the employee’s right to benefits. Where, however, a union contract exists which consents to the closing of the plant for vacation purposes, statutory sections of the kind in question may become operable. It has been held, for example, that if the individual, acting through his union negotiators, voluntarily consents to a leave of absence, he is not entitled to benefits notwithstanding the fact that under the union contract he would not be entitled to any idle-time payment from the employer.\textsuperscript{13} Reasoning of that character ought to be equally applicable to those instances where the employee consents to the work stoppage for the purpose of enjoying a vacation.

Notice should also be taken of another general requirement to be found in unemployment insurance laws, one which requires that the individual must be available for work in order to be eligible for benefits.\textsuperscript{14} One aspect of the decision in the Connecticut case of \textit{Kelly v. Administrator, Unemployment Compensation Act},\textsuperscript{15} a case involving a situation wherein the employer closed the plant for a short holiday period and tendered payment to the employees pursuant to the employment contract, indicates that a denial of benefits would be proper upon the basis that the workers were unavailable for work. That result was achieved on the ground that, according to the court, no one could be found who would hire the employees for the balance of the holiday period, considering the time it would take to process a registration of the idle employees for work during that week. The court commented upon the fact that it could “hardly be said that they were in the labor market for so short a period.”\textsuperscript{16} Inasmuch as the Connecticut statute treats an individual as not being unemployed if he receives a payment by way

\textsuperscript{12} See, for example, Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 223(a).
\textsuperscript{14} Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 222(c).
\textsuperscript{15} 136 Conn. 482, 72 A. (2d) 54 (1950).
\textsuperscript{16} 136 Conn. 482 at 486, 72 A. (2d) 54 at 56.
of compensation for loss of wages from his employer, and as payment clearly existed under the facts of that case, it would appear that the rationale adopted was both unnecessary and unfortunate. The fact of unemployment ought not be affected by the assumption that, at the end of the "vacation" period, the employee might be recalled to work. For that matter, it is not entirely impossible that another employer might seek employees even for so short a period. Anyway, the statutory test merely requires that the employee demonstrate that he is "available," that is that he will accept comparable work in the locality if it is offered to him. It is doubtful, then, if the Connecticut court would fall back on this rationale if the employer, without the employee's acquiescence, were to cease operations for a "vacation" period without tendering pay, yet promised to resume activity at the end of the period. Too much reliance, therefore, should not be placed on that decision.

While the addition of the instant cases to the body of existing law on the subject creates no conflict, and while both decisions appear sound, it is clear that all of the problems relating to payment of unemployment benefits for inactivity during vacation periods have not yet been solved.

A. Katz

Negligence — Acts or Omissions Constituting Negligence — Whether or Not an Artificially Created Water-Filled Excavation Constitutes an Attractive Nuisance — The Supreme Court of Indiana, through the medium of the case of Plotzki v. Standard Oil Company of Indiana, had presented to it, for determination, a problem of not infrequent occurrence but which has often created a good deal of perplexity. The case was one in which a parent sued to recover damages for the wrongful death of the plaintiff's eleven-year old son. The defendant had caused an excavation to be dug on certain realty owned by it within municipal limits, which excavation was unguarded and located about 150 feet from a public street. The hole was visible to pedestrians and was also frequented, to the knowledge of the defendant, by numerous children while at play. The floor of the excavation was unevenly graded, having drop-offs and hidden holes, some as much as eight feet in depth. The pit became filled with rain water which, becoming murky in character, concealed the hidden holes. The plaintiff's intestate waded in the pool so formed and was drowned when he fell into one of the holes. The plaintiff attempted to utilize the attractive nuisance doctrine as the

1 — Ind. —, 92 N. E. (2d) 632 (1950). Emmert, Ch. J., and Gilkison, J., each wrote a dissenting opinion.
DISCUSSION OF RECENT DECISIONS

basis for her suit, but defendant demurred on the ground the facts did not state a cause of action. The trial court sustained the demurrer. Upon direct appeal, a majority of the judges of the Supreme Court affirmed the ruling, stating that a pool, pond, lake, stream or other body of water does not, by the overwhelming weight of authority, constitute an attractive nuisance. The majority also refused to agree that the presence of sharp drop-offs and deep holes in artificially constructed pools of water constituted traps or hidden dangers for which the defendant could be held liable.

The "turntable" doctrine, one later to acquire the name of "attractive nuisance," was originally formulated in this country in the case of Sioux City & Pacific Railroad Company v. Stout, a case wherein an infant was permitted to recover damages for injuries sustained notwithstanding the fact that the infant was then trespassing. The court there stated it to be a question for the jury to determine as to whether or not the defendant's act in maintaining the instrumentality was likely to attract children. If so, a duty was thereby imposed on the property owner to prevent harm to infant trespassers; a duty not previously known in law. The doctrine so formulated has been defined, in Pekin v. McMahon, to be one creating an obligation to use reasonable care where "land of a private owner is in a thickly populated or settled city adjacent to a public street or alley and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class."

One would normally assume that bodies of water, even though hazardous, would constitute such an allurement for children as to become attractive nuisances. Courts, however, have historically held that natural water hazards are not within the scope of the doctrine although the reasons advanced have not been consistent. From absence of liability for natural water hazards, it has been an easy step to excuse the owner for the consequences flowing from an artificial accumulation of water. Legally speaking, the arguments may sound strange, but they bear evidence of expediency. Some learned courts have displayed a remarkably business-like viewpoint in holding that it would be impracticable to guard the

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2 84 U. S. (17 Wall.) 657, 21 L. Ed. 745 (1874).
4 154 Ill. 141 at 148, 39 N. E. 484 at 485.
water hazard. In *Sullivan v. Huidekoper*, for example, the court used colorful language to the effect that every "man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools or other bodies of water." For want of better reason to deny liability, some courts have been induced to disregard the value of life and have advanced a morbid consideration based on a mathematic proportion between the small number of deaths in relation to the large number of boys who visit ponds or bodies of water. Others, acting as amateur psychologists, have indicated that it is the nature of boys to seek out bodies of water so that the expense of securing the same from invasion would be astronomical in comparison to the utility derived from such water.

It has been an accepted fact, in a few jurisdictions, that water may be considered to be patently dangerous, but these courts have refused to transfer the burden of the duty of protecting the infant from the parent to the property owner on whose land the water is situated. These courts presuppose that it is the duty of the parent to acquaint the child with the patent danger of water and of the possibility of drowning therein. Such a duty is regarded as preventative on the part of the parent rather than a curative one resting on the property owner. As candidly stated in the Minnesota case of *Stendal v. Boyd*, if an owner "must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children?"

Being aware of the danger which would be created by fixing unlimited liability on the land owner, courts have nevertheless devised a method

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12 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597 (1898). The complaint had been sustained in 67 Minn. 279, 69 N. W. 899 (1897).
13 73 Minn. 53 at 55, 75 N. W. 735.
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of allowing for some degree of liability where water is artificially gathered on the land, yet limiting the scope of that liability. The vehicle by which this has been accomplished has been through the introduction of an element of unusual danger existing about the water hazard. Such unusual danger has been considered to be an additional allurement, turning the presence of water into an attractive nuisance. In the Illinois case of Peers v. Pierre,\(^{14}\) a case similar on its facts to the instant one, the court denied recovery by saying that the "weight of authority is to the effect that the attractive nuisance doctrine does not apply to ponds where there is no unusual danger."\(^{15}\) But it did refer to Pekin v. McMahon,\(^{16}\) one of the leading cases in which liability has been established because of the presence of an unusual danger. The danger there took the form of a raft-like log floating on the pond. The extra hazard necessary has been satisfied by a floating sidewalk;\(^{17}\) by floating sawdust in the pool;\(^{18}\) by a spoil bank with sand adjacent to the pool;\(^{19}\) and by a plank walk with access to a pumphouse.\(^{20}\)

Absent such an unusual danger, recovery has generally been denied in the so-called "excavation" cases. In the Texas case of Banker v. McMahon,\(^{21}\) however, an infant was drowned in an excavation filled with water. The excavation was located in a homesite, in close proximity to dwellings wherein lived numerous families with children. No unusual danger was evident beyond the presence of accumulated water, but the court was persuaded to allow a recovery, utilizing the attractive nuisance doctrine as the basis therefor. It stressed three points to justify the result. In the first place, the body of water served no practical purpose and possessed no value or utility. Second, the water hazard could have been abated or removed at a nominal cost. The third point turned on the landowner's knowledge of the presence of children on the premises. The accumulation of these three was said to be enough to impose liability. That decision marked a departure from prior Texas holdings, but the views so expressed have found favor in only a few other jurisdictions.\(^{22}\)

The Indiana court, in the instant case, may be said to have resolved

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\(^{15}\) 336 Ill. App. 134 at 138, 83 N. E. (2d) 20 at 22. Italics added.
\(^{17}\) Linnberg v. City of Rock Island, 136 Ill. App. 495 (1907). The same case, on subsequent appeal, appears in 157 Ill. App. 527 (1910).
\(^{20}\) Howard v. City of Rockford, 270 Ill. App. 155 (1933).
\(^{21}\) 146 Tex. 454, 208 S. W. (2d) 843, 8 A. L. R. (2d) 1231 (1948).
\(^{22}\) Peters v. City of Tampa, 115 Fla. 666, 155 So. 854 (1934); Altus v. Mullihan, 98 Okla. 12, 23 P. 851 (1924); Pigford v. Cherokee Falls Mfg. Co., 124 S. C. 389, 117 S. E. 419 (1923).
the problem correctly, if correctness is to be measured by the weight of authority. The fact remains, however, that it is undeniable that certain bodies of water are hazardous to children who may be attracted by them. It may be better, for that reason, to have these cases decided on their individual facts rather than by attempting to fit them into arbitrary categories. Certainly, the Indiana court has not contributed to that end, while the Texas court, although not deciding correctly in view of the weight of authority, has shown an adventurous spirit which might well stimulate thought.

If practicability is to be the keynote, in working out a definition of a water hazard as an attractive nuisance, would it not be more practicable to permit the jury, rather than a court on demurrer, to evaluate the several factors? It might be remembered that to be practical is not always to be wise. But, for that matter, to be legal is not always to be just. A happy medium, however, may lie at the point where legal and practical approaches unite in the just and equitable disposition of cases.

E. F. NOWAK

WILLS—CONSTRUCTION—WHETHER OR NOT A LEGATEE GRANTED AN ANNUITY BY WILL MAY ELECT TO TAKE THE CAPITAL SUM IN LIEU THEREOF—The problem before the court in the recent Illinois case of In re Herrick's Estate turned about the question as to whether or not a legatee could elect to take the capital sum in lieu of an annuity which had been provided for her under the will of the testatrix. It appeared that the testatrix had received literature from the American Bible Society explaining a plan by which persons desiring to help the society, and to further its missionary work, might do so by purchasing annuity contracts from it. Under these contracts, the named annuitant would receive a stipulated certain amount for life with reversion of the principal, at the annuitant's death, going to the society. Testatrix had, during her lifetime, purchased several such annuities with the avowed intention of helping the society in its work. By her will, she directed her executor to purchase another annuity from the same society for the benefit of her cousin. The executor, after the death of the testatrix, which was soon followed by the death of the annuitant-legatee, petitioned the probate court for directions concerning the purchase of the annuity. Objection was made by the executor of the estate of the cousin. He claimed the principal sum in lieu of the annuity. On appeal from an order overruling the objection and directing the executor to pay the fund to the society, the circuit court reversed

the judgment. The Appellate Court for the Second District, passing on the question for the first time in this state, in turn reversed the circuit court and remanded the case to the probate court with direction to proceed as originally ordered.

Cases dealing with testamentary direction to purchase or provide an annuity generally fall into one of three classes. Under the first, the will contains an absolute direction to make the purchase. The second group includes cases where the will contains a gift over of the residue, after payment of the annuity, to a designated remainderman. The third treats with a direction to purchase an annuity from a named corporation for the benefit of a designated annuitant for life with the understanding that any unexpended portion of the principal is to remain in the hands of the corporation.

As to the first class, an uninterrupted line of English cases has held that a bequest of money to be used in the purchase of an annuity gives to the legatee an unqualified right to elect to take the money itself, so as to put the annuitant in a position where he can insist that the annuity shall not be bought. There is consistency in this reasoning for it is based on the accepted premise that, as the legatee may sell the particular object as soon as it has been bought for him, the law should not require the doing of a nugatory act. The first American case, that of Reid v. Brown, adopted much the same view. The action was one to construe a will directing the purchase of an annuity for the benefit of a named person but with a direction to give the money to certain designated charitable organizations in the event the beneficiary had predeceased the testator. The annuitant, who had survived, elected to take the principal as a lump sum in preference to the annuity which might have been purchased therewith. The court, holding that she had that right, stated that: "Where an absolute and unqualified annuity is given, with instructions to invest a sum sufficient to purchase the annuity, the annuitant may elect to take the capital sum instead of having it invested for the purpose of producing the annuity."

The fundamental principle which underlies this view, one which treats


5 54 Misc. 481, 106 N. Y. S. 27 (1907).

the annuity provision as no more than one providing for a transferable legacy, has been repeatedly followed in Massachusetts and New York. In fact, the insistent refusal to follow the evident intention of the testator probably reached its peak in one New York case, that of *In re Cole’s Estate,* for the court there, in substance, stated the intention of the testator did not count as he should have known the law on the subject when he drew up his will. That attitude probably led to the passage of a statute in New York, one which forbids any right of election if there is a direction to purchase an annuity from an insurance company unless the will gives express recognition to such a right. Despite this statute, a New York court, applying a strict construction thereto, has still permitted a right of election where the direction is one to purchase the annuity from some one other than an insurance company.

In contrast, a larger number of American jurisdictions have refused to adopt the English view than have accepted it. In the Ohio case of *Feiler v. Klein,* for example, the court was faced with a similar problem arising under a direction in a will for the purchase of an annuity for the life of the beneficiary. It decided that the annuitant had no right to elect to take the principal in lieu thereof because it was said that the intention of the testator should control. When the will was construed as the court supposed the testator understood it, it revealed a purpose to lay out a fixed and certain amount in the purchase of the annuity but contemplated that the benefit thereof should accrue to the annuitant for life and not in one lump sum. In answer to the claim that the making of the purchase would be rendered nugatory by the annuitant’s sale of the annuity contract, the court pointed out that the annuitant would find a

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9. Thompson, Consol. Laws N. Y. 1939, Vol. 1, Ch. 13, § 47-b, Decedent Estate Law, states: “If a person hereafter dying shall direct in his will the purchase from an insurance company of an annuity, the person or persons to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purpose in lieu of such annuity except to the extent the will expressly provides for such right . . . .”


11. The problem appears to have arisen in only five states in addition to Massachusetts and New York. The opposite view is illustrated by *In re Lawrence’s Estate,* 17 Cal. (2d) 1, 108 P. (2d) 893 (1941); *Ketcham v. International Trust Co.,* 117 Colo. 559, 192 P. (2d) 426 (1948); *In re Johnson’s Estate,* 238 Iowa 1221, 30 N. W. (2d) 164 (1947); *Bedell v. Colby,* 94 N. H. 384, 54 A. (2d) 161 (1947); *Feller v. Klein,* 149 Ohio St. 237, 74 N. E. (2d) 384 (1947).

12. 149 Ohio St. 237, 74 N. E. (2d) 384 (1947).
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sale difficult as the face value of the contract would be uncertain. Except as an agreement might be worked out between the annuitant and the holder of the fund for a commutation thereof into, and payment of, its present worth, the majority reasoning is persuasive and reflects the sounder attitude that the intention of the testator should control.

The second class of cases deals with directions calling for the purchase of an annuity for life with a gift over of the residue to a designated remainderman. Again, the English decisions would seem to favor the right of the annuitant to elect to take the capital sum in lieu of the annuity, even to the disappointment of the remainderman’s expectations,13 but the American courts would appear to be in complete harmony on a rule to the effect that where there is a gift over the annuitant has no right of election.14 Whatever the quality of the reasoning behind the English view, it would seem more nearly to be the intention of the testator, from the presence of the gift over, that the annuitant should have no more than a life interest. If the remainderman has a vested interest in the principal sum, or in the residue thereof, the annuitant certainly should not be allowed to destroy that interest.

Between these two views lies the third group, one into which the instant case falls. Herein are found the cases dealing with the purchase of annuities from a named company for the purpose of paying stipulated sums to the beneficiary for life but with the remainder, if any, staying in the hands of the company selling the contract. The first American case in this category also arose in New York. In the case of In re Geis,15 the testator, who had been active in missionary work, made a will directing the purchase of annuities from certain missionary societies for the benefit of named legatees. These legatees claimed a right to elect to take the principal in lieu of the annuity provision but the court refused to permit any such election. The court considered it to be the intention of the testator that the beneficiaries were to receive what was, in essence, a life estate with a remainder over to the societies to receive the unexpended portions of the principal at the death of the annuitants, even though such purpose was not expressly stated. The purpose being, in reality, to make a gift to the societies of the residue after payment of the annuities, the annuitants were denied the right to destroy this vested interest in the principal. That holding has been followed in later cases arising in Ohio16 and Maryland,17 and is now accepted into the law of Illinois.

14 In re Oakley’s Will, 142 Misc. 1, 254 N. Y. S. 306 (1931); In re Lejlie’s Estate, 181 Pa. 416, 37 A. 554 (1897).
15 167 Misc. 357, 3 N. Y. S. (2d) 770 (1938).
17 The Maryland Court of Appeals, in Gilbert v. Finlay College, — Md. —, 74 A. (2d) 36 (1950), reached a similar conclusion on somewhat similar facts to the ones in the instant case.
When the particular plan of disposition utilized by the testator in the instant case is borne in mind, the results achieved are nothing if not eminently fitting. A testator, intent on providing a modicum of support for the natural objects of his bounty, but nothing more, ought to be assured that the unneeded portions of his estate will eventually inure to his favored charity without the necessity of interposing a trust to support the ultimate distribution. The instant holding provides that assurance.

B. Berger
RECENT ILLINOIS DECISIONS

Administrative Law and Procedure—Judicial Review of Administrative Decisions—Whether a Request for a Second Rehearing is Necessary Where the First Rehearing Resulted in a Modification of the Original Order—Alton Railroad Company v. Illinois Commerce Commission involves one aspect of the exhaustion of administrative remedies doctrine which has not heretofore been decided in this jurisdiction. In 1933, certain railroads furnishing switching services to industries in Bloomington, Illinois, eliminated from their switching districts various concerns operating in the locality. Subsequently the Bloomington Association of Commerce and several of the firms directly affected filed a complaint with the Illinois Commerce Commission alleging the above facts and requesting that the industries be restored to the district and thus obtain the benefit of the reasonable switching rates applicable thereto. Extensive hearings were held and finally, in 1940, the Commission entered an order dismissing the complaint and upholding the legality of the action taken by the railroads. An appeal was pursued in accordance with the Act and the Circuit Court of McLean County set aside the decision, remanding the case to the Commission. This judgment was later affirmed by the Supreme Court. Upon the remandment the Commission conducted more hearings and in 1945 rendered a ruling requiring the railroads to restore their switching districts as originally established, thus reinstating the eliminated firms, and also to fix a connecting line switching rate in accordance with specifications included in the order. A rehearing was granted at which time both parties were permitted to present additional testimony and exhibits. Thereafter, in 1947, a second order was entered incorporating by reference its 1945 predecessor but modifying it to allow the railroads (1) to take advantage of a statewide increase in freight rates which had become effective subsequent to its entry and (2) more time in which to comply with the Commission’s mandate. The railroads still being dissatisfied, appealed to the Circuit Court of McLean County at which time the Commission filed a motion to dismiss, urging that the court did not have jurisdiction. It was

1 407 Ill. 202, 95 N. E. (2d) 76 (1950).
2 This action forced those industries to pay a higher rate for the delivery of freight to and from their loading facilities.
3 The Public Utilities Act, Ill. Rev. Stat. 1949, Vol. 2, Ch. 111 2/3, § 72, sets out the procedure to be utilized in obtaining a judicial review of the Commerce Commission decisions. This procedure has not been supplanted by the Illinois Administrative Review Act since, as yet, Commerce Commission orders have not been brought within its scope.
argued that since the railroads failed to request a rehearing subsequent to the entry of the 1947 order before appealing, a procedure which is required by the Act, they had no standing in court. The trial court denied the motion but affirmed the Commission’s decision on its merits. The railroads appealed to the Illinois Supreme Court, and upon the request of the Attorney-General appearing in behalf of the Commission that tribunal reversed the lower court and remanded with directions to grant the Commission’s motion to dismiss the appeal for failure to request a second rehearing.

In order to provide for effective and orderly administrative process the courts have adopted the attitude that until an individual exhausts all of his administrative remedies the judiciary cannot intervene and grant relief. One phase of this principle concerns itself with the necessity of seeking a rehearing after an administrative tribunal has entered an adverse decision. While the law as to this particular point has never been entirely clear, it appears to be well settled that if the statute creating the administrative agency and its procedure requires a request for a rehearing before appeal to the courts, it is imperative that the party follow its mandate.

Since the Public Utilities Act requires the pursuit of such a procedural step, the only question in this particular case is whether or not the railroads complied. After the 1945 order was entered they acted in accordance with the statute by filing the necessary petition. As a result of that hearing the 1947 decision was handed down. If it had merely affirmed the former, obviously an appeal would have been in order since all the statutory requirements had been met. However, the 1947 ruling was entered upon new evidence submitted during the rehearing and modified its predecessor in certain respects. The Supreme Court held that this modification resulted in an entirely new order different from the former and therefore an additional request for rehearing was necessary. Its rationale

5 Ill. Rev. State 1949, Vol. 2, Ch. 111 3/4, § 71, provides: “No appeal shall be allowed from any rule, regulation, order or decision of the Commission unless and until an application for a rehearing thereof shall have been filed with and acted upon by the Commission.” The section continues “No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the Commission.” In defining the purpose of this latter provision the Supreme Court, in the recent case of Granite City v. Illinois Commerce Commission, 407 Ill. 245, 95 N. E. (2d) 371 (1950), stated that it was to require the party contesting the decision of the tribunal to inform the Commission and the opposition wherein errors of law and fact were made in the ruling, thus presenting an adequate basis for a reconsideration. As a result, a petition for rehearing which merely made general allegations as to the invalidity of an order was not sufficient compliance with the Act and upon judicial appeal the party filing such petition would not be allowed to present specific objections to the Commission’s decision.

was based upon the fact that the issues resolved in the two decisions were
dissimilar. Thus the Commission, in its 1945 order, simply found that the
existing switching rates were reasonable. On the other hand, by allowing
the railroads an increase in the general freight tariffs, the Commission, by
its 1947 ruling, decided an entirely new issue, to wit: that in the light of
the increase in freight rates the existing switching rates were adequate.

ADOPTION—CONSENT OF PARTIES—WHETHER NATURAL PARENT, HAVING
EXECUTED CONSENT TO ADOPTION IN ACCORDANCE WITH STATUTORY RE-
QUIREMENTS, MAY WITHDRAW SUCH CONSENT PRIOR TO ENTRY OF DEGREE
OF ADOPTION—In the recent case of Dickholtz v. Littfin,1 the Appellate
Court for the First District was presented, for the first time since the
passage of the revised Illinois Adoption Act,2 with the problem of the
revocability of a consent to adoption given by a natural parent where
the consent conforms to statutory requirements. The child there con-
cerned had been born out of wedlock but the natural mother and the
putative father shortly thereafter intermarried. Prior to the marriage, a
petition for adoption had been filed together with a prepared form of
appearance and consent signed by the natural mother. She thereafter
attempted to revoke such appearance and consent, alleging the perpetra-
tion of various acts of a coercive nature which she claimed had been used
to obtain her signature thereto. Petitioners, seeking the adoption, filed an
answer in which they denied that any duress had been used to secure the
consent and also charging the mother with being an unfit person to have
custody of the child. The County Court dismissed the petition for adop-
tion and ordered the child surrendered to the natural mother. Upon ap-
peal, the Appellate Court affirmed the order.

In substantiating such decision, the court proceeded on the theory that
the complete revision in the law produced by the Adoption Act of 1945
was intended by the legislature, among other things, to broaden the scope
of the discretion which the trial court might exercise in adoption proceed-
ings. From the vantage of that starting point, the court examined the
facts, considered the welfare of the child, studied the effect of the inter-
marriage of the natural mother and the putative father upon the question
of illegitimacy, noted the length of the child’s residence with the peti-
tioners, and agreed that the trial court had properly exercised its discre-
tion in allowing the parental consent to be revoked. In reaching that
result, the court said: "We do not think that the right to withdraw should
be declared absolute, but rather that it must be left to the sound discre-
tion of the trial court depending upon the peculiar circumstances in each case.\(^3\) The importance of the decision lies in the fact that it serves to place Illinois in line with the majority of other jurisdictions on the question as to the right to withdraw a consent prior to the time when the same has been acted upon.\(^4\) By making that right depend on the discretion of the trial court, to be exercised according to the facts of each case, rather than by treating the same as an absolute right authorizing withdrawal solely at the whim of the consenting natural parent,\(^5\) the court has done much to effectuate an acknowledged legislative purpose.\(^6\)

**Bills and Notes—Requisites and Validity—Whether Personal Defenses are Available Against an Accommodation Endorser Who Has Been Obliged to Pay the Holder of a Check Following Dishonor Thereof by the Drawer**—The dispute in the case of *Schmetzle v. Transportation Investment Corporation*\(^1\) grew out of an exchange of checks between the defendant and another who furnished two post-dated checks for the one in suit but who agreed not to deposit the defendant’s check for collection until the post-dated checks had cleared. In violation of such agreement, the payee secured the plaintiff’s accommodation, beneath the payee’s signature, and secured cash for the check at another bank than the one on which the check had been drawn. The post-dated checks were not honored so the defendant, drawer of the primary check, ordered the drawee bank to stop payment thereon. The drawee bank refused payment as ordered, causing the holder bank to demand, and to receive, reimbursement from the plaintiff, who had acted as accommodation endorser. After taking a blank endorsement of the check, plaintiff proceeded against the drawer of the check and was met by the defense of failure of consideration. A summary judgment for the plaintiff in the trial court was affirmed by the Appellate Court for the Second District.

Plaintiff had claimed to be a holder in due course, so as not to be

\(^3\) 341 Ill. App. 400 at 405, 94 N. E. (2d) 89 at 92.

\(^4\) A minority of states regard the right to withdraw a consent as being absolute in character. For annotations on the general subject, see 156 A. L. R. 1011 and 138 A. L. R. 1038.

\(^5\) In the case of Petition of Thompson, sub nom. Thompson v. Burns, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 308-13, the court held that an improperly executed consent was insufficient, but proceeded, by way of dicta, to imply that the right to withdraw the consent was absolute, at least until decree had been entered. The court in the instant case expressly rejected this dicta in favor of the majority rule.

\(^6\) To that extent, the case follows the view of Nelson v. Nelson, 127 Ill. App. 422 (1906), decided under an earlier statute, where the court held that the fact that the natural mother had given her consent in the mistaken belief of her impending death was insufficient to invalidate the same upon her subsequent recovery.

\(^1\) 341 Ill. App. 639, 94 N. E. (2d) 682 (1950).
subject to the personal defense of failure of consideration existing between the drawer and the payee, but the court properly took the position that he was not such since he had received the check, under the blank endorsement, knowing that it had been dishonored. For that matter, Section 142 of the Illinois Negotiable Instruments Act was of little help to the plaintiff. That section, in essence, declares that an instrument is not discharged when paid by a party secondarily liable thereon. Instead, it directs that such person be remitted to his former position on the instrument as regards all prior parties. While the plaintiff, as an accommodation endorser, was a secondary party, it was not possible to remit him to any "prior position" for his signature was not in the chain of title.

No other section of the statute being applicable, and there being no Illinois precedent squarely in point, the court proceeded to decide the case on the law merchant, a body of law which holds that the accommodation endorser is subrogated to the rights of the holder whom he has paid off as against all who were parties prior to his accommodation. Thus, even though the plaintiff could not technically be deemed to be a holder in due course he was, under the subrogation theory, entitled to rights equal to those of such a holder for he had no knowledge of any infirmities at the time of his accommodation endorsement.

FIXTURES—REMOVAL—WHETHER OR NOT A RIGHT OF REMOVAL OF FIXTURES CONFERRED BY LEASE IS LOST BY REASON OF A FORFEITURE OF THE LEASEHOLD—The case of Getzendaner v. Erbstein presented the Appellate Court for the First District with the necessity of ruling on a problem which

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3 Ibid., Ch. 98, § 142. The court, in circumventing the effect of this section, made no attempt to interpret that portion which provides an exception to the general rule laid down therein. The exception states that an accommodating party satisfying an instrument made or accepted for accommodation is not remitted to his former position on the instrument as are other secondary parties under similar circumstances. Literal interpretation of this section would indicate that it does not apply to the accommodation endorser.
4 The court referred to the abstract opinion in Graves v. Neeves, 183 Ill. App. 235 (1913), but said it was not possible to tell therefrom whether the maker had claimed any special defense as against the payee. If not, the problem in the instant case would be an entirely new one for Illinois.
6 See Lill v. Gleason, 92 Kan. 754, 142 P. 287 (1914). That decision confined the subrogation theory to instances where the accommodation endorser could be termed an "irregular" one. The instant case drew no such differentiation. In fact, the plaintiff's signature appeared beneath that of the payee. He would, therefore, normally be considered to be a "regular" accommodation endorser.
7 For further discussion, see Chafee, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Col. L. Rev. 538 (1921), and notes in 28 Harv. L. Rev. 102 and 39 Ill. B. J. 300.
has been resolved in many jurisdictions but which has never previously been decided in Illinois. A lessor had there given a lease for a term upon the understanding that the lessee was to add to the improvements but was to have the privilege of removing such additions "at the expiration" of the term so created. During the term, the lessor served the tenant with a statutory five-day notice for possession because of non-payment of rent and followed up such notice with a forcible entry and detainer proceeding. A judgment for possession was duly obtained. When the tenant was served with a writ of restitution based on such judgment, she attempted to remove the fixtures which she had added pursuant to the lease but was forcibly prevented from so doing by the landlord. The tenant thereafter filed the instant action against the landlord to recover as for a conversion of the fixtures. A motion to strike the complaint for failure to state a cause of action was sustained but, on appeal from that ruling, the Appellate Court, with one judge dissenting, reversed and remanded the case.

The majority of the court recognized the doctrine that a tenant for a definite term is ordinarily aware that all of his rights under the lease will be extinguished on a day certain, hence is not prejudiced by a requirement that he remove any fixtures he wishes to retain during the defined period or else lose his rights therein. Where, however, the tenancy comes to an end prior to the normal expiration of the lease, as by the successful prosecution of a forcible entry and detainer proceeding, the majority felt the same certainty of termination would not appear until after judgment had been rendered therein, hence it considered it proper to recognize a right of removal for a reasonable period after the date of such termination. The dissenting judge, on the other hand, laid stress on the fact that the statutory right conferred on the tenant to remove his fixtures is limited to those cases where the possession is retained lawfully by him in his character as a tenant. He believed that, as the plaintiff had wilfully breached the contract, her possession was unlawful especially after a judgment for possession had been obtained, hence she should not be entitled to a greater

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4 O'Connell v. Fay, 186 Ill. App. 113 (1914).
5 There is dicta to that effect in Fellows v. Johnson, 183 Ill. App. 42 (1913), but the tenant there concerned had agreed to an earlier cancellation of the lease upon six months' notice. See also Berger v. Horner, 36 Ill. App. 360 (1889).
right than would be granted to a tenant who had fully performed his covenants.

There is some evidence of an effort on the part of the majority of the court to do substantial justice between the parties. Such being the case, the decision, if upheld, should go to alleviate some of the harshness of the common law rule which compelled a tenant to lose his right to remove his fixtures when, because of some act or omission, he had forfeited his interest under the lease.9 Express language in the lease to that end would seem to be necessary, hereafter, if such a penalty is to be imposed on the defaulting tenant.

INTOXICATING LIQUORS—CIVIL DAMAGE LAWS—WHETHER OR NOT THE DRAM SHOP ACT ALLOWS A RECOVERY FOR INJURIES ARISING OUT OF AN ACCIDENT OCCURRING IN A SISTER STATE—For the first time in Illinois, a plaintiff requested that the Dram Shop Act1 be given extraterritorial effect. In Eldridge v. Don Beachcomber, Inc.,2 the following facts were alleged: that the plaintiff was a passenger in an automobile driven by Slaughter; that Slaughter while under the influence of intoxicating liquor purchased from the defendant in Chicago drove into the side of a truck in Hammond, Indiana; that the accident was due to Slaughter’s intoxication; and that, by reason of the collision, the plaintiff was injured. The defendant moved for a dismissal of the suit, claiming that since the accident had occurred in Indiana an action under the Illinois statute could not be maintained. The trial court granted the motion and, upon appeal, the judgment was affirmed by the Appellate Court for the First District.

The court, in reaching its decision, alluded to the fact that the Illinois Dram Shop Act contains no specific provision extending its scope to instances where the act causing the injury occurred in a sister state. In refusing to extend the explicit words of the statute in such a situation the court recognized that its conclusion was supported by commonly accepted rules of statutory interpretation. Thus it is well established that a statute should not be given extraterritorial effect except where the legislature has expressly provided for such an extension.3 Then, too, since the Act in

1 Ill. Rev. Stat. 1949, Vol. 2, Ch. 43, § 135, provides: “Every ... person ... injured, in person or property ... by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication ... of such person.”
2 2342 Ill. App. 151, 95 N. E. (2d) 512 (1950).
3 Union Bridge & Construction Co. v. Industrial Commission, 287 Ill. 396, 122 N. E. 609 (1919).
question is to some degree penal in nature and is in derogation of the common law, the strict construction utilized by the court appears to be appropriate. As the result of this decision both the intoxication and tortious act must occur within the boundaries of Illinois before an action under the Dram Shop Act can be maintained.

MUNICIPAL CORPORATIONS — PROPERTY — WHETHER STATUTE AUTHORIZING A MUNICIPALITY TO ACQUIRE LAND FOR PURPOSE OF PROVIDING OFF-STREET PARKING FACILITIES IS CONSTITUTIONAL—By passage of an ordinance, the City of Kankakee indicated its intention to exercise the special power of eminent domain allegedly conferred upon it and other Illinois cities by an amendment to the Cities and Villages Act, with a view toward acquiring eight tracts of real estate in the business section of the city for use as off-street parking lots. Thereafter, certain persons, including the owner and operator of a private parking lot, filed suit to prevent the city officials from proceeding under the ordinance on the theory that the basic statute was void because it authorized the taking of property for a private use in violation of both the state constitution and the Fourteenth Amendment to the United States Constitution. The trial court, after hearing evidence, decreed that the ordinance and Section 8 of the statute were invalid, upheld the constitutionality of the balance of the basic act, and issued the injunction. Both sides then took a direct appeal to the Illinois Supreme Court under a certificate that the validity of both a statute and an ordinance was involved. That court, in Poole v. City of Kankakee, found the measures to be constitutional and ordered the injunction dissolved.

Starting from the premise that it is a legislative function to decide whether a public necessity exists and that a court should inquire only as to whether or not the use authorized by the statute is a public one, the court readily found that the statute contemplated a taking of land for a public purpose. The enormous increase, over the years, in the number of

4 However, it is considered remedial to the extent that it cures a defect in the common law by allowing a recovery from one who would not have otherwise sustained any liability but who contributes to a certain extent to the resultant injury.


2 Ill. Const. 1870, Art. II, §13, and Art. IV, § 20, were particularly called upon to support the claim of unconstitutionality.

3 406 Ill. 521, 94 N. E. (2d) 416 (1950).


5 People ex rel. Tuohy v. City of Chicago, 394 Ill. 477, 68 N. E. (2d) 761 (1946). All courts agree that the determination of whether a given use is or is not a public use forms part of the judicial function.
automobiles in operation has created traffic problems of national concern. Outmoded and narrow streets in business areas of cities are clogged daily by a degree of traffic congestion which strangles movement, harms business and directly affects the safety of those who must use the streets. In addition, emergency cars, ambulances, police, and fire vehicles are frequently delayed from reaching the scene of emergency or danger because of such conditions. Any legislative action of the type in question, being designed to alleviate traffic congestion, could well be said to be responsive to the public need.

It had also been urged that the statute improperly purported to give authority to the municipality to lease the parking lots so acquired, hence resulted in a taking for a private use. Any such use was said to be merely incidental to the public purpose manifested in the statute and would not result in creating purely private benefits. In much the same way, the court overcame the argument that the use was necessarily private, because it enabled the municipality to enter into direct competition with individuals engaged in a private calling, by noting that the presence of private garages in the area did not prevent the operation of public garages if public necessity required their existence. The legislature, by passing the basic statute, and the court, by holding it constitutional, have done much to bring about a solution for the problem which burdens every Illinois city.

Municipal Corporations—Torts—Whether Police Officer of Municipal Corporation is Immune From Liability for His Negligence When Operating a Motor Vehicle in Performance of His Duties—The effect that a 1945 amendment to the Cities and Villages Act is to have upon the personal liability of police officers has been indicated by the holding in Both v. Collins. The plaintiffs there were injured when the automobile in which they were riding was struck by a police car negligently...
operated by the defendant who was, at the time, on his way to a police station to interrogate a criminal suspect. The Appellate Court for the First District, after reversing a judgment in favor of the plaintiff on the ground of error not here pertinent, proceeded to dispose of a claim of immunity pressed on it by the defendant in order to aid the trial court in the conduct of the new trial there ordered. The defendant had relied primarily upon the case of Taylor v. City of Berwyn in which the question had been presented as to whether or not a police officer, in fresh pursuit of certain felony suspects, was engaged in a governmental function. It having been decided that he was, the court then refused to hold him liable for injuries growing out of his negligent operation of a police car in the course of that pursuit. The doctrine of immunity from tort liability when engaged in performance of governmental functions is well established with regard to municipalities as well as to other governmental agencies, but the Taylor case was apparently the first in which the immunity was extended to protect the negligent police officer personally.

As neither the officer nor the municipality, after the holding in the Taylor case, would be liable to respond in damages to the injured person, the legislature, in 1943, enacted a provision which repealed any immunity favoring the municipal corporation for injuries caused by the negligent operation of motor vehicles driven by members of police departments while on duty, but presumably left the officer still protected. The statute was again amended in 1945, this time to make it apply to "any injury" inflicted by the police officer, whether by motor vehicle or not, but the corporate liability was changed to that of indemnitor on any judgment pronounced against the officer. It would seem that the legislative intent must have been to extend the liability of the police officer, and correspondingly lessen the immunity, otherwise there could be no judgment requiring indemnity. Whether or not the statute nullified the holding in the Taylor case, the instant case has certainly operated to minimize the scope thereof for it establishes liability on the officer's part for injuries resulting from his negligent operation of a motor vehicle when not in "fresh pursuit". By implication, at least, it also casts doubt upon the continued validity of the holding in the Taylor case and, when a proper situation arises, may help lead to the reversal thereof.

3 372 Ill. 124, 22 N. E. (2d) 930 (1939).
4 In general, see Green, "Freedom from Litigation," 38 Ill. L. Rev. 355 (1944).
5 Ill. Rev. Stat. 1943, Ch. 24, §1-15. The statute then provided that only the municipality was to be liable for "any injury . . . caused by the negligent operation of a motor vehicle by a member of the police department."
6 Laws 1945, p. 477.
RECENT ILLINOIS DECISIONS

VENUE—NATURE OR SUBJECT OF ACTION—WHETHER OR NOT AN OBJEC-
TION TO VENUE MAY BE RAISED BY A DENIAL TYPE OF ANSWER—The plain-
tiff in Dever v. Bowers filed a complaint in a wrongful death action in
Gallatin County against two defendants, neither of whom were residents
thereof. The complaint charged that the death occurred in a collision at an
indicated point on an Illinois highway. That highway followed the county
line between Gallatin and White counties but, at the trial, there was evi-
dence that the accident had happened on that part of the road located in
White County. The defendants, without utilizing any preliminary mo-
tion, filed an answer categorically denying each paragraph of the com-
plaint. The ensuing trial resulted in a verdict and judgment for the
plaintiff. On appeal therefrom, the defendants assigned error on the
ground the trial court was without jurisdiction as the record showed that
the deceased had crossed the center line of the road into White County
prior to the moment of the collision, hence no part of the transaction out
of which the action arose had occurred in Gallatin County. The Appellate
Court for the Fourth District, nevertheless, affirmed the judgment in favor
of the plaintiff.

The defendants had argued that no preliminary motion to test the
jurisdiction was necessary as they had a right to raise the matter by an
answer, event though an attack might have been offered by a motion based
on Section 48 of the Civil Practice Act. They also relied on the proposi-
tion that a failure to raise a defense of the type in question by motion did
not preclude them from raising that defense by answer. The court, while
not accepting the premise that a motion under Section 48 would be a
proper way to raise an objection to venue, agreed that the defendants


2 If the accident had occurred in Gallatin County, plaintiff's choice of place for
suit would have been proper under the election provided by Ill. Rev. Stat. 1949,
Vol. 2, Ch. 110, § 131, which permits the bringing of suit where one or more of the
defendants reside or where "the transaction or some part thereof occurred out of
which the cause of action arose."

3 Defendants undoubtedly labored under the belief that, by denying the allega-
tions in the complaint in categorical fashion, they thereby denied every allegation
set forth in the complaint, including the venue allegations, so as to raise an issue
concerning venue or jurisdiction.

4 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(b), indicates the use of a motion where
the "court has not jurisdiction of the subject matter . . ."

5 Ibid., Ch. 110, § 172(4), so states.

6 There would seem to be some confusion over the meaning to be ascribed to
certain of the grounds listed in the statute to support a motion filed under Section
48 of the Civil Practice Act. The court in the instant case, with all correctness,
indicated that the specific ground that "the court has not jurisdiction of the subject
matter" relates only to matters concerning inherent jurisdiction, or the power to
hear and determine the type of case presented, as distinguished from jurisdiction
in terms of venue. See 21 C. J. S., Courts, §§ 15c and 23. For confusion as to the
110, § 172(c), see Classen v. Heil, 330 Ill. App. 483, 71 N. E. (2d) 537 (1947), and
comments thereon in 26 CHICAGO-KENT LAW REVIEW 38-9 and 36 ILL. B. J. 194.
Elaboration upon statutory language may be desirable in the interest of clarity.
had the right to preserve the venue objection by answer, particularly since
the statute now permits the pleading of matter in abatement, such as lack
of venue, along with matter in bar of the action.7

The significance of the case, however, lies in the fact that the court,
while it recognized that the defendants were entitled to proceed as they
had done, found the denial form of answer insufficient to raise any issue
as to matters relating to venue.8 In that regard, the court required that
the answer should disclose compliance with certain particulars both as
to form and allegation, namely: (1) the objection to venue should be sep-
arately designated;9 (2) the answer should be specific as to the facts per-
taining to the matter in abatement;10 and (3) the objection raised had to
be insisted upon at the trial on the merits in order that there be no waiver
of the defense.11 The particularity required of defenses in abatement under
the former procedure12 has not, apparently, been changed in any substan-
tial fashion by anything to be found in the Civil Practice Act.13

WILLS—CONSTRUCTION—WHETHER OR NOT BEQUEST OF MONEY ON
DEPOSIT INCLUDES MONEY CONTAINED IN TESTATOR'S SAFETY BOX LOCATED
IN VAULT OF A BANKING INSTITUTION—The Supreme Court of Illinois,
having granted leave to appeal from the decision of the Appellate Court
for the First District in the case of Lavin v. Banks,1 followed up that
action by reversing the decision of the Appellate Court. The case had re-

8 See Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856 (1906), to the
point that a denial type of answer, comparable to the general issue of the common
law pleading system, does not serve to formulate any issue as to matters properly
presentable under a defense in abatement.
10 Gillian v. Gray, 14 Ill. 416 (1853).
11 The possibility that an error in venue may be cured by a failure to assert the
12 People's Bank of Bloomington v. Wood, 193 Ill. App. 442 (1914), provides a
good illustration of the meticulousness required in dilatory pleading.
13 The defendants in the instant case apparently recognized the error in venue
prior to pleading, hence were in a position to take advantage thereof during the
pleading stage. If the error had not become apparent until during the course of
the trial, and there was no culpable negligence on the part of the defendants in
not ascertaining the facts prior to that time, the trial court might have, in keeping
with the spirit of the Civil Practice Act, permitted withdrawal of the answer to the
merits or the amendment thereof, so as to allow assertion of the defense in abate-
ment thus disclosed. The factual situation, however, suggests that it might be
desirable to amend the venue provisions of the Civil Practice Act to assimilate
civil procedure with the rule formerly existing as to criminal prosecutions for
crimes committed on or near county lines: Ill. Rev. Stat. 1945, Ch. 38, § 704.
14 406 Ill. 605, 94 N. E. (2d) 876 (1950), reversing 338 Ill. App. 612, 88 N. E. (2d)
512 (1949), criticized in 28 CHICAGO-KENT LAW REVIEW 175.
quired a construction of a provision in a testator's will, one by which he had bequeathed to his wife "all monies on deposit in my name in any bank or banking institution," as the same might have bearing on the right to a substantial amount of cash found in a safety deposit box rented by the testator in the vault of a safety deposit company which was a wholly-owned subsidiary of, and located within premises operated by, a banking institution. The trial court had decreed that the money in question did not pass to the widow. The Appellate Court, affording a liberal construction in favor of the widow because she was the legatee named to receive the disputed bequest, reversed and adopted the opposite construction on the ground that the ordinary testator would not distinguish between a bank and its subsidiary safety deposit company, particularly when the latter was to all appearances a component part of the former. The Supreme Court, however, reversed and reinstated the trial court decision.

It decided that the controlling rule of construction to be applied was one which called for the giving of an ordinary meaning to the words employed by the testator in order to determine his intent at the time of making the bequest in question. It reasoned, in the light of this principle, that the term "money on deposit" in a bank described more nearly the customary relationship of debtor and creditor which arises between a bank and a depositor whereby the bank assumes control over the money so deposited and, in return, gives the depositor the right to withdraw not the same money but an equivalent amount from the account. The dissimilarity between this relationship and the one which exists between a box renter and a safe deposit company, one under which the customer places valuables in a receptacle for safekeeping but, more significantly, retains complete control over his property, is quite marked. The cash in question may have been deposited, i.e. placed in the safety deposit box within the bank building, but it was not "on deposit" in the bank in the usually accepted sense of that term.

2 See 69 C. J., Wills, § 1151. The Supreme Court refused to apply this rule because the record did not reveal the value of the property the widow would take under the will nor the value which would attach to her interest if there had been no will or if she had renounced its benefits. The rule that favors a construction which most nearly conforms to the law of inheritance, illustrated by Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1 (1932), was said to be inappropriate for the same reasons.

3 The Appellate Court had relied on Ill. Rev. Stat. 1949, Vol. 2, Ch. 114, § 334 et seq., which regulates the keeping and letting of safety deposit boxes but which is expressly made inapplicable to state and national banks whose vaults are deemed an integral part of the banking business, as justifying the result attained.

WILLS—REQUISITES AND VALIDITY—WHETHER AN AGREEMENT DESIGNED TO EXTINGUISH A MORTGAGE DEBT UPON THE DEATH OF THE MORTGAGEE IS TO BE REGARDED AS A TESTAMENTARY DISPOSITION REQUIRING ATTENTION TO THE FORMALITIES OF A WILL—The administrator of a mortgagee's estate sought, in Miller v. Allen,1 to foreclose a purchase money mortgage which provided that the note secured thereby should be considered as fully paid on the mortgagee's death, if such death occurred before full payment of the debt had been made. The defendant-mortgagor, who relied on the provision for discharge as a defense to the suit, had been a tenant on the mortgagee's farm for more than twenty years prior to the time when it was conveyed to him on purchase money mortgage and this rather unusual agreement was made.2 When reversing a trial court decision in favor of plaintiff, the Appellate Court for the Fourth District rejected the argument that the provision for discharge of the mortgage constituted an attempted testamentary disposition which was ineffective because of non-compliance with statutory requirements relating to wills.3 It was, instead, held that a mortgage containing such a stipulation amounted to a valid contract conferring a present, binding right on the promisee-mortgagor over which the promisor-mortgagor no longer had any control.4

The decision marks acceptance by Illinois, with possible reservations, of a majority view which upholds the validity of agreements of this character provided the same are contemporaneous with the creation of the debt or legal obligation.5 The court was, however, faced with the apparently contrary precedent of Jennings v. Neville.6 In that old case, a father who held several notes of his son had agreed that, in case the son should pay two bequests upon the father's death, the notes should be cancelled. It was there held that, even though the agreement was executed on the same day as the giving of the notes, the agreement was testamentary in character and, being such, was ineffectual because not executed according to the statute relating to wills. The court in the

1 339 Ill. App. 471, 90 N. E. (2d) 251 (1950). Leave to appeal has been denied.
2 It would appear, from the synopses of the cases dealing with such agreements as listed in 127 A. L. R. 635, that the creditor and debtor are more often related to one another as, for example, father and son.
3 Covenants in a mortgage made binding on a mortgagor are rare, but would usually be upheld, even without the mortgagee's signature, on the same basis as is used in case of covenants or assumption agreements in a deed poll. The absence of signature and attestation, however, would prevent the instrument from operating as a will: Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 194.
4 Although most decisions upholding the validity of such agreements have been predicated on the theory that the agreement constitutes a valid and enforceable contract, validity has sometimes been justified on the theory that a valid gift has been made thereby: 127 A. L. R. 635.
5 The cases adopting both the majority and the minority views on this problem are collected in an annotation in 127 A. L. R. 635.
6 180 Ill. 270, 54 N. E. 202 (1899).
instant case, declaring that the Jennings case was not a precedent and that "no exact precedent" had been directed to its attention, dismissed that case with an observation to the effect that the parties in the Jennings case were attempting to put into effect a prior will which had been destroyed, from which it could be inferred that a testamentary disposition was intended by the agreement. The court also observed that the notes giving rise to the son's legal obligation were not conditioned in any manner at the time of their execution. By contrast, it was said that the note and mortgage in the instant case "contained the precise conditions relating to payment of such obligations."  

Language utilized by the court in the instant case certainly does not make it any too clear why the holding therein did not, in effect, amount to a refusal to follow the position taken by the former Illinois Supreme Court in the Jennings case. Certain of the vague distinctions which the court draws would seem to indicate that an agreement to extinguish, at the death of the creditor, a contemporaneously incurred debt would have to be executed as a will in order to be valid, if the parties to the agreement had a testamentary intent at the time of the making thereof, but not if they were simply in a bargaining frame of mind. Such an intent, apparently, would have to be established by extrinsic evidence for the existence of such an agreement, by itself, would ordinarily tend to prove merely a contractual state of mind. Yet the nature of the agreement is so unusual, even foreign to the customary creditor-debtor situation, as almost to force the conclusion that the creditor's primary purpose was one of testamentary character. In addition, while it is clear that, to be valid, the agreement must be made contemporaneously with the debt, the exact meaning to be given to the term "contemporaneously" is not made too clear. The decision in the Jennings case would seem to make it evident that such an agreement is not necessarily valid even though it be made on the same day that the legal obligation is incurred.

7 No mention was made of two Appellate Courts decisions dealing with the same type of problem. In May v. May, 36 Ill. App. 77 (1890), a maker of notes defended against a suit thereon, after his father's death, on the ground that the father, payee, had agreed that at the payee's death the notes were to be discharged. The court there held the transaction to be an incomplete gift, there being an intention to give but no delivery. Mathews v. Mathews, 86 Ill. App. 654 (1900), upholds the validity of an agreement between a father and son to the extent that a note of the son held by the father would be cancelled on the father's death. That agreement was held to be neither a gift nor a testamentary devise but a valid contract. While the holding therein would seemingly contradict the decisions in the May and Jennings cases, the opinion makes no mention of either of these cases.

8 329 Ill. App. 471 at 474, 90 N. E. (2d) 251 at 253.

9 The present court, judged by its denial of leave to appeal from the instant decision, may also be indicating a willingness to reject the former holding.
BOOKS RECEIVED


